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Comparative Tables showing seriatim the Volumes and Pages of all Indian Law Journals and Reports, for the 1st quarter of 1912, with the corresponding pages of Indian Cases Volumes 1 to 15.

Table 1

ALLAHABAD HIGH COURT.

(A).—34 I. L. R., ALLAHABAD SERIES, FROM JANUARY TO MARCH, 1912.

Page of Vol. 34 I. L. R., All., 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1911-12. V.	P.
1	Muhammad Usman *v.* Muhammad Abdul Ghafur ...	11	319
4	Beni Ram *v.* Man Singh ...	11	663
8	Chunni Lal *v.* Sita Ram ...	11	476
13	Jiwan Ram *v.* Tondi Singh ...	11	305
20	Mohsin Ali *v.* Masum Ali ...	11	672
22	Abdullah Khan *v.* Bundi ...	11	710
25	Bhola Nath *v.* Kishori ...	11	646
32	Rangam Lal *v.* Jhandu ...	11	640
36	Muhammad Sharif *v.* Bande Ali ...	11	474
41	Khub Chand *v.* Harmukh Rai ...	12	183
43	Kuldip Dube *v.* Mahaul Dube ...	11	705
49	Salig Ram *v.* Chaha Mal ...	11	712
53	Muhammad Nazir Khan *v.* Makhdum Bakhsh ...	11	737
57	Jit Singh *v.* Maharaj Singh ...	13	257
63	Jamna Das *v.* Ram Autar Pande ...	13	304
65	Lekhraj Kunwar *v.* Harpal Singh	13	269
72	Ganga Singh *v.* Banwari Lal ...	9	700
78	Emperor *v.* Masit ...	12	837
79	Indar Sen Singh *v.* Harpal Singh	12	915
89	Emperor *v.* Naushe Ali Khan ...	12	844
91	Emperor *v.* Gur Prasad Gir ...	12	990
93	——— *v.* Abdul Wahid Khan ...	12	987
96	——— *v.* Ahmad Khan ...	12	988
98	Bishambhar Nath *v.* Bhullo ...	12	920
102	Gur Narain *v.* Shadi Lal ...	12	607
103	Mamraj *v.* Brij Lal Chakravarti ...	12	587
109	Zaib-un-nissa *v.* Maharaja of Benares ...	12	604
113	Jagannath Prasad *v.* Badri Prasad	11	768
115	Emperor *v.* Sardar ...	12	836
118	——— *v.* Ram Naresh Singh ...	13	921
121	Raghubir Singh *v.* Ram Chandar	12	927
123	Gaura Bibi *v.* Ghasita ...	12	603
126	Nand Ram *v.* Bhupal Singh ...	13	5
129	Abdulla *v.* Ram Lal ...	12	601
135	Ganpat Rai *v.* Munni Lal ...	13	34
140	Shankar Lal *v.* Sarup Lal ...	13	19
143	Shami Nath Chaudhri *v.* Ramjas	13	80
146	Emperor *v.* Behari Lal ...	13	
148	Huran Bibi *v.* Hingan Bibi ...	12	
150	Jagarnath Ojha *v.* Ram Phal ...	13	79
155	Kedar Nath *v.* Naipal Singh ...	12	922

(B).—9 ALLAHABAD LAW JOURNAL, FROM JANUARY TO MARCH, 1912.

Page of Vol. 9 A.L.J. 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1911-12. V.	P.
1	Shami Nath *v.* Ramjas ...	13	80
4	Abdul Hakim Khan *v.* Chandna ...	13	83
8	Ganpat Prasad *v.* Sarju ...	13	94
12	Sarvi Begum *v.* Haider Shah ...	13	404
15	Balmakund *v.* Kundun Lal ...	13	943
17	Mewa Lal *v.* Ahmad Ali ...	13	929
19	Ishar Das *v.* Asaf Ali Khan ...	13	134
23	Sohni *v.* Mohan Koer ...	13	944
29	Kanhai Lal v. Hulas Singh ...	13	939
33	Mir Sarwarjan v. Fakhruddin Mahomed ...	13	331
37	Jamna Das v. Ram Autar Pande...	13	304
40	Lekhraj Kunwar v. Harpal Singh	13	269
48	Jagannath Prasad v. Badri Prasad	11	768
51	Emperor v. Ram Naresh Singh ...	13	921
54	Ganpat Rai v. Munni Lal ...	13	24
59	Khazan Singh v. Panna Lal ...	13	131
63	Dirgbijai Singh v. Bhan Partab Shah Singh ...	13	945
67	Baldeo Singh v. Hira Lal ...	13	951
72	Ram Sarup v. Jasodha Kunwar ...	13	138
79	Maharaja of Benares v. Lalji Singh	13	187
84	Fakhran Bibi v. Nageshar Ram ...	13	954
86	Gendan Lal v. Babu Ram ...	13	197
95	Mutsaddi Lal v. Mule Mal ...	13	384
97	Balmakund v. Emperor ..	13	778
103	Kanhaya Lal v. Girdhari Lal ...	13	956
105	Chittar Kuar v. Gaura Kuar ...	13	320
108	Jackson v. Jackson ...	13	958
111	Bande Ali v. Gokul Misir ...	13	154
124	Ajudhia Pershad v. Ram Lal ...	13	284
131	Habib-ullah v. Abdul Hamid ...	13	963
137	Muhammad Umar Khan v. Muhammad Niaz-ud-din Khan ...	13	344
148	Wilaiti Begam v. Fazal Husain Khan ...	13	961
152	Ahmad Said Khan v. Masi-ullah Khan ...	13	975
156	Gauri Shanker Lal v. Emperor ...	13	1006
158	Raja Dei v. Ummed Singh ...	13	632
162	Bansi v. Emperor ...	13	829
165	Durga Prasad Lahiri v. Sashibala Debi ...	14	463
170	Gulzari Lal v. Ganga Ram ...	14	652
173	Elizabeth C. Balanchette v. Secretary of State for India ...	13	417
180	Dhian Singh v. Emperor ...	14	649
183	Birjbasi Lal v. Salig Ram ...	14	472
188	Ram Chandra Das v. Farzand Ali Khan ...	13	531
198	Rashik Lal v. Ram Narain ...	13	573
207	Shankar Lal v. Mahtab Dei ...	14	414
211	Sat Narain v. Badri Nath ...	13	645
215	Mata Din v. Ahmad Ali ...	13	976
226	Jugal Kishor v. Ram Narain ...	13	619
231	Abdul Ghafur v. Raza Husain ...	13	829
233	Banarsi Das v. Banarsi Das ...	14	416
234	Khadim Husain v. Bharat Singh	14	433
238	Jainath Pathak v. Kalka Upadhia	13	613
244	Kishori Lal v. Todar Singh ...	13	535
253	Brijnath Sarin v. Byrne ...	13	506
258	Narain Das v. Ram Prasad ...	14	455
260	Lal Singh v. Emperor ...	14	657
262	Baijnath Dube v Emperor ...	14	653
263	Debi Mangal Prasad v. Mahadeo Prasad Singh ...	14	1000
276	Mi Me v. Mi Shwe Ma ...	14	475
285	W. J. O'Grady v. Harbert Winn...	14	135
288	Babu Lal v. Emperor ...	14	666
290	Gobardhan Sahi v. Mahabir Singh	14	506
292	Bikram Singh v. Narain Singh ...	14	59
294	Heydorn and Co. v. Muhammad Shafi ...	14	507
297	Lachhmi Narain v. Turab-un-nissa	14	505
300	Parbati v. Baijnath Pathak ...	14	61
307	Jasauli v. Emperor ...	14	734
308	Ram Singh v. Mathura ...	14	599
310	Ram Dial v. Emperor ...	14	607
311	Gopi Narain v. Kunj Behari Lal...	13	625
323	Manohar Lal v. Ram Babu ...	14	674
332	Mahomed Ibrahim Hossein Khan v. Ambika Pershad Singh ...	14	496
348	Bhondo v. Salig Ram ...	14	810
351	Bela Rani v. Mahabir Singh ...	14	116
355	Bharosa Pathak v. Emperor ...	13	999
358	Ram Krishna v Ram Kirpanidh	14	97
362	Nathumal v. Abdul Wahid Khan...	14	812
365	Khetpal v. Tikam Singh ...	14	172

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Table 2

BOMBAY HIGH COURT.

(A).—33 I. L. R., BOMBAY SERIES, FROM JANUARY TO MARCH, 1912.

Page of Vol. 36 I. L. R., Bom. 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1911. V.	P.
1	Kaikhusru Aderji *v.* Secretary of State ...	12	117
20	Bai Jamnabai, *In re* ...	11	554
29	Ghelabhai Gavrishankar *v.* Uderam Icharam ...	12	577
37	Trimbak Bhikaji *v.* Shankar Shamrav ...	12	532
42	Motilal Virchand *v.* Thakore Chandrasangji ...	12	549
47	Chunilal Virchand *v.* Ahmedabad Municipality ...	12	540
53	Pirojshah *v.* Manibhai ...	12	543
58	Kassum Goolam Hoosein *v.* Dayabhai Amarsi ...	12	547
61	Ahmedabad Municipality *v.* Ramji Kuber ...	12	551
68	Dattatraya Vishnu *v.* Vishnu Narayan ...	12	949
77	Fatmabai *v.* Sonbai ...	11	568
81	Municipal Commissioner for the City of Bombay *v.* Mathuradas	11	995
88	Ganpat *v.* Tulsiram ...	12	271
91	Dharma Bal Patil *v.* Balamiya ...	12	545
94	Ghelabhai Gavrishankar *v.* Hargowan Ramji ...	12	928
105	Merali Visram *v.* Sheriff Dewji ...	12	687
111	Salebhai Abdul Kader *v.* Bai Safiabu ...	12	702
116	Tanaji Dagde *v.* Shankar Sakharam	12	564
120	Trikam Purshottam *v.* Natha Daji	12	359
123	Keshav *v.* Jairam ...	12	709
127	Muljibhai Narbheram *v.* Patel Lakhmidas ...	12	711
131	Parwatibai *v.* Chatru Limbaji ...	12	708
135	Pandurang Balaji *v.* Dnyanu ...	12	9-6
138	Gangadhar Parappa *v* Yellu ...	12	714
139	Jasudin *v.* Sakharam Ganesh ...	12	693
144	Sayyad Jiaul Hussan Khan *v.* Sitaram Bhau ...	12	720
146	Bagas Umarji *v.* Nathabhai Utamram ...	12	737
151	Chunilal Jamnadas *v.* Bhanumati	12	727
156	Sorabji Coovarji *v.* Kala Raghunath ...	12	911
164	Velchand *v.* Flagg ...	13	853

(B).—14 BOMBAY LAW REPORTER, FROM JANUARY TO MARCH, 1912.

Page of Vol. 14 Bom. L. R. 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1912. V.	P.
1	Jamna Das *v.* Ram Autar Pande...	13	304
5	Mir Sarwarjan *v.* Fakhruddin Mahomed ...	13	331
9	Govind Baba *v.* Jijibai Saheb ...	13	849
14	Gopal *v.* Rajaram ...	13	851
18	Velchand *v.* Flagg ...	13	853
22	Pandurang *v.* Gangaram ...	13	855
26	Abdul Kayam *v.* Bahadur Vithoba	13	858
30	Jit Singh *v.* Maharaj Singh ...	13	257
33	Thakurain Lekhraj Kunwar *v.* Thakur Harpal Singh ...	13	269
40	Emperor *v.* Hari ...	13	827
41	——— *v.* Balwant ...	13	825
45	Shivlal *v.* Tricumdas Mills Co. Ld.	14	353
77	Secretary of State *v.* Sadashiv ...	14	434
89	Tukaram *v.* Narayan ...	14	438
115	Mahadev *v.* Janu ...	14	447
120	Ismailmiya *v.* Wahadani Begam...	14	469

(B).—14 BOMBAY LAW REPORTER, 1912—*concld.*

Page of Vol. 14 Bom. L. R. 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1912. V.	P.	Page of Vol. 14 Bom. L. R. 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1912. V.	P.
124	Vasudeo v. Govind ...	14	473	212	Kunwar Ragho Prasad v. Lala Mewa Lal ...	15	177
128	Rakhmini v. Dhondu ...	14	466	220	Debi Mangal Prasad Singh v. Mahadeo Prasad Singh ...	14	1000
135	Emperor v. Somnath ...	14	764	231	Claridge, *In re* ...	15	93
137	——— v. Kanji ...	14	669	236	Emperor v. C. W. King ...	15	96
141	——— v. Imankhan ...	14	671	237	Haridas Lalji v. Narotam Raghavji	14	769
144	——— v. Keshavlal ...	14	672	250	Gangadas v. Bai Suraj ...	14	777
146	——— v. Dwarka Poonja ...	14	598	254	Sahadu Manaji v. Devlya Jaba ...	14	780
147	——— v. Chhotalal ...	14	970	259	Dalpat Zopdoo v. Mahadu Uka ...	14	782
158	——— v. Dattatraya ...	14	974	261	Ambaidas Parag v. Jijibhai Raiji	14	979
163	——— v. Jina Badhar ...	14	757	264	Vithoba Kondiba v. Tejiram Bhavaniram ...	14	977
165	Lakhichand v. Great Indian Peninsular Railway Company ...	14	793	267	Rangubai v. Subaji Ramchandra...	14	821
177	Durga Prasad v. Srimati Sashibala Debi ...	14	463	270	Ibrahim Ali Khan v. Muhammad Ahsan Ullah ...	13	695
182	Muhammad Umar Khan v. Muhammad Niaz-ud-din Khan ...	13	344	280	Mahomed Ibrahim Hossein Khan v. Ambika Pershad Singh ...	14	496
192	Mata Din v Sheikh Ahmad Ali ...	13	976	295	Abdul Rajak v. Bai Jimbabai ...	14	988
204	Mi Me v. Mi Shwe Ma ...	14	475				

Table 3

BURMA (LOWER) CHIEF COURT.

(A).—5 BURMA LAW TIMES, FROM JANUARY TO MARCH, 1912.

Page of Vol. 5 Bur. L. T. 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1911-12. V.	P.	Page of Vol. 5 Bur. L. T. 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1912. V.	P.
1	Ma We v. Maung Cheik ...	12	797	30	Navana Chiai Madar v. Peria Curpen Chetty ...	14	637
5	Momein Bee Bee v. Ariff Ebrahim Malim ...	14	508	33	Subramanian Chetty v. Mg. Po Thet ...	14	801
9	Nga I v. Emperor ...	14	651	36	Mg. Pwe v. Maung Daw Na ...	14	809
11	Wong Yone Wain v. Emperor ...	14	653	37	Nga Than v. Emperor ...	14	765
13	Tan Gaw Pok v. Sundaresan Chetty ...	14	626	38	Jordan v. Emperor ...	14	763
15	Matilda Brown v. Trevor Figg Francis ...	14	628	39	Macmillan, *In re* ...	14	804
17	Nga Thwe v. Emperor ...	14	656	45	Cohen v. Mg. Ba Chit ...	14	811
20	Emperor v. Thomas Pellako ...	14	643	47	Nambiar v. Sundrabai ...	14	813
				49	Nga Shwe Pa v. Mi Yon ...	14	815

(A).—5 BURMA LAW TIMES, 1912—*concld.*

Page of Vol. 5 Bur. L. T. 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1912. V.	P.	Page of Vol. 5 Bur. L. T. 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1912. V.	P.
52	Nga Kyin Ya v. Mi Tok ...	14	818	79	Shwe Wa v. Sullivan ...	15	368
55	Nga Tok v. Nga Kasim ...	14	978	80	S. R. M. C. T. Chetty v. Ko Aung Gyi ...	15	276
57	Nga La v. Nga Than ...	14	837	81	A. P. S. V. Firm v. Shree Safatulla	15	363
61	Mi Kan Yon v. Nga Pwe ...	14	843	85	Ma Yin Za v. C. Nash ...	15	353
72	Maung Po Tu v. Chaung Taik ...	15	358	87	Maung Pu v. Napean ...	15	355
73	Ma Ein Thu v. Maung Hla Dun ...	15	360	92	San Paw Aung v. King-Emperor	15	305
75	Mahomed Sultan v. The Moulmein Municipal Committee ...	15	361	95	Christensen v. Sattia ...	15	374
77	Ma Sein Hnyin v. Lutchman Chetty	15	366				

6 LOWER BURMA CHIEF COURT RULINGS, FROM OCTOBER TO DECEMBER, 1911.

Page of Vol. 6 L. B. R. 1911.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1912. V.	P.	Page of Vol. 6 L. B. R. 1911.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1912. V.	P.
34	Momein Bee Bee v. Ariff Ebrahim Malim ...	14	508	43	Po Nyun v. Muthu Karapan Chetty	14	437
38	Po Yon v. Messrs. Mohr Brothers & Co., Ltd. ...	13	386	44	On Pe v. Kun Ti ...	14	447
41	Nga I v. King-Emperor ...	14	651	46	Wong Yone Main v. King-Emperor ...	14	653

Table 4

BURMA (UPPER) JUDICIAL COMMISSIONER'S COURT.

1 UPPER BURMA RULINGS, FROM JULY TO DECEMBER, 1911.

Page of Vol. 1 U. B. R. 1911.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1912. V	P.	Page of Vol. 1 U. B. R. 1911.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1912. V.	P.
96	Ah Tat v. Emperor ...	14	968	100	Ali Muddin v. Meah Jan ...	15	89
98	Na Kaung Nyein v. Emperor ...	14	973	105	Nga Ba Gyaw v. King-Emperor ...	15	311

Table 5

CALCUTTA HIGH COURT.

(A).—39 I. L. R., CALCUTTA SERIES, FROM JANUARY TO MARCH, 1912.

Page of Vol. 39 I. L. R. Cal. 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1911-12. V.	P.
1	Rameshwar Singh v. Secretary of State ...	12	114
26	Rang Lal Singh v. Ravaneshwar Pershad Singh ...	12	174
33	Kamini Debi v. Pramatha Nath Mookerjee ...	10	491
53	Abhoy Charan Jalia v. Dwarka Nath Mahto ...	11	180
59	Paul v. Robson ...	12	60
84	Tripendeswar Mitter v. Corporation of Calcutta ...	11	997
87	Dinesh Chandra Roy Chowdhury v. Biraj Kamini Dasee ...	11	67
104	Begg, Dunlop & Co. v. Jagannath Marwari ...	11	417
119	Lalit Chandra Chanda Chowdhury v. Emperor ...	15	65
138	Afazuddi Khan v. Prasanna Gain	14	991
141	Deb Narain Dutt v. Chairman of the Barnipur Municipality ...	12	32
146	Abdul Karim v. Abdus Sobhan ...	13	243
150	Emperor v. Abbas ...	12	833
157	Mehi Singh v. Mangal Khandu ...	12	297
164	Rudolf Stallmann, *In the matter of* ...	12	273
220	Midnapore Zemindari Company, Ld., v. Naresh Narain Roy ...	11	939
227	Jati Kar v. Mukunda Deb ...	11	884
232	Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri ...	13	331
238	Ambar Ali v. Anjab Ali ...	14	768
241	Raghubar Sahi v. Protap Udoy Nath Sahi Deo ...	13	193

(B).—15 CALCUTTA LAW JOURNAL, FROM JANUARY TO MARCH, 1912.

Page of Vol. 15 C. L. J. 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1911-12. V.	P.
1	Koilash Chandra Santra v. Gajendra Nath Misra ...	13	407
3	Narsingh Narain v. Sheikh Jahi Mistry ...	13	414
6	Upendra Chandra Mandal v. Sheikh Sobhan ...	11	183
7	Imrit Chamar v. Sirdhari Pandey	13	120
12	Sridhan Chattopadhyaya v. Kalipada Chuckerbutty ...	11	971
14	Mahomed Farid v. Mahomed Abdul Gafur ...	13	434
17	Ram Narain Singh v. Odindra Nath Mookerjee ...	13	440
23	Dwarka Nath Roy v. Sarat Chandra Singh Roy ...	11	872
40	Kishan Prasad Sinha v. Purnendu Narain Sinha ...	11	820
49	Gouri Dutt v. Amar Chand ...	13	907
52	Annada Prasanna Mukerjee v. Nagendra Nath Biswas ..	11	123
54	Ganga Pershad Sahu v. Irshad Ali Khan ...	13	959
57	Nabadwip Chandra Saha v. Jugal Dasee Dasya ...	7	214
61	Jadunandan Prosad Singh v. Koer Kallyan Singh ...	13	653
68	Jamna Das v. Pandit Ramautar Pande ...	13	304
69	Mir Sarwarjan v. Fakhruddin Mahomed ...	13	331

(B).—15 CALCUTTA LAW JOURNAL, 1912—*concld.*

Page of Vol. 15 C. L. J. 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1910 to 1912. V.	P.
72	Thakurain Lekhraj Kunwar v. Thakur Harpal Singh ...	13	269
78	Jit Singh v. Maharaj Singh ...	13	257
80	Gajendra Ghorai v. Emperor ...	13	1004
82	Bepin Behari De v. Emperor ...	11	255
83	Dulhin Mathura Koer v. Bangsidhari Singh ...	10	880
88	Bajrang Binari Lal v. Lachmi Narain ...	13	944
89	Raghubar Dayal Sukul v. Jadu Nandan Misser ...	13	365
97	Bhagwat Prasad v. Murarilal ...	7	427
110	Narsingh Narain Singh v. Ajodhya Prasad Singh ...	13	118
114	Sibu Sant v. Nitai Charan Das ...	9	806
120	Gopal Lal Sahai v. Bahorni ...	13	900
122	Ali Mahamad v. Nayan Rajah ...	13	912
123	Sreepati Charan v. Shamaldhone Dutt ...	8	22
128	Jadu Nath Bose v. Premmoni Dasi	6	414
132	Harendra Lal Roy v. Purna Chandra ...	14	368
137	Ramdayal Das v. Ramtanoo Das...	11	464
138	Raikishori Ghose v. Kumudini Kanta Ghose ...	14	377
142	Subhadra Koer v. Dhajadhari Gossain ...	13	898
145	Raja Raghubar Sahi v. Pratap Uday Nath Sahi Deo ...	13	193
147	Subhadra Koer v. Dhajadhari Goswami ...	14	380
151	Khirode Chunder Roy v. Emperor	13	993
160	Lakshiram Mandal v. Sonatan Basar ...	7	775
162	Kunja Lal v. Dinabandhu Jha ...	14	458
167	Rasik Chandra Ghose v. Jitendra Kumar Ghose ...	8	77
170	Abdul Sobhan v. Monab Ali ..	14	453
172	Muhammad Umar Khan v. Muhammad Niaz-ud-din Khan ...	13	344
180	Durga Prasad v. Sashibala Debi ...	14	463
184	Sris Chandra Bose v. Fakir Chandra	11	592
186	Sukheswar Phukan v. Emperor ...	11	593
187	Beni Madho Singh v. Pran Singh	14	456

Page of Vol. 15 C. L. J. 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1910 to 1912. V.	P.
191	Lalmohan Thakur v. Nanda Lal ...	14	461
194	Birendra Kishore v. Akram Ali ...	13	513
203	Birendra Kishore v. Rosan ...	13	518
204	Gokul Krishna Das v. Sasimukhi Dasi ...	13	23
211	Janaki Dass v. Bengal Nagpur Railway Co. Ld. ...	13	509
215	Bengal Nagpur Railway Co Ld. v. Rampratap ...	13	529
217	Raj Kumar Roy v. Harekrishna Chakravarti ...	10	355
219	Rakimuddin Ahmed v Naimulla	9	623
220	Maharam v. Telamuddin Khan ...	13	606
224	Tincowri Santra, *In re* ...	14	208
225	Fatik Chandra Rai v. Atlas Bibi ..	14	478
227	Satya Sri Ghoshal v. Kartik Chandra Das ...	13	596
228	Chakouri Mahton v Ganga Pershad	12	609
239	Chagmull v. Jai Narain ...	13	605
241	Hedlot Khasia v Karan Khasiani	13	377
251	Chandra Kumar Dhar v. Ramdin Poddar ...	13	702
254	Chandra Sekhar Prosad Singh v. Hari Harendra Sahi ...	10	898
256	Ramdeo Pershad Singh v. Gopi Koeri ...	13	349
258	Gora Chand v. Basanta Kumar ..	12	684
263	Abdul Gani v. Azizul Huq ...	14	611
267	Dawlat Koer v. Siva Pershad ...	10	615
270	Mata Din v. Sheikh Ahmad Ali ...	13	976
276	Mi Me v. Mi Shive Ma ...	14	475
281	Secretary of State v Kalika Prosad	14	609
305	Lalit Chandra v. Baikuntha Nath	5	395
308	Rakhal Das v. Prodyat Coomar ...	6	121
310	Rani Dassi v. Asutosh Roy ...	6	206
312	Martyrose v. Courjon ...	14	981
323	Tufani Sheikh v. Emperor ...	14	667
325	Jaymangal Pershad Narayan Singh v. Jhagroo Sahu ...	11	591
327	Ragho Prasad v. Mewa Lal ...	15	177
332	Narain Chandra v. Mohendra Nath	14	820
334	Rukminimoyi Dasi v. Poran Chunder ...	14	823
335	Sati Nath v. Ratanmani ...	14	808

(C).—16 CALCUTTA WEEKLY NOTES, FROM JANUARY TO MARCH, 1912.

Page of Vol. 16 C. W. N. 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1911-12. V.	P.
122	Jit Singh v. Maharaj Singh ...	13	257
124	Deoki Nandan Singh v. Bansi Singh ...	10	371
126	Khubsurat Kuer v. Saroda Charan Guha ...	12	165
129	Jati Kar v. Mukanda Bashi ...	11	884
132	Laldhari Singh v. Manager Court of Wards Bhabatpura Estate ...	12	70
137	Ramavatar Singh v. Tulsi Prosad Singh ...	11	713
143	Dr. H. P. Sandyal v. Kunjeswar Misra ...	13	781
145	Peary Mohan Das v. D. Weston ...	13	721
217	Thakurain Lekhraj Kunwar v. Thakur Harpal Singh ...	13	269
225	Somaruddi Mollah v. Port Canning and Land Improvement Company, Ld. ...	13	481
227	Gangadhar Das v. Bhikari Charan Das ...	13	403
231	Mohamed Abdul Hossain v. Sarifan	12	593
235	Taran Chandra v. Ganendra Nath Roy ...	11	30
237	Hara Kumar Chatterjee, *In re* ...	11	997
238	Paimullah v. Emperor ...	13	783
241	Jyoti Proshad Singh Dev v. George Mathew Darby ...	12	482
247	Kedar Nath v. Manu Bibi ...	13	879
251	Shaikh Samaraddi v. Shyama Churn Sen ...	11	637
252	Abdullah v. Kunj Behari Lal ...	12	149
256	Narsingh Narayan Singh v. Ajodhya Prosad Singh ...	13	118
259	Ban Behari Kapur v. Khetterpal Sinha Roy ...	13	785
263	Deputy Superintendent and Remembrancer of Legal Affairs v. Chulhan Ahir ...	13	826
265	Gopessur Dutt v. Bissessur Datt...	13	577
288	Elahi Buksh v. Ram Narayan ...	10	117
289	N. C. Sircar and Sons v. Baraboni Coal Concern Ld. ...	13	868
294	Raghubur Sahi v. Pratap Udoy Nath Sahi Deo ...	13	193
297	Lal Gopal Dutt v. Khororiah Majozilla Zemindary Syndicate Ld.	13	673
299	Gokul Krishna Das v. Sashimukhi Dasi ...	13	23
304	Birendra Kishore Manikya v. Akram Ali ...	13	5.3
311	Barkal Parida v. Jogendra Nath Sen ...	11	259
313	Abdul Hossein v. Ram Churn Law	12	459
317	Prya Nath v. Mahendra Kumar ...	10	376

Page of Vol. 16 C. W. N. 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1910 to 1912. V.	P.
322	Mohadeo Pershad v. Sheikh Pachkari ...	13	941
325	Bhuttacharya & Co. v. Cawnpur Woolen Mills Co., Ld. ...	13	943
327	Krishna Das Roy v. Land Acquisition Collector of Pabna ...	13	470
329	East India Railway Co. v. Sispal Lal ...	12	596
332	Patringa Koer v. Madhava Nand Ram ...	12	65
336	Gurameah v. Emperor ...	13	1002
338	Mata Din v. Ahmad Ali ...	13	976
346	Rampal Singh v. Nand Lal ...	13	603
347	Dwarka Missra v. Rampratap Missra ...	10	41
351	Nanda Kumar Dey v. Ajodhya Sahu ...	11	465
356	Janaki Das v. Bengal Nagpore Railway Co. ...	13	509
360	Bengal Nagpur Railway Co. v. Ramprotab Gonesham Das ...	13	529
362	Bir Bikram Deo v. Secretary of State ...	13	965
383	Ramdeo Prashad Singh v. Gopi Koeri ...	13	349
384	Baisnab Charan v. Gatinath Munshi	13	830
386	Moses Amado Taylor, *In the matter of* ...	15	72
394	Golam Hossein v. Fatima Begum	6	300
395	Nash Mohini Dasi v. Debendra Nath Sinha ...	13	604
396	Kutabullah Sarkar v. Durga Charan Rudra ...	13	424
398	Tara Nath Chakraverty v. Iswar Chandra Das Sarkar ...	11	164
402	Begg, Dunlop & Co. v. Jaggannath Marwari ...	11	4 7
409	Debi Mangal Prosad Singh v. Mahadeo Prasad Singh ...	14	1000
417	Harold Tucker, *In the matter of* ...	15	398
418	Satya Sri Ghoshal v. Kartick Chandra Das ...	13	596
420	Shakaruddin Choudry v. Rani Hemangini Dasi ...	13	192
421	Nalini Behary Ray v. Fulmani Dasi	13	457
424	Ramjas Agarwalla v. India General Navigation and Railway Company Limited ...	14	627
426	Aliar Rai v. Jhingur Tewari ...	13	844
431	Harbans Sahai v. Emperor ...	15	77
433	Kunwar Ragho Prosad v. Lala Mewa Lal ...	15	177
440	Ranjit Lal v. Bijoy Krishna ...	14	17
444	Sahadra Koer v. Ramadin Chowdry	13	898
447	Sahodra Koer v. Dhajadhari Gosain	14	380

(C).—16 CALCUTTA WEEKLY NOTES, 1912—*concld.*

Page of Vol. 16 C. W. N. 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1912. V.	P.	Page of Vol. 16 C. W. N. 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1912. V.	P.
451	Abdul Ghani v. Azizul Haque ...	14	641	471	Emperor v. Salimulla ...	14	598
455	Sew Karan v. Corporation of Calcutta ...	14	205	472	Romesh Chandra Sen, *In re* ...	14	682
458	Muhammad Umar Khan v. Muhammad Niaz-ud din Khan ...	13	344	475	Radha Kant Chuckerbutty v. Ramananda Shaba ...	13	698
466	Jeolal Mahton v. Loke Narayan Mahton ...	15	184	480	Syed Mahomed Zahurul Huq v. Shah Wazirul Huq ...	14	31

Table 6

MADRAS HIGH COURT.

(A).—35 I. L. R., MADRAS SERIES, FROM JANUARY TO MARCH, 1912.

Page of Vol. 35 I. L. R. Mad. 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1910 to 1912. V.	P.	Page of Vol. 35 I. L. R. Mad. 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1910 to 1912. V.	P.
1	Tuljaram Row v. Alagappa Chettiar ...	8	340	75	Kumara Venkata Perumal v. Ramasamy Chetty ...	9	875
21	Mallikarjuna Dugget v. Secretary of State ...	14	401	92	Govindasami Pillai v. Dakshinamurthi Poosari ...	8	760
26	Thiruvengadathamiah v. Mungiah	12	775	95	Syed Ajam Sahib v. Ananthanarayana Aiyar ...	8	668
28	Vibudapriya Thirthaswamy v. Esoof Sahib ...	8	175	108	Maharaja of Bobbili v. Zamindar of Chundi ...	8	860
35	Ramu Aiyar v. Palaniappa Chetty	8	117	114	Rajai Tirumal Raju v. Muthial Naidu ...	9	289
39	Kovvuri Basivi Reddi v. Tallapragada Nagamma ...	8	1087	120	Fakir Nynar Muhamed v. Kandasawmy Kulathu Vandan ...	14	993
42	Raman Namboodri v. Achutha Pishurodi ...	14	415	124	Arumugam Chetty v. Jagaveera Rama Venkateswara Eitappa ...	8	330
44	Krishnasami Chettiar v. Ramasami Chettiar ...	8	763	139	Venkata Narasimha Naidu v. Ravi Subbayya ...	9	738
47	Chinnu Pillai v. Kalimuthu Chetti	9	596				
63	Narayanan Chetty v. Muthiah Servai ...	8	520				

(B).—22 MADRAS LAW JOURNAL, FROM JANUARY TO MARCH, 1912.

Page of Vol. 22 M. L. J. 1912	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1911-12. V.	P.
1	Nadarsa Rowthen v. Amirtham ...	12	414
12	Hanumanthaiyan v. Meenatchi Naidu ...	12	412
14	Subba Naidu v. Ethirajammal ...	12	673
23	Kalliani Amma v. Govinda Menon	12	492
35	Abdul Khadir v. Shaiva Ravuthar	12	679
44	Rajammal v. Emperor ...	12	653
45	Jijamba Bai Sahib v. Jathai Row Sahib ...	14	374
47	Kothe Raman v. Minger Pocker ...	13	174
49	Narayana Iyer v. Subramania Iyer	13	985
52	Jeer Chetti v. Rangasawmi Chetti	12	618
60	Vasudevad Nambudri v. Sankaran Nambudri ...	12	719
62	Somasundaram Chetty v. Ramiah	12	635
68	Batcha Chetty v. Ponnusawmy Chetty ...	13	16
73	Jeremiah v Vas ...	12	961
85	Sivagnanam Servaigar v. Ramsawmy Chettiar ..	13	7
105	Nataraja Iyer v. Subbiah Iyer ...	13	91
108	Anantarazu v. Narayanarazu ...	13	96
109	Thambi Marakayar v. Hamed Marakayar ...	12	1006
112	Ramappa, *In re* ...	13	103
114	Venkateswara Sastri, *In re* ...	11	795
118	Achutha Menon v. Sankaran Nair	12	1007
121	Gopal Row v. Veerappen ...	13	95
122	Packrichi v. Kumbacha ...	13	236
124	Subbiah Pillai v. Vellappa Naicker	13	176
125	Krishnamachariar v. Bagiammal	12	439
126	Narayanan v. Sankaran ...	13	233
127	Achanna v. Venkataramanna ...	13	175
129	Venkatagiri Aiyar v. Sadagopachariar ...	14	449
136	Venkatasubbiah v. Seshachellum	12	173
138	Arulanandham Pillai, *In re* ...	13	221
139	Sevugan Chetty v. Krishna Aiyangar ...	13	268
141	Assistant Sessions Judge of North Arcot v. Ramaniammal ...	13	275
146	Gopala Menon v. Anujan Rajah ...	13	179
148	Swaminatha Naicker v. Paul ...	12	251
149	D'Coutha v. Assan Kunhu ...	10	665
151	Valla Achan v. Ravunni Nair ...	12	140
152	Gopalsami Iyer v. Subramania Sastri ...	12	207

Page of Vol. 22 M. L. J. 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1912. V.	P.
154	Ismail Ghami v. Katinna Rowther	13	215
155	Velu Nattan, *In re* ...	12	526
156	Mutyala Papayya v. Kosuri Muramullu ...	13	322
159	Rajagopala Raju v. Radhayya ...	13	205
161	Kuppusami Iyengar v. Subbaraya Rowtha ...	13	324
166	Subbaraya Iyer v. Ramasawmy Pillai ...	13	204
169	Ramanuja Ammal v. Marikuruthu Ammal ...	13	313
170	Ponnuswamy Nadar v. Letchmanan Chettiar ...	12	657
181	Muthia Chetti v. Emperor ...	13	286
184	Subbiah Servai, *In re* ...	13	278
186	Arunachella Thevan v. Emperor ..	13	282
187	Srinivasa Aiyar v. Balakrishna Devai ...	13	800
190	Saminatha Pathan v. Soranatha Ammal ...	12	692
193	Komma Somakka v. Pedda Ramiah	13	251
201	Sengoda Goundan v. Raju Goundan	13	39
204	Govinda Pillai v. Meenatchi Achi	13	152
207	Gopala Aiyar v. Ramaswamy Sastrigal ...	10	320
212	Venkatesa Iyengar v. Kamalammal	13	463
217	Ramien v. Veerappudian ...	14	394
219	Vedachella Mudaliar v. Vijayaraghava Chariar ...	13	71
221	Parie Amma v. Moothoran ...	12	765
225	Tej Mal v. Papayamma ...	13	788
228	Ramanuja Ammal v. Sawmi Pillai	13	795
231	Anantanarayana Iyer v. Savithri Ammal ...	13	458
240	Muhammad Umar Khan v. Muhammad Niaz-ud-din Khan ...	13	344
247	Albrecht v. Bathee Jellamma ...	13	453
251	Gurusawmi Nadar, *In re* ...	13	831
253	Venkayamma Row v. Narayanaswami Naidu ...	14	396
257	Govinda Naicken v. Aiyavu Iyer	13	471
260	Subbama v. Audilakshmamma ...	13	870
265	Narayudu v. Venkamma ...	13	866
270	Venkata Row v. Crown ...	14	418
276	Krishnasawmi Aiyar, *In re* ...	14	965
284	Muruga Chetty v. Rajasami ...	14	823

(C).—11 MADRAS LAW TIMES, FROM JANUARY TO MARCH, 1912.

Page of Vol. 11 M. L. T. 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1911-12. V.	P.
1	Thakurain Lekhraj Kunwar v. Thakur Harpal Singh ...	13	269
6	Jamna Das v Ram Autar Pande...	13	304
8	Sarwarjan v. Fakhruddin Mahomed	13	331
11	Mutyala Papayya v. Kosuri Muramallu ...	13	322
13	Chidiri Kristappa v. Siddhamsetti Yamanappa ...	13	159
14	Kosuri Rajagopala v. Datla Radhayya ...	13	205
15	Kuppusami Iyengar v. Subbaraya Rowtha ...	13	324
18	Subbaraya Iyer v. Ramasawmi Pillai ...	13	204
19	Adisupalli Venkata Row v. Marikuruthu Ammal ...	13	313
20	Arunachella Thevan, *In re* ...	13	282
21	Muthia Chetty v. Emperor ...	13	286
23	Subbiah Servai, *In re* ...	13	278
24	Adala Yerrivadu, *In re* ...	13	216
25	Tej Mal v. Jagappilla Papayamma	13	788
27	Adusupatti Venkata Rao v. Sawmi Pillai ...	13	795
30	Neechooli Pattie Amma v. Moothoran ...	12	765
32	Gurusawmi Nadar, *In re* ...	13	831
33	Gujjalapadi Subba Naidu v. Venkata Subba Naidu ...	13	113
38	Ramasami Chetti v. Karuthalachi	12	751
53	Albrecht v. Bathee Jellamma ...	13	453
56	Sanka Krishnamurthi v. Bank of Burma, Ld. ...	14	389
63	Anantanarayana Iyer v. Savithri Ammal ...	13	458
69	Pamien v. Veerapuddian ...	14	394
71	Ramasawmy Reddi v. Abboy Chetty	11	17
73	Durga Prasad v. Sashibala Debi...	14	463
76	Muhammad Umar Khan v. Muhammad Niaz-ud-din Khan ...	13	344
84	Venkatesa Iyengar v. Kamalammal	13	463
87	Govinda Naicken v. Apath Sahaya Iyer ...	13	471
90	Lakshmi Venkayamma Row v. Gopisetti Narayanaswami Naidu	14	396
93	Basrur Venkata Row, *In re* ...	14	418
103	Pugalia Vettorammal v. Vettor Goundan ...	13	475
112	Maravadi v. Pamakkar ...	14	383
121	Gadiyan Narayudu v. Mallavarapu Venkamma ...	13	866
124	Allareddi Subbamma v. Nallapareddi Adi Lakshmamma ...	13	870
127	Public Prosecutor v. Mushunooru Suryanarayanamoorty ...	13	833
142	Muthusawmy Chettiar v. Subramania Iyer ...	14	69
144	Thiruvengadaw Pillay v. Doridla Subbiah ...	13	659
145	Mata Din v. Ahmad Ali ...	13	976
155	Ramiah v. Ramaswami ...	13	903
157	Valliammai Achi v. Nataraja Pillay	13	906
159	Srinivasa Iyer v. Balkristna Devai	13	860
160	Pitchuvier v. Perumal Konan ...	13	651
162	Chockalingam Pillai v. Emperor...	13	819
169	Mi Me v. Mi Shwe Ma ...	14	475
174	Narayana Kutti Goundan v. Pechiammal ...	15	206
182	Krishnasamy Doss Reddy, *In re*...	13	648
184	Kommeneni Chinna Veerayya v. Kommeneni Lakshminarasamma	15	213
186	Vellai Ocha Thevan, *In re* ...	15	315
187	Venkataramana Iyer *v.* Kittammal	15	184
188	Gudlavellaru Venkataratnam *v.* Vellathambi Venkataratnam ...	15	218
190	Narna Balayya *v.* Rudravaram Venkatappa ...	15	221
191	Kolli Appiah, *In re* ...	13	832
192	Koripalli Ramiah *v.* Sajja Subbiah	13	315
193	Ragho Prasad *v.* Mewa Lal ...	15	177
198	Sivavadivelu Pillai v. Ponnammal	15	365
199	Vijayaraghava Reddi *v.* Komarappa Reddi ...	15	367
201	Akilandan Pillai *v.* Chinnasawmy Moopan ...	13	649
202	Sivaprakasam *v.* Palaniappa Mudaliar ...	15	369
203	Ghulam Ali, *In the matter of* ...	15	371
207	Challapalli Hanumanulu Pantulu *v.* Secretary of State ...	15	376
209	Rajah of Venkatagiri *v.* Vemru Chinta Reddi ...	15	378
212	Satrucherla Veerabhadra Raju v. Ganta Kumari Naidu ...	15	393
213	Advocate General *v.* Govindasawmi ...	15	306
214	Public Prosecutor *v.* Bala Nagi Reddi ...	15	308
216	Kulandaivelu Padayachi *v.* Kamatchi Ayyar ...	15	388
217	Debi Mangal Prasad Singh *v.* Mahadeo Prasad Singh ...	14	1000
225	Ibrahim Ali Khan *v.* Muhammad Ahsan Ullah Khan ...	13	695
232	Kunhichekkan *v.* Lydia Arucanden	14	480
240	Kishen Bahadur *v.* Ramasawmy Mudaliar ...	14	491
241	Andiappa Pillai *v.* Muthukumara Thevan ...	14	140

(C).—11 MADRAS LAW TIMES, 1911—*concld.*

Page of Vol. 11 M. L. T. 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1912. V.	P.
245	Venkatachelam Iyer *v.* Subramania Iyer ...	14	144
246	Raman Chetty *v.* Nagarathna Naicker ...	15	380
248	Singaram Chettiar *v.* Kaliyana Sundaram Pillay ...	15	283
251	Veerana Nadan *v.* Emperor ...	15	310
253	Narayanasawmy Naicken *v.* Emperor ...	15	79
256	Maharaja of Vizayanagaram *v.* Mahaswaram Ramabhadrayya...	15	397
257	Sivagurunatha Chettiar *v.* Ramaswamy Iyengar ...	15	399
261	Prattipati Seshayya, *In re* ...	15	403
262	Subramania Pillay *v.* Dakshinamurthi Mudali ...	15	193
265	Mahomed Ibrahim Hossein Khan *v.* Ambika Pershad Singh ...	14	496
276	Sundararamier *v.* Muthu Ganapathigal ...	14	184
280	Muruga Chetty *v.* Rajasami ...	14	823
296	Vakil of the High Court, *In the matter of* ...	14	965
301	Muthayamanigaran v. Lakku Reddiar ...	14	255
305	Arunachalam Pattar *v.* Seshan Pattar ...	14	189
307	Venkatanarayana Pillai *v.* Subbammal ...	14	209
312	Srinivasa Sundara Thathachariar *v.* Krishnaswamy Iyengar ...	15	354

(D).—(1912) 1 MADRAS WEEKLY NOTES, FROM JANUARY TO MARCH.

Page of Vol. (1912) 1 M. W. N.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1911-12. V.	P.
1	Kuppusami Iyengar v. Subbaraya Ravutha Munda Nainar ...	13	324
3	Assistant Sessions Judge of North Arcot *v.* Ramanamal ...	13	275
7	Mutyala Bapayya *v.* Kosuri Muramullu ...	13	322
9	Adusupalli Venkata Row *v.* Marikruthu Ammal ...	13	313
9	Subbaraya Aiyar *v.* Ramasamy Pillai ...	13	204
11	Velluvakandi Kunhi Pathumma *v.* Ponnanki Moossan Mammad ...	13	300
16	Ponnusawmy Nadan *v.* Emperor ...	13	110
16	Thakurain Lekhraj Kunwar *v.* Thakur Harpal Singh ...	13	269
22	Mir Sarwarjan *v.* Fakhruddin Mahomed ...	13	331
24	Sellapadi Mahalakshmi Ammal *v.* Sriman Mathvasiddhantha Onnahini Nidhi, Ld. ...	11	865
29	Jit Singh *v.* Maharaj Singh ...	13	257
32	Jamna Das *v.* Ram Autar Pande	13	304
35	Arunachala Tevan *v.* Emperor ...	13	282
36	Chidrie Kristappa *v.* Siddamsetti Zamanappa ...	13	159
37	Raman Menon *v.* Chandra Sekharan Patter ...	13	203
38	Jayanthi Krishtappa *v.* Jayanthi Chennayya ...	13	188
39	Kosuri Rajagopala Raju *v.* Datla Radhayya ...	13	205
41	Katchalai Mudali *v.* Kuppanna Mudali ...	13	182
42	Ramaswami Ayengar *v.* Muthuswami Aiyer ...	13	799
42	Subbian Servai *v.* Emperor ...	13	278
44	Venkatachalapathy Aiyen *v.* Perumal Aiyen ...	13	133
45	Cheria Imbichi Beebe *v.* Syed Ali	13	791
47	Gurusawmi Nadan *v.* Emperor ...	13	831
49	Mandi Ghasi *v.* Emperor ...	13	781
49	Tadikonda Venkayya *v.* Kodali Venkatasubbamma ...	13	486
50	Aiya Chalamaya *v.* Emperor ...	13	777

(D).—(1912) 1 MADRAS WEEKLY NOTES—*contd.*

Page of Vol. (1912) 1 M. W. N.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1911-12. V.	P.
50	Tejmal Sowcar *v.* Jaggupillai Papayamma ...	13	788
53	George Albrecht *v.* Bathee Yellamma ...	13	453
56	Adusupatti Venkata Row *v.* Sami Pillai ...	13	795
59	Anantanarayana Iyer *v.* Savittri Ammal ...	13	458
65	Venkatesa Iyengar *v.* Komalammal ...	13	463
68	Malla Veeranna *v.* Malla Chelamayya ...	13	467
69	Emperor *v.* Arumukham Pillai ...	13	780
70	Sunkara Ramiah *v.* Sunkara Subbammah ...	13	489
72	Maddaniah *v.* Bhimappa ...	13	469
73	Durga Prasad *v.* Srimati Sashibala Debi ...	14	463
77	Muhammad Umar Khan *v.* Muhammad Niaz-ud-din Khan ...	13	344
84	Crown Prosecutor *v.* Andiasavaloo Naidoo ...	13	832
85	Rasoolkhan Saheb *v.* Emperor ...	13	927
85	Arunachalamiyer *v.* Athmakoor Ram Mohan Roy ...	12	184
87	Govinda Naicken *v.* Apathsahaya Iyer ...	13	471
89	Pugalia Vettorammal *v.* Vettor Goundan ...	13	475
97	Sessions Judge of Vizagapatam *v.* Gorle Kandungadu ...	13	828
99	Seeni Ammal *v.* Angamuttu Nadar	13	802
100	Venkattan *v.* Emperor ...	14	655
101	Lakshmi Venkayamma Rao *v.* Narayanasami Naidu ...	14	396
105	Sivagurunatha Chettiar v. Ramaswamy Iyengar ...	15	299
109	Maradevi *v.* Pammakka ...	14	383
117	Ramuvien *v.* Veerappudayan ...	14	394
119	Chockalingam Pillai *v.* Emperor...	13	819
125	Basrur Venkata Row *v.* Emperor...	14	418
136	Public Prosecutor *v.* Suryanarayanamoorty ...	13	833
150	Sreenivasier *v.* Balakrishna Devai	13	860
152	Ambalam Pakkiya Udayan *v.* Right Reverend J. M. Barthe ...	13	599
158	Manikka Mudaliar *v.* Daivasikamani Pillai ...	13	595
158	Hanumanthaiyan *v.* Meenatchi Naidu ...	12	412
161	Malaiyya Pillai *v.* Thirumalai Perumal Pillai ...	12	170
163	Pichuvier *v.* Perumal Konan ...	13	651
164	Challavenkata Reddy *v.* Devabhaktuni Mruthunjayadu ...	14	65

Page of Vol. (1912) 1 M. W. N.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1912. V.	P.
166	Chellammal *v.* Krishnaswami Iyer	13	618
167	Krishnasami Doss Reddy, *In re* ...	13	648
169	Narainasawmy Naicken *v.* Emperor	15	79
172	Akilandam Pillai *v.* Chinnasami Moopan ...	13	649
173	Venkataramana Iyer v. Kittammal	15	184
174	Ponna Krishnavasudemudu *v.* Kouviriri Basuri Reddi ...	15	188
175	Rangachariar, *In re* ...	15	190
176	Thiruvengadam Pillai *v.* Doredla Subbiah ...	13	659
177	Savirimuthu Moopan *v.* Sattan Chinnappan ...	15	185
178	Allareddi Subbamma *v.* Adi Lakshmamma ...	13	870
181	Ganapathi Pillai, *In re* ...	15	186
182	Atyam Venkiah, *In re* ...	15	186
183	Mata Din *v.* Ahmad Ali ...	13	976
193	Perumal Naicken v. Emperor ...	13	817
196	Velappa Goundan, *In re* ...	13	640
198	Vellaimmai Achi v. Nataraja Pillai	13	906
199	Chelesani Ramaya v. Chelasani Ramaswami ...	13	903
201	Mi Me v. Mi Shwe Ma ...	14	475
207	King-Emperor v. Nilakanta ...	14	849
311	Ragho Prasad v. Mewa Sab ...	15	177
316	Nawab Ibrahim Ali Khan v. Nawab Muhammad Ahsan Ullah Khan	13	659
324	Debi Mangal Prasad Singh v. Mahadeo Prasad Singh ...	14	1000
352	Muruga Chetty v. Rajasami ...	14	823
348	Vakil, *in the matter of* ...	14	965
353	Narayana Kutti Goundan v. Pechiammal ...	15	206
361	Ulagappa Chettiar v. Peria Karuppan Chetty ...	15	195
361	Sangu Iyer v. Subbiah Iyer ...	13	642
362	Vellai Ocha Thevan v. Emperor ...	15	315
363	Subramania Pillai v. Dakshnamurthi Mudaliar ...	15	193
366	Narayana Iyer v. Venkatarama Aiyar ...	15	202
367	Syed Mahomed Ibrahim Hossein Khan v. Ambika Pershad Singh	14	496
378	Sessions Judge of Tanjore v. Thiagaraja Thevan ...	15	313
379	Srinivasa Sundara Thathachariar v. Krishnasamy Iyengar ...	15	354
380	Rayi Krishnayya v. Ganga Bai ...	15	357
381	Gopisetti Narayanasamy Naidu Garu v. Bondada China Narsigadu ...	15	359
382	Sivaprakasam v. Palaniappa Mudaliar ...	15	369
383	Sivavadiveloo Pillai v. Ponnamal...	15	365

(D).—(1912) 1 MADRAS WEEKLY NOTES—*concld.*

Page of Vol. (1912) 1 M. W.N.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1912. V.	P.
384	Gudlavalleru Venkataratnam v. Vellathambi Venkataratnam ...	15	218
386	Kunhichekkan v. Lydia Aruchanden	14	480
393	Rajah of Venkatagiri v. Vemure Chinta Reddi ...	15	378
395	Chinna Krishna Reddy v. Merri Poliah ...	15	317
396	Advocate-General v. Govindasami	15	306
397	Singaram Chettiar v. Kalyanasundram Pillai ...	15	383
400	Kolli Appiah v. Emperor ...	13	832
400	Varidsahayam Fernandez v. Renchordin Kheki ...	15	362
401	Govinda Varier v. Paru Amma ...	15	360
401	Chathkutty Nair v. Kalath Chandu Kutti Nair ...	15	224
402	Annathuri Iyer v. Ramanuja Chariar ...	15	223
403	Maharajah of Vizianagaram v. Maheswaram Ramabhadriah ...	15	397
404	Veerana Nadan v. Emperor ...	15	310
405	Public Prosecutor v. Bala Nagi Reddi ...	15	308
407	Seetharama Chettier v. Krishna Row ...	15	406
409	Kulandavelu Padayachi v. Kamatchi Aiyer ...	15	388
410	Vijia Raghava Reddi v. Komarappa Reddi ...	15	3[illegible]7
411	Singanamala Krishnamacharlu v. Singanamala Venkatamma ...	15	408
412	Yelambal Achi v. Govindasami Odayar ...	15	370
413	Sri Janaganti China Venkatarajaum Garu v. Kappojee Linganna	15	382
414	Narna Balayya v. Venkatappa ...	15	221
415	Koripalli Ramiah v. Sajja Subbiah	13	315
416	Abdul Kadir Beari v. Bagade Shiva Rao ...	15	377

Table 7

NAGPUR JUDICIAL COMMISSIONER'S COURT.

8 NAGPUR LAW REPORTS, FROM JANUARY TO MARCH, 1912.

Page of Vol. 8 N. L. R. 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1912. V.	P.
1	Bhop Singh v. Karmoti ...	14	428
7	Nathusa v. Phulchandsa ...	14	399
11	Krishna v. Balia ...	14	403
13	Balaprasad v. Kanoo ...	14	407
17	Saroopchand v. Tularam ...	13	902
18	Shrikison v. Chatarsingh ...	13	904
20	Emperor v. Lekria ...	13	1005
22	Ganeshdas v. Shankar ...	13	909
29	Bapu v. Temsa ...	13	982
34	Deorao v. Great Indian Peninsular Railway Company ...	14	684
36	Maroti v. Balaji ...	14	786
39	Tejsingh v. Lalji ...	14	788
42	Vithoba v. Tanba ...	14	673
44	Gopal v. Dhondya ...	14	685

Table 8

OUDH JUDICIAL COMMISSIONER'S COURT.

(A).—15 OUDH CASES, FROM JANUARY TO MARCH, 1912.

Page of Vol. 15 O. C. 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1912. V.	P.	Page of Vol. 15 O. C. 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1912. V.	P.
1	Badri Singh *v.* Chandika Singh ...	14	8	49	Mata Din *v.* Ahmad Ali ...	13	976
7	Nazir Ahmad *v.* Swami Dyal ...	13	986	55	Amir Begam *v.* Khwaja Syed Badr-ud-din Husain ...	15	2
22	Waliulla *v.* Ejaz Ali ...	13	984	58	Mohammad Amir Mirza Beg *v.* Kedar Nath ...	15	202
25	Tajammul Husain *v.* Raunak Ali	13	979	67	Wazir Mohammad *v.* Har Pershad	13	613
33	Girdhari Lal *v.* Jaswant Singh ...	15	181	78	Nathe *v.* Tasadduq Husain ...	15	212
39	Amir Ali *v.* Nizam Ali ...	14	584	81	Debi Sahai *v.* Gauri Shankar Sahai	15	214
43	Hub Lal *v.* Ganga ...	15	191				
45	Bhan Partab Sahai *v.* Sheo Dat Bahadur Singh ...	15	189				

Table 9

PUNJAB CHIEF COURT.

(A).—13 PUNJAB LAW REPORTER, FROM JANUARY TO 7TH APRIL, 1912.

No. of Vol. 13 P. L. R. 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1911-12. V.	P.	No. of Vol. 15 P. L. R. 1914.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1912. V.	P.
1	Kala *v.* Lachmi ...	12	576	20	Emperor *v.* Ganda Singh ...	13	109
2	Hira Singh *v.* Mohar Singh ...	12	605	21	Umar Din *v.* Budhe Khan ...	13	58
3	Tara Chand *v.* Chiman ...	12	530	22	Prem Singh *v.* Mokand Singh ...	13	62
4	Ali Mardan *v.* Mohar Singh ...	12	532	23	Jiwa *v.* Buta ...	13	167
5	Ghulam Fatima *v.* Jantan Bibi ...	12	625	24	Kariman *v.* Masiti ...	13	171
6	Dharm Singh *v.* Ali Marad Khan	12	616	25	Muhammad *v.* Imam Khatun ...	13	172
7	Amir Chand *v.* Sundar Mal ...	12	617	26	Balmokand *v.* Aya Singh ...	13	63
8	Sewa Ram *v.* Balu Ram ...	12	623	27	Nura *v.* Nazir Din ...	13	18
9	Raman *v.* Chinto ...	12	623	28	Bishna *v.* Rattani ...	13	92
10	Fazal Ahmad *v.* Khan Bahadur ...	12	624	29	Ram Chand *v.* Ram Jowaya ...	14	494
11	Ali Muhammad *v.* Emperor ...	12	515	30	Kirpal Singh *v.* Sant Singh ...	13	305
12	Muhammad Umar Khan *v.* Muhammad Niaz Din Khan ...	13	344	31	Isar Das *v.* Ghulam Haider ...	14	799
13	Sawan Singh *v.* Jafar Khan ...	13	405	32	Bhola *v.* Brij Lall ...	13	900
14	O'Brien *v.* Abdul Rahman ...	13	6	33	Parman Nand *v.* Arura Ram ...	14	674
15	Mohammad *v.* Sukha Singh ...	13	20	34	Bhagtu *v.* Bua Ditta ...	13	957
16	Muhammad Badar Khan *v.* Chiragh Shah ...	13	32	35	Kanhya Lal *v.* Narpat Rai ...	14	793
17	Muhammad *v.* Bakko ...	13	27	36	Tulsi Ram *v.* Karm Chand ...	13	955
18	Amar Singh *v.* Husaina ...	13	28	37	Crown *v.* Sadapur ...	13	924
19	Mehr Singh *v.* Devi Dyal ...	13	50	38	Stamp Act, *In re* ...	13	350
				39	Devta Jamlu *v.* Hari Das ...	13	248
				40	Nathu Ram *v.* Karmon ...	13	326

(A).—13 PUNJAB LAW REPORTER, 1912—*concld.*

No. of Vol. 13 P. L. R. 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1911-12. V.	P.
41	Partap Singh *v.* Panjabu ...	13	177
42	Sayad Mir Nawab *v.* Hardeo ...	12	871
43	Lal Chand *v.* Crown ...	14	604
44	Hazara Singh *v.* Harnam Singh ...	13	180
45	Ida *v.* Rahim Bakhsh ...	12	857
46	Pir Bakhsh *v.* Emperor ...	13	220
47	Chet Singh *v.* Allahditta ...	13	877
48	Mela Ram *v.* Bando ...	12	859
49	Muhammad Ali *v.* Muhammad Shah ...	12	850
50	Sahib *v.* Usman ...	13	72
51	Bela Singh *v.* Labh Singh ...	13	298
52	Shadi Khan *v.* BeebeeUmdan Begam	13	73
53	Fateh Din *v.* Allah Ditta ...	13	77
54	Tola Singh *v.* Mohammad ...	15	467
55	Bhagat Ram *v.* Sidhu ...	12	595
56	Emperor *v.* Qadir Bhakhsh ...	13	209
57	Badri Das *v.* Santa Singh ...	13	873
58	Tulsa Singh *v.* Natha Singh ...	15	469
59	Fatma *v.* Imtiazi Jan ...	13	930
60	Balmokand *v.* Manak Chand ...	13	928
61	Ganpat Rai *v.* Sardara ...	13	511
62	Salig Ram *v.* Rai Chand ...	14	468
63	Narayan Singh *v.* Lal Singh ...	15	478
64	Mangal *v.* Crown ...	14	758
65	Karm Ilahi *v.* Sultan Alam ...	13	812
66	Sita Ram *v.* Gobind Sahai ...	15	314
67	Radha Kishan *v.* Crown ...	15	316
68	Sundar Singh *v.* Crown ...	15	318
69	Dhian Singh *v.* Dhian Singh ...	13	312
70	Mrs. R. Sharkey *v.* Mrs. Jerry Allard ...	13	433
71	Dasaundhi *v.* Chanda Singh ...	13	421
72	Tulsi *v.* Madho Ram ...	13	343
73	Rukman Devi *v.* Sain Das ...	13	401

(B).—47 PUNJAB RECORD, FROM JANUARY TO MARCH, 1912.

No. of Vol. 47 P. R. 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1911-12. V.	P.
	Civil.		
1	Fatma *v.* Imtiazi Jan ...	13	930
2	Dalo Mal *v.* Sundar ...	11	523
3	Badri Das *v.* Santa Singh ...	13	873
4	Indar *v.* Rao ...	11	35
5	Bhagat Ram *v.* Siddu ...	12	595
6	Mansa Ram *v.* Behari ...	12	453
7	Mahmud Bakhsh *v.* Hassan Bakhsh	11	708
8	Singer Manufacturing Co., Delhi *v.* Yar Muhammad ...	10	141
9	Achhar Singh *v.* Badhawa Singh	11	404
10	Sahib Dial *v.* Lajpat Rai ...	14	510
11	Duni Chand *v.* Aziz Khan ...	10	207
12	Hamid Ullah *v.* Sahibji ...	14	624
13	Ali Muhammad *v.* Suraj-ud-din ...	10	236
14	Rahmat Ali Khan *v.* Bubu Zuhra	14	486
15	Saif-ud-din *v.* Hans Raj ...	11	76
16	Umra *v.* Karim Bakhsh ...	11	492
17	Ghulam Muhammad *v.* Latif Ahmad Khan ...	14	495
18	People's Bank of India, Ld., *v.* Abdul Karim ...	14	512
19	Muhammad *v.* Bakhto ...	13	27
20	Indar Narain *v.* Onkar Lal ...	10	130
21	Piare Lal *v.* Ram Chand ...	11	443
22	Moti Singh *v.* Maghar ...	11	880
23	Rughnath Das *v.* Rahiman ...	14	776
24	Hazara Singh *v.* Harnam Singh ...	13	180
25	Partap Singh *v.* Panjabu ...	13	177
26	Jiwa *v.* Buta ...	13	167
27	Shahab-ud-din *v.* Barkati ...	14	779
28	Azim Khan *v.* Mustaqim Khan ...	14	782
29	Tari Baz Khan *v.* Fateh Khan ...	13	316
30	Tulsi *v.* Madho Ram ...	13	343
31	Bhero Das *v.* Mona ...	14	783
32	Chhangu *v.* Muhammad Bakhsh ...	8	666
33	Ram Jawaya Shah *v.* Natha ...	14	787
34	Najabat Ali *v.* Mehtab Bibi ...	14	789
35	Gobind Ram *v.* Muhammad Ali ...	11	317
	Criminal		
1	Crown *v.* Sadapur ...	13	924
2	Ali Muhammad *v.* Emperor ...	12	515
3	Crown *v.* Qadir Bakhsh ...	13	209
	Revenue		
1	Nura *v.* Nasir Din ...	13	18

(C).—7 PUNJAB WEEKLY REPORTER, FROM JANUARY TO MARCH, 1912.

No. of Vol. 7 P. W. R. 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1912. V.	P.
	Civil.		
1	Ram Devi *v.* Shib Devi ...	13	290
2	Sundar Singh *v.* Deva Singh ...	13	863
3	Nihal Chand v. Chanda Singh ...	13	859
4	Hafiz Mahbub Bakhsh *v.* Abdul Rahman ...	13	816
5	Khanu *v.* Fateh Khan ...	13	851
6	Umar Khan *v.* Niaz Din Khan ...	13	344
7	Sawan Singh *v.* Jafar Khan ...	13	405
8	Duni *v.* Ali Mohammad ...	13	857
9	Lehna Singh *v.* Santa Singh ...	13	852
10	Ramji Das v. Shankar Das ...	13	855
11	Sarkhara *v.* Nawab ...	13	850
12	Alim Ali *v.* Nabbu ...	13	314
13	Abdul Karim *v.* Sahib Jan ...	13	917
14	Pars Ram *v.* Muhammad Yasin Khan ...	13	953
15	Amar Singh *v.* Husaina ...	13	28
16	Narpat Rai *v.* Devi Das ...	14	375
17	Narpat Rai *v.* Devi Das ...	14	379
18	Balmokand *v.* Aya Singh ...	13	68
19	Fateh Din *v.* Allah Ditta ...	13	77
20	Bishna v. Rattani ...	13	92
21	Jiwa *v.* Buta ...	13	167
22	Hazara Singh *v.* Harnam Singh ...	13	180
23	Umar Din *v.* Budhe Khan ...	13	58
24	Jan Khan *v.* Ahmad ...	13	445
25	Tulsi Ram *v.* Karm Chand ...	13	955
26	Bhagtu *v.* Bua Ditta ...	13	957
27	Bhola *v.* Brij Lall ...	13	960
28	O'Brien *v.* Abdul Rahman ...	13	6
29	Kariman *v.* Masiti ...	13	171
30	Prem Singh *v.* Mokand Singh ...	13	62
31	Chet Singh *v.* Allahditta ...	13	877
32	Mehr Singh *v.* Devi Dyal ...	13	50
33	Fatma *v.* Imtiazi Jan ...	13	930
34	Shadi Khan *v.* Umdan Begam ...	13	73

No. of Vol. 7 P. W. R. 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1911-12. V.	P.
	Civil—concld.		
35	Salig Ram *v.* Rai Chand ...	14	463
36	Muhammad *v.* Sukhan Ram ...	13	20
37	Muhammad *v.* Imam Khatun ...	13	172
38	Bindraban *v.* Ganpat Rai ...	14	463
39	Muhammad *v.* Bakko ...	13	27
40	Mangal Singh *v.* Dula ...	14	477
41	Prabhu Dial *v.* Kahan ...	14	479
42	Dalo Mal *v.* Sundar ...	11	523
43	Muhammad Badar Khan *v.* Chiragh Shah ...	13	32
44	Badri Das *v.* Santa Singh ...	13	873
45	Rukman Devi *v.* Sain Das ...	13	401
46	Indar *v.* Rao ...	11	35
47	Devta Jamlu *v.* Hari Das ...	13	348
48	Bela Singh *v.* Labh Singh ...	13	298
49	Heta Ram *v.* Chandan ...	13	447
50	Ibrahim Ali Khan *v.* Muhammad Ahsan Ullah Khan ...	13	695
51	Dhian Singh *v.* Dhian Singh ...	13	312
52	Khair Ahmad *v.* Mir Ahmad Ullah	13	408
53	Ahmad Khan *v.* Ratan Chand ...	13	539
	Criminal.		
1	Isa *v.* Ranon ...	13	824
2	Nabi Bakhsh *v.* Crown ...	*Unreportable.*	
3	Balmokand *v.* Manak Chand ...	13	928
4	Sita Ram *v.* Gobind Sahai ...	15	314
5	Mangal *v.* Crown ...	14	758
6	Sundar Singh *v.* Crown ...	15	318
7	Radha Kishen *v.* Crown ...	15	3.6
	Revenue.		
1	Bahawal *v.* Nurkhan ...	13	815
2	Lehri *v.* Shiv Nath ...	13	865

Table 10

SIND JUDICIAL COMMISSIONER'S COURT.

5 SIND LAW REPORTER, FROM JULY TO SEPTEMBER, 1911.

Page of Vol. 5 S. L. R. 1911.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1911-12. V.	P.	Page of Vol. 5 S. L. R. 1911.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1912. V.	P.
107	Manghirmal v. Vithalram ...	13	225	140	Mathradas v. Secretary of State...	13	237
122	Haji Changal v. Basarmal ...	13	214	153	Bodomal v. Crown ...	13	213
123	Imperator v. Rino ...	13	210	155	Doulatram v. Halo Kanya ...	13	244
125	Haji Mansoor v. Mahomedin ...	13	234	168	Sobhomal v. Pohumal ...	13	255
129	Imperator v. Haji Alu ...	13	215	173	Imperator v. Rajabali ...	13	284
130	Lekhraj v. Imambux ...	12	987	174	Crown v. Audal ...	13	273
131	Crown *v.* Morio Khan ...	12	986	179	Karam Bahadin v. Crown ...	13	223
133	Mc'Gill v. Byrne ...	13	217	181	Manghanmal v. Fernandez ...	13	260
135	Imperator *v.* Abdul Latif ...	13	219	184	Hemandas v. Chellaram ...	13	264
136	Bukshali v. Crown ...	13	220	190	Dur Mahomed v. Allahdino ...	13	224
137	Imperator v. Bhojraj ...	13	222				

Table 11

CRIMINAL LAW JOURNAL OF INDIA.

13 CRIMINAL LAW JOURNAL, FROM JANUARY TO MARCH, 1912.

Page of Vol. 13 Cr. L. J. 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1912. V.	P.	Page of Vol. 13 Cr. L. J. 1912.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1912. V.	P.
1	Bala Pasban Kuldip Lal *v.* Gurwar Misser ...	13	111	21	Bodomal Kishinchand *v.* Emperor	13	213
3	Emperor *v.* Ganda Singh ...	13	109	21	Lakshminarain Apuram *v.* Emperor	13	213
4	Raghunandan Prosad Singh *v.* Ram Narain Singh ...	13	97	22	Changal Halapoto *v.* Basarmal ...	13	214
6	Krishna Proshad *v.* Rabindra Nath	13	99	23	Ismail Ghami Ammal *v.* Katima Rowther ...	13	215
8	Emperor *v.* Behari Lal ...	13	101	23	Imperator *v.* Alu ...	13	215
9	Babu Pershad *v.* Emperor ...	13	102	24	Adala Yerrivadu, *In re* ...	13	216
15	Theophilus Ramappa, *In re* ...	13	108	25	Mr. McGill *v.* Mr. Byrne ...	13	217
16	Pounusawmy Naidu *v.* Emperor...	13	110	26	Meher Sardar *v.* Emperor ...	13	218
17	Emperor *v.* Qadir Bakhsh ...	13	209	27	Imperator *v.* Abdul Latif ...	13	219
18	Imperator *v.* Rino ...	13	210	28	Pir Bakhsh *v.* Emperor ...	13	220
19	Muthuvarapu Seshiah *v.* Gatram Ramiah ...	13	211	28	Bakshali *v.* Emperor ...	13	220
				29	Arulanantham Pillai, *In re* ...	13	221
				30	Imperator *v.* Bhojraj ...	13	222

13 CRIMINAL LAW JOURNAL, 1912—*concld.*

Page of Vol. 13 Cr. L. J. 1914.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1912. V.	P.
31	Karam Bahadin v. Emperor ...	13	223
32	Dur Mahomed v. Allahdino ...	13	224
33	Emperor v. Andal ...	13	273
35	Assistant Sessions Judge of North Arcot v. Ramammal ...	13	275
38	Subbiah Servai, *In re* ...	13	278
39	Kader Sundar v. Emperor ...	13	279
42	Arunachella Tevan, *In re* ...	13	282
43	Ganesh Pershad v. Emperor ...	13	283
44	Imperator v. Rajabali ...	13	284
44	Ajodhia Parshad v. Ram Lal ...	13	284
46	Muthiah Chetty, *In re* ...	13	286
48	Surya v. Lachmi Narain ...	13	288
49	Nga Pyan v. Emperor ...	13	385
50	Nga Po Yon v. Mohr Brothers and Co. Ld. ...	13	386
52	Madar Sahib v. Emperor ...	13	388
53	Mi Hla So v. Nga Then ...	13	389
54	Nga Po Chein v. Emperor ...	13	390
55	Dragon v. Emelie Mi Taik Dragon	13	391
56	Nga Lu Pe v. Emperor ...	13	392
58	Emperor v. Nga Sit Cho ...	13	394
59	Nga Po Shat v. Emperor ...	13	395
61	Rudra Prosad, *In re* ...	13	397
62	Emperor v. Nga Po Sin ...	13	398
62	Jang Bahadur Lal v. Emperor ...	13	398
65	Peary Mohan Das v. D. Weston ...	13	721
120	Amodini Dasee v. Dorson Ghose ..	13	776
121	Aiya Chalamya v. Emperor ...	13	777
122	Nga Pu v. Emperor ...	13	778
122	Balmakund v. Emperor ...	13	778
124	Emperor v. Arumukham Pillai ...	13	780
125	Sandyal v. Kunjeswar Misra ...	13	781
125	Mandi Ghasi v. Emperor ...	13	781
126	Dewat Singh v. Emperor ...	13	782
126	Kamini Mohan Das v. Harendra Kumar ...	13	782
127	Paimullah v. Emperor ...	13	783
129	Perumal Naicken, *In re* ...	13	817
131	Chockalingam Pillay, *In re* ...	13	819
136	Isa v Ranon ...	13	824
137	Emperor v. Balwant Kondo Patole	13	825
138	Deputy Superintendent v. Chulhan Ahir ...	13	826
139	Emperor v. Hari Govind Limave...	13	827
140	Gorle Kandungadu, *In re* ...	13	828
141	Abdul Ghafoor, *In re* v. Raza Husain ...	13	829
141	Bansi v. Emperor ...	13	829
142	Baisnab Charan Manjhi v. Gati Nath Munshi ...	13	830
143	Gurusawmi Nadan v. Emperor ...	13	831
144	Kolli Appiah, *In re* ...	13	832
144	Emperor v. Andiasavaloo Naidoo	13	832
145	Public Prosecutor v. Mushunooru Suryanarayanamoorty ...	13	833
156	Alia Rai v. Jhingur Tewari ...	13	844
159	Musai v. Emperor ...	13	847
161	Satish Chandra Sarkar v. Emperor	13	913
162	Me Tha v. Nga San E ...	13	914
164	Vithoo v. Emperor ...	13	916
167	Waris Ali v. Emperor ...	13	919
169	Emperor v. Ram Naresh Singh ...	13	921
170	Emperor v. Murli Singh ...	13	922
172	Emperor v. Sadapur ...	13	924
173	Tunnoo Mia v. Emperor ...	13	925
175	Bhoja Ram v. Emperor ...	13	927
175	Rasoolkhan Saheb v. Emperor ...	13	927
176	Balmokand v. Nanak Chand ...	13	928
177	Khirode Chunder Roy Chowdhury v. Emperor ...	13	993
182	Lad Khan v. Emperor ...	13	998
183	Bharosa Patak v. Emperor ...	13	999
184	Ambika Prosad Singh v. Gur Sahai Singh ...	13	1000
185	Emperor v. Sohan Singh ...	13	1001
186	Gurameah v. Emperor ...	13	1002
188	Gajendra Ghorai v. Emperor ...	13	1004
188	Emperor v. Dilsukh ...	13	1004
189	Emperor v. Lekria ...	13	1005
190	Gauri Shankar Lal v. Emperor ...	13	1006
191	Ram Charan Chandra v. Tirupulla Sheikh ...	13	1007

TABLE

OF

Cases reported in Volume XIII of Indian Cases, 1912.

An asterisk (*) denotes cases not reported yet elsewhere.

Names of cases reported.		Where reported.	Page of Ind. Cas. Vol. XIII.
Abdul Ghafoor v. Raza Husain	...	s. c. 9 A. L. J. 231; 34 A. 267; 13 Cr. L. J. 141 ...	829
Abdul Ghani v. Abdul Majid	...	*All. High Court ...	116
Abdul Hakim Khan v. Chandan	...	s. c 9 A. L. J. 4; 34 A. 165 ...	83
Abdul Karim v. Abdul Rahman	...	s. c. 16 C. W. N. 618; 15 C.L.J. 672	364
Abdul Karim v. Abdus Sobhan	...	s. c. 16 C. W. N. 44; 39 C. 146 ...	243
Abdul Karim v. Sahib Jan	...	s. c. 13 P. W. R. 1912 ...	947
Abdul Kayam v. Bahadur Vithoba	...	s. c. 14 Bom. L. R. 26 ...	858
Abdul Rahman v. Bhagwan Das	...	s. c. 59 P W. R. 1912; 120 P. L. R. 1912 ...	720
Abdullah Beg v. Abbul Hasan	...	*All High Court ...	350
Abhai Charan Chakrawati v. Kesho Das	...	*All. High Court ...	642
Adala Yerrivadu, *In re*	...	s. c. 11 M. L. T. 24; 13 Cr. L. J. 24	216
Adhari Dubain v. Sheodihal Pande	...	*All. High Court ...	708
Adusupalli v. Marikurthu	...	s. c. 11 M. L. T. 19; (1912) 1 M. W. N. 9; 22 M. L. J. 169 ...	313
Adusupatti Venkata Rao v. Swami Pillai	...	s. c. 11 M L. T. 27; (1912) 1 M. M. N 56; 22 M. L. J. 228 ...	795
Ahmad Khan v. Ratan Chand	...	s. c. 53 P. W. R. 1912; 50 P. R. 1912 ...	539
Ahmad Said Khan v. Masi-ullah Khan	...	s. c. 9. A. L. J. 152; 34 A. 250 ...	975
Aiya Chalamaya v. Emperor	...	s. c. (1912) 1 M. W. N. 50; 13 Cr. L. J. 121 ...	777
Ajodhia Parshad v. Ram Lal	...	s. c. 9 A. L. J. 124; 34 A. 197; 13 Cr. L. J. 44 ...	284
Ajodhya Prasad v. Jagdish Singh	...	s. c. 14 O. C. 321 ...	813
Akhju Singh v. Jagannath Prasad	...	*Cal. High Court ...	1
Akilandam Pillai v. Chinnasawmi Moopan	...	s. c (1912) 1 M. W. N. 172; 11 M. L. T. 201 ...	649
Albrecht v. Bathee Jellamma	...	s. c. 11 M L. T. 53; (1912) 1 M. W. N. 53; 22 M. L. J. 247 ...	453
Ali Mohammad v. Nayan Rajah Bhuiya	...	s. c. 15 C. L. J. 122; 16 C. W. N. 620 *note* ...	912
Alia Rai v. Jhingur Tewari	...	s. c. 16 C. W. N. 426; 15 C. L. J. 403; 39 C. 476; 13 Cr. L. J. 156	844
Alim Ali v. Nabbu	...	s. c. 12 P. W. R 1912 ...	314
Allareddi Subbamma v. Nallapareddi	...	s. c. 11 M. L. T. 124, (1912) 1 M. W. N. 178; 22 M. L. J. 260 ...	870
Aman ullah v. Abdul Ghafur	...	s. c. 85 P. R. 1911 ...	808

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XIII.
Amar Singh v. Husaina ...	s. c 15 P. W. R. 1912; 13 P. L. R. 1912; 36 P. R. 1912 ...	28
Ambalam Pakkiya Udayan v. J. M. Bathe ...	s. c. (1912) 1 M. W. N. 152 ...	599
Ambika Prosad Singh v. Gur Sahai Singh ...	s. c. 13 Cr. L. J. 184 ...	1000
Amodini Dassee v. Darson Ghose ...	s. c. 38 C. 828; 13 Cr. L J. 120 ...	776
Anantanarayana Iyer v. Savittri Ammal ...	s c (1912) 1 M. W.N. 59; 11 M.L. T. 63; 22 M. L. J. 231 ...	458
Acantarazu Garu v. Narayanarazu Garu ...	s. c. (1911) 2 M. W. N. 531; 10 M. L. T. 504; 22 M. L. J. 108 ...	96
Angulia & Co v. Sassoon & Co. ...	s. c. 16 C. W. N. 593 ...	705
Annada Prosad v. Sham Sundar ...	*Cal. High Court ...	688
Arnold v. Arnold ...	s. c. 38 C. 907 ...	491
Arulanantham Pillai, *In re* ...	s. c. (1911) 2 M. W. N. 558; 10 M. L T. 550; 22 M. L. J. 138 ...	221
Arunachella Tevan, *In re* ...	s. c. 11 M. L. T. 20; (1912) 1 M. W. N. 35; 22 M. L. J. 186; 13 Cr. L. J. 42 ...	282
Asalat Khan v. Birendra Kishore ...	*Cal. High Court ...	519
Ashutosh Chatterjee v. Sudhindra Chandra Moulik ...	*Cal. High Court ...	597
Assistant Sessions Judge of North Arcot v. Ramammal ...	s. c. 10 M. L. T. 563; (1912) 1 M. W. N. 3; 22 M. L. J. 141; 13 Cr. L. J. 35 ...	275
Atal Bajadar v. Madan Dai ...	*Cal. High Court ...	694
Atul Chandra Dutt v. Eson Ali ...	*Cal. High Court ...	423
Babu Pershad v. Emperor ...	s c. 13 Cr. L J. 9 ...	102
Badri Das v. Ram Rikh ...	*All. High Court ...	142
Badri Das v. Santa Singh ...	s. c 3 P. R. 1912; 44 P. W.R. 1912	873
Badruddin Hasan v. Amir Begam ...	s. c. 14 O. C. 308 ...	520
Bahawal v. Nurkhan ...	s. c 1 P. W. R. 1912, Rev. ...	815
Baij Nath v. Jang Bahadur ...	*Cal. High Court ...	657
Baisnab Charan Manjhi v. Gati Nath Munshi	s c. 16 C. W. N. 384; 39 C. 469; 13 Cr. L. J. 142 ...	830
Bajrang Behari Lal v. Lachmi Narain ...	s. c. 15 C. L. J. 88 ...	944
Bakhtawari v. Shibban Lal ...	s. c. 69 P. W. R. 1912; 121 P. L. R. 1912 ...	621
Bakshali v. Emperor ...	s. c. 5 S. L. R. 136; 13 Cr. L. J. 28	220
Bala Pasban Kuldip Lal v. Gurwar Misser ...	s c 13 Cr. L J. 1 ...	111
Bala Proshad v. Partab Singh ...	*All. High Court ...	38
Baldeo Singh v. Hira Lal ...	s. c. 9 A. L. J. 67 ...	951
Balmakund v. Emperor ...	s. c. 9 A. L. J. 97; 34 A. 192; 13 Cr. L. J. 122 ...	773
Balmakund v. Kundan Lal ...	s. c. 9 A. L. J. 15 ...	943
Balmokand v. Aya Singh ...	s. c. 18 P. W. R. 1912; 26 P. L. R. 1912 ...	68
Balmokand v. Nanak Chand ...	s. c. 3 P. W. R. 1912 Cr.; 13 Cr. L. J. 176 ...	928

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XIII.
	s. c. 38 C. 923; 16 C. W. N. 159 ...	725
Banbihari Kapur v. Khetra Pal Singh Roy ...	s. c 9 A. L. J. 111; 34 A. 172 ...	154
Bandey Ali v. Gokul Misir ...	*Oudh Judl. Commr.'s Court ...	473
Banke Behari Lal v. Ahlad Singh ...	s. c. 9 A. L. J. 162; 34 A. 210; 13 Cr. L. J 141 ...	829
Bansi v. Emperor ...	s. c. 8 N. L. R. 29 ...	982
Bapu v. Temsa ...	s. c. 48 P. W. R. 1912 ...	298
Bela Singh v. Labh Singh ...	s. c. 16 C. W.N. 360; 15 C.L.J. 215	529
Bengal Nagpur Co. Ld. v. Ram Protap Ghaneswam Das ...	*Cal. High Court ...	691
Bhagabati Koer v. Sohodra Koer ...	s. c. 15 O. C. 122 ...	495
Bhagan v. Munnu ...	s. c. 14 O. C. 295 ...	466
Bhagannah v. Chandi Singh ...	s c 26 P. W. R. 1912; 34 P. L. R. 1912 ...	957
Bhagtu v. Bua Ditta ...	s. c. 7 N. L. R. 179 ...	862
Bhaosirgh v. Hazari ...	s. c. 9 A L.J. 355; 13 Cr. L. J. 183	999
Bharosa Patak v. Emperor ...	s. c. 21 P. W. R. 1912 Cr; 115 P.L. R. 1912; 13 Cr. L. J. 175 ...	927
Bhoja Ram v. Emperor ...	s. c. 27 P. W. R. 1912; 32 P. L. R. 1912 ...	960
Bhola v. Brij Lal ...	s. c. 16 C. W. N. 325 ...	943
Bhuttacharya and Co. v. Cawnpore Woollen Mills Co. Ld. ...	*All. High Court ...	156
Bihari Lal v. Durga Das ...	*Oudh Judl. Commr.'s Court ...	547
Binda Prasad v. Gaya Prasad Singh ...	s. c 16 C. W. N. 362; 9 A L. J. 585; 15 C. L. J. 633 **P. C.** ...	965
Bir Bikram Deo v. Secretary of State ...	s. c. 16 C. W. N. 304; 15 C. L. J. 194; 39 C. 439 ...	513
Birendra Kishore v. Akram Ali ...	*Cal. High Court ...	517
Birendra Kishore v. Dilwar Ali ...	s. c. 15 C. L. J. 203; 39 C. 453 ...	518
Birendra Kishore v. Roshan Khan ...	s. c. 9 A. L J. 254 ...	506
Birjnath Sarin v. Byrne ...	*Cal. High Court ...	63
Birco Gorain v. Jainurat Koer ...	s. c. 20 P. W. R. 1912; 28 P. L. R. 1912 ...	92
Bishna v. Rattani ...	s. c. 9 A. L. J. 173 ...	417
Blarchett v. Secretary of State ...	s. c 5 S. L. R. 153; 13 Cr. L. J. 21	213
Bodomal Kishinchand v. Emperor ...	s. c. 14 O. C. 343 ...	803
Brij Mohan Lal v Munni Bibi ...	s. c. 16 C. W. N. 94 ...	328
Brindarani Choudhrani v. Annoda Mohan Ray	s. c. 15 C. L. J. 239 ...	605
Chag Mull v. Jai Narain ...	s. c. 61 P. W. R. 1912; 108 P. L. R. 1912; 53 P. R. 1912 ...	665
Chajju Mal v. Telu Mal ...	s. c. 11 M. L. T. 155; (1912) 1 M. W. N. 199 ...	903
Chalasamy Ramiah v. Chalasamy Ramaswami	*All. High Court ...	530
Champa Lal v. Sham Sundar Mali ...	s. c. 15 C. L. J. 251; 16 C. W. N. 496 ...	702
Chandra Kumar v. Ram Din ...	s. c. 5 S. L. R. 122; 13 Cr. L. J. 22	214
Changal Halapoto v. Basarmal ...		

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Names of cases reported.		Where reported.	Page of Ind. Cas. Vol. XIII.
Chellammal v. Krishnasawmy Iyer	...	s. c. (1912) 1 M. W. N. 166 ...	618
Chet Singh v. Allahditta	...	s. c. 31 P. W. R. 1912; 47 P. L. R. 1912 ...	877
Cheria Imbichi Bibee v. Syed Ali	...	s. c. (1912) 1 M. W. N. 45 ...	791
Cheriyonni v. Nhera Poyile	...	s. c. (1911) 2 M. W. N. 587; 10 M. L. T. 528; 22 M. L. J. 47 ...	174
Chhotey Lal v. Har Narain	...	*All. High Court ...	634
Chidrie Kristappa v. Siddamsetti Yamanappa		s. c. 11 M. L. T. 12; (1912) 1 M. W. N. 36 ...	159
Chittar Kuar v. Goura Kuar	...	s. c. 9 A. L. J. 105; 34 A. 189 ...	320
Chockalingam Pillai, *In re*	...	s. c. 11 M. L. T. 162; (1912) 1 M. W. N. 119; 13 Cr. L. J. 131 ...	819
Dalgliesh v. Nandan Misser	...	*Cal. High Court ...	186
Dan Singh v. Phangan Singh	...	s. c 83 P. R. 1911 ...	796
Dasaundhi v. Chanda Singh	...	s. c. 85 P. W. R. 1912; 45 P. R. 1912 ...	421
Debendra Nath v. Bindhubala Dasi	...	*Cal. High Court ...	125
Debi Das v. Chairman of Motihari Municipality		*Cal. High Court ...	183
Deo Raj v. Govind Parshad	...	s. c. 55 P. W. R. 1912 ...	647
Deputy Superintendent v. Chulhan Ahir	...	s. c. 16 C.W.N. 263; 13 Cr L.J. 138	826
Devidas v. Ramlal	...	s. c. 7 N. L. R. 190 ...	864
Devta Jamlu v. Hari Das	...	s. c. 39 P. L. R. 1912; 47 P. W. R. 1912 ...	348
Dewat Singh v. Emperor	...	s. c. 11 P. W. R. 1912 Cr.; 4 P. R. 1912 Cr.; 13 Cr. L. J. 126 ...	782
Dhian Singh v. Dhian Singh	...	s. c 51 P. W. R. 1912 ...	312
Dibakar Nag v. Mrittunjoy Bhattacharya	...	*Cal. High Court ...	495
Dirg Bijai Singh v. Bhan Partab Shah Singh		s. c. 9 A. L. J. 63 ...	945
Doulatram v. Halo Kanya	...	s. c. 5 S. L. R. 155 ...	244
Dragon v. Emelie Mi Taik Dragon	...	s. c. 4 Bur. L.T. 269; 13 Cr. L.J. 55	391
Dukhimoni Dasi v. Tulsi Charan	...	*Cal. High Court ...	512
Duni v. Ali Mohammad	...	s. c. 8 P. W. R. 1912 ...	857
Dur Mahomed v. Allahdino	...	s. c. 5 S. L. R. 190; 13 Cr. L. J. 32	224
Durga Shankar v. Ram Ratan	...	*Oudh Judl. Commr.'s Court ...	544
Dwarka Nath v. Pralhad Ram	...	*Cal. High Court ...	201
Emperor v. Andal	...	s. c. 5 S. L. R. 174; 13 Cr. L. J. 33	273
——— v. Andiasavaloo Naidoo	...	s. c. (1912) 1 M. W. N. 84; 13 Cr. L. J. 144 ...	832
——— v. Arumukham Pillai	...	s. c. (1912) 1 M. W. N. 69; 13 Cr. L. J. 124 ...	780
——— v. Balwant Kondo Patole	...	s. c. 14 Bom. L.R. 41; 13 Cr.L.J. 137	825
——— v. Behari Lal	...	s. c. 8 A. L. J. 1324; 34 A. 146; 13 Cr. L. J. 8 ...	101
——— v. Dilsukh	...	s. c. 19 P.R. 1911 Cr., 13 Cr.L.J. 188	1004
——— v. Ganda Singh	...	s. c. 20 P. L. R. 1912; 13 P. W. R. 1912 Cr.; 13 Cr. L. J. 3 ...	109
——— v. Hari Govind Limaye	...	s. c. 14 Bom.L.R. 40; 13 Cr.L.J. 139	827
——— v. Lekria	...	s. c. 8 N. L. R. 20; 13 Cr. L. J. 189	1005

Names of cases reported.		Where reported.	Page of Ind. Cas. Vol. XIII.
		s. c. 33 A. 775; 13 Cr. L. J. 170 ...	922
Emperor v. Murli Sirgh	...	s. c 4 Bur. L. T. 270; 13 Cr. L. J. 62	398
——— v. Nga Po Sin	...	s. c 4 Bur. L. T. 271; 13 Cr. L. J. 58	394
——— v. Nga Sit Cho	...	s. c 3 P. R. 1912 Cr ; 9 P. W. R. 1912 Cr ; 13 Cr. L. J. 17 ...	209
——— v. Qadir Bakhsh	...	s. c 9 A L. J. 51; 34 A. 118; 13 Cr. L J. 169 ...	921
——— v. Ram Naresh Singh	...	s. c. 1 P. R. 1912 Cr ; 37 P. L. R. 1912; 15 P. W. R. 1912 Cr ; 13 Cr L. J. 172 ...	924
——— v. Sadapur	...	s. c 18 P. R. 1911 Cr.; 13 Cr. L. J. 185 ...	1001
——— v. Sohan Singh	...	*Cal. High Court ...	311
Ensar Ali v. Yakub Ali	...	s c 9 A. L. J 84 ...	954
Fakhran Bibi v. Nageshar Ram	...	s c. 62 P. W. R. 1912 ...	709
Fakir Chand v. Ram Chand	...	s c. 76 P.W.R. 1912; 48 P. R. 1912	561
Fateh Chand v. Kirpa Singh	...	s. c. 19 P. W R. 1912 ...	77
Fateh Din v. Allah Ditta	...	s. c 81 P. R. 1911 ...	790
Fateh Din v. Nikka	...	s. c. 1 P R. 1912; 33 P. W. R. 1912	930
Fatma v. Imtiazi Jan	...	s. c 11 M L.T. 121; 22 M. L. J. 265	866
Gadiyam Narayudu v. Mallavarapu Venkamma		s. c. 15 C. L J. 80; 13 Cr.L. J. 188	1004
Gajendra Ghorai v. Emperor	...	s. c. 77 P. W. R 1912 ...	661
Ganda Singh v. Nathu Ram	...	s. c. 13 Cr. L. J. 43 ...	283
Ganesh Pershad v. Emperor	...	s. c. 8 N. L. R. 22 ...	909
Ganeshdas v. Shankar	...	s. c. 15 C. L. J. 54 ...	959
Ganga Pershad Sahu v. Irshad Ali Khan	...	s. c. 16 C. W. N. 227 ...	403
Gangadhar Das v. Bhikari Charan Das	...	*Cal. High Court ...	206
Ganpat v. Balmakund	...	s. c 9 A. L. J. 8; 34 A. 168 ...	94
Ganpat Prasad v. Sarju	...	s. c. 9 A. L J. 54; 34 A. 135 ...	34
Ganpat Rai v. Munni Lal	...	s. c. 67 P. W. R 1912 ...	511
Ganpat Rai v. Sardara	...	s. c. 9 A. L J. 156; 13 Cr. L. J 190	1006
Gauri Shankar Lal v. Emperor	...	s. c 9 A. L. J. 86 ...	197
Gendan Lal v. Babu Ram	...	s. c 9 A L. J. 496 ...	191
Ghansham Singh v. Teg Bahadur Singh	...	s. c. 60 P. W. R 1912; 79 P. L. R. 1912 ...	319
Ghasi Ram v. Jai Lal	...	*Ajmer-Merwara Judl. Commr.'s Court ...	363
Ghisu v. Ram Ballabh	...	s. c. 9 A. L. J. 574 ...	59
Gokul Chand v. Shib Charan	...	s. c. 16 C. W. N. 299; 15 C. L. J. 204 ...	23
Gokul Krishna Das v. Shashi Mukhi Dasi	...	s. c. 16 C. W. N 108 ...	329
Gopal Chandra Chakrabarty v. Radharaman Das Babaji	...	s. c. 14 Bom. L. R 14 ...	851
Gopal Ghela v. Rajaram Amtha	...	s. c 15 C. L. J. 120 ...	900
Gopal Lal v. Bahorni	...	s. c 10 M. L. T. 522; 22 M. L. J. 121 ...	95
Gopal Row v. Veerappan Servaikaran	...	s. c 16 C W. N 265; 39 C. 245 ...	577
Gopessur Dutt v. Bissessur Dutt	...		

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XIII.
Gopi Narain v. Kunj Behari Lal ...	s. c 9 A. L. J. 311 ...	625
Gorle Kandungadu, *In re* ...	s. c.(1912)1 M.W.N. 97; 13 Cr. L. J. 140 ...	828
Gouri Dutt v. Amar Chand ...	s. c. 15 C. L. J. 49 ...	907
Govind Baba Gujar v. Shrimant Jijibai Saheb	s. c. 14 Bom. L R. 9; 36 B. 189 ...	849
Govinda Naicken v. Arathshaya Iyer ...	s. c. (1912) 1 M. W. N. 87; 11 M. L T. 87; 22 M L J 257 ...	471
Govinda Pillay v. Meeratchi Achi ...	s. c 10 M. L. T. 493; (1911) 2 M. W. N. 563; 22 M. L. J. 204 ...	152
Gujjalapadi Subba Naidu v. Gujjalapadi Vancatasubba Naidu ...	s. c. 11 M. L. T. 33 ...	113
Gul Mahomed v. Abdul Jubbar ...	s. c. 16 C. W. N. 498; 15 C. L J. 683 ...	694
Gunniah Vencatachalapathy Aiyar v. Perumal Iyer ...	s. c. 10 M. L. T. 527; (1912) 1 M. W. N. 44 ...	133
Gurameah v. Emperor ...	s. c. 16 C. W. N. 33?; 39 C. 403; 13 Cr. L. J. 186 ...	1002
Gurusawmy Nadan v. Emperor ...	s. c. (1912) 1 M W N. 47; 11 M.L.T. 32; 22 M.L J. 251; 13 Cr.L.J. 143	831
H. W. G. v. Mrs. H. W. G. ...	*All. High Court ...	617
Habeebullah v. Abdul Hamid ...	s. c. 9 A. L. J. 131; 34 A. 261 ...	963
Haddington Island Quarry Co. Ld. v. Alden Wesley ...	s. c. 10 M. L. T. 554 ...	261
Hansraj v. Narain Chand ...	s. c. 86 P. R 1911 ...	716
Hardey Narain v. Mrs. Powell ...	*All. High Court ...	420
Hari Narain Chatterjee v. Ishwar Chandra Chatterjee ...	*Cal. High Court ...	457
Hari Singh v. Bholi ...	s. c. 64 P. W. R. 1912; 119 P. L. R. 1912 ...	719
Harnamon v. Santa Singh ...	s. c. 98 P. W. R. 1912 ...	711
Hazara Singh v. Harnam Singh ...	s. c. 22 P. W. R. 1912; 44 P. L. R. 1912; 24 P. R. 1912 ...	180
Hedlot Khasia v. Ka Ran Khasiani ...	s. c. 15 C. L. J. 241 ...	377
Hemandas v. Chellaram ...	s. c. 5 S L. R 184 ...	264
Heta Ram v. Chandan ...	s. c. 49 P. W. R. 1912 ...	447
Hewa Mal v. Karunamoy Gupta ...	*Cal. High Court ...	542
Ibrahim Ali Khan v. Mahammad Ahsan Ullah	s. c. 11 M. L. T. 225; (1912) 1 M. W. N. 316; 50 P. W. R 1912; 15 C. L J. 352; 9 A. L J. 390; 14 Bom. L. R. 276; 22 M. L. J. 478; 16 C. W. N. 625 **P. C.** ...	695
Imambandi v. Matasuddi ...	s. c. 15 C. L. J. 621 ...	678
Imperator v. Abdul Latif ...	s. c. 5 S. L R. 135; 13 Cr. L. J. 27	219
——— v. Alu ...	s. c. 5 S. L R. 129; 13 Cr. L. J. 23	215
——— v. Bhojraj ...	s c. 5 S. L. R. 137; 13 Cr. L J. 30	222
——— v. Rajabali ...	s. c. 5 S. L R. 173; 13 Cr. L J 44	284
——— v. Rino ...	s. c. 5 S. L R. 123; 13 Cr. L J. 18	210

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XIII.
Imrit Chamar v. Sridhar Panday ...	s. c. 15 C. L. J. 7 ...	120
Indar Dawan Singh v. Deputy Commissioner, Fyzabad ...	*Oudh Judl. Commr.'s Court ...	629
Isa v. Ranon ...	s. c. 1 P. W. R. 1912 Cr; 83 P. L. R. 1912; 13 Cr. L. J. 136 ...	824
Ishar Das v. Asaf Ali Khan ...	s. c. 9 A. L. J. 19; 34 A. 186 ...	134
Ismail Ghami Ammal v. Katima Rowther ...	s. c. 10 M. L. T. 573; 22 M. L. J. 154; 13 Cr. L. J. 23 ...	215
Jackson v. Jackson ...	s. c. 9 A. L. J. 108; 34 A. 203 ...	958
Jadunandan Prosad Singha v. Koer Kalliyan Singh ...	s. c. 15 C. L. J. 61; 16 C. W. N. 612 ...	653
Jafar Husain v. Husan Ara Begam ...	*Oudh Judl. Commr.'s Court ...	609
Jafri Begam v. Ghasu Khan ...	*Oudh Judl. Commr.'s Court ...	504
Jagan Nath v. Debi Sahay ...	*Oudh Judl. Commr.'s Court ...	493
Jagar Nath v. Ramphal ...	s. c. 8 A. L. J. 1312; 34 A. 150 ...	79
Jagarnath Das v. Bibi Rupa ...	*Cal. High Court ...	85
Jagat Chandra Majumdar v. Munsef Ali Sarkar	*Cal. High Court ...	671
Jamna Das v. Ram Autar ...	s. c. 16 C. W. N. 97; 11 M. L. T. 6; 9 A. L. J. 37; (1912) 1 M. W. N. 32; 15 C. L. J. 68; 14 Bom. L. R. 1; 21 M. L. J. 1158; 34 A. 63 **P. C.** ...	304
Jan Khan v. Ahmad ...	s. c. 24 P. W. R. 1912 ...	445
Jang Bahadur Lal v. Emperor ...	s. c. 14 C. L. J. 652; 13 Cr. L. J. 62	398
Jainath Pathak v. Kalka Upadhya ...	s. c. 9 A. L. J. 238; 34 A. 285 ...	643
Janki Das v. Bengal Nagpur Railway Company ...	s. c. 15 C. L. J. 211; 16 C. W. N. 356 ...	509
Janki Das v. Tika Ram ...	*All. High Court ...	48
Janki Koeri v. Basdeo Ojha ...	*Cal. High Court ...	351
Janki Pershad Singh v. Yahia Hossain ...	s. c. 15 C. L. J. 211; 16 C. W. N. 356 ...	637
Janki Prashad v. Thakur Das ...	*All. High Court ...	21
Jasoda Dassi v. Rameswari Dassi ...	s. c. 14 C. L. J. 603 ...	374
Jayanti Kistappa v. Jayanti Chinnapiya ...	s. c. (1912) 1 M. W. N. 38 ...	188
Jesa Ram v. Thakar Das ...	s. c. 197 P. W. R. 1911 ...	468
Jit Singh v. Maharaj Singh ...	s. c. 10 M. L. T. 551; 16 C. W. N. 122; (1912) 1 M. W. N. 29; 15 C. L. J. 78; 14 Bom. L. R. 3[illegible]; 34 A. 57 **P. C.** ...	257
Jiwa v. Buta ...	s. c. 21 P. W. R. 1912; 23 P. L. R. 1912; 26 P. R. 1912 ...	167
Jiwan v. Dit ...	s. c. 103 P. W. R. 1912; 49 P. R. 1912 ...	549
Jnan Chandra Nag Das v. Lochh Mohan ...	*Cal. High Court ...	541

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XIII.
Jog Narain Singh v. Badri Das ...	*Cal. High Court ...	144
Jogal Kishore v. Ram Narain ...	s. c. 9 A. L. J. 226; 34 A. 268 ...	619
Jotindra Mohan v. Kedar Nath ...	*Cal. High Court ...	289
Kader Sundar v. Emperor ...	s. c. 16 C. W. N. 69; 13 Cr. L. J. 39	279
Kalimuddin v. Mahurni ...	s. c. 15 C. L. J. 382; 16 C. W. N. 662 ...	690
Kamini Mohan Das v. Harendra Kumar ...	s. c. 38 C. 876; 13 Cr. L. J. 126 ...	782
Kamini Moni Debi v. Khettra Mohan Ganguli	*Cal. High Court ...	43
Kanhai Lal v. Hulas Singh ...	s. c. 9 A. L. J. 29 ...	939
Kanhaya Lal v. Girdhari Lal ...	s. c. 9 A. L J. 103 ...	956
Karam Bahadin v. Emperor ...	s. c. 5 S. L. R. 179; 13 Cr. L. J. 31	223
Karam Chand v. Sultan ...	s. c. 72 P. W. R. 1912 ...	650
Karim Khan v. Salmuddi ...	*Cal. High Court ...	594
Kariman v. Masiti ...	s. c. 29 P. W. R. 1912; 24 P. L. R. 1912 ...	171
Karippala v. Muchai Manakal ...	s. c. 10 M. L. T. 526; 22 M. L. J. 126 ...	233
Karm Ilahi v. Sultan Alam ...	s. c. 79 P. R. 1911 ...	812
Kashmire v. Ramsaran ...	s. c. 15 C. L. J. 660 ...	416
Katchalai Mudali v. Kuppanna Mudali ...	s. c. (1912) 1 M. W. N. 41 ...	182
Kedar Nath v. Manu Bibi ...	s. c 16 C. W. N. 247 ...	879
Khair Ahmad v. Mir Ahmad Ullah ...	s. c. 52 P. W. R. 1912 ...	408
Khanu v. Fateh Khan ...	s. c. 5 P. W. R. 1912 ...	861
Khazan Singh v. Panna Lal ...	s. c 9 A. L. J. 59 ...	131
Khirode Chunder Roy Chowdhury v. Emperor	s. c. 15 C. L. J. 151; 39 C. 377; 13 C. L. J. 177 ...	993
Kiman v Sultani Mal ...	s. c. 82 P. W. R. 1912 ...	559
Kirpal Singh v. Sant Singh ...	s. c. 71 P. R. 1911; 30 P. L. R. 1912	305
Kishori Lal v. Todar Singh ...	s. c. 9 A. L. J. 244 ...	535
Kailash Chandra v. Gajendra Nath ...	s. c. 15 C. L. J. 1 ...	407
Koipalli Ramiah v. Sajja Subbiah ...	s. c. 11 M. L. T. 192; (1912) 1 M. W. N. 415 ...	315
Kolli Appiah, *In re* ...	s. c. 11 M. L. T. 191; (1912) 1 M. W. N. 400; 13 Cr. L. J. 144 ...	832
Komma Somakka v. Kodidala Pedda Ramiah	s. c. (1911) 2 M. W. N. 519; 22 M. L. J. 193 ...	251
Kolpati Kuar v. Rajdhari Lal ...	*All. High Court ...	641
Kosuri Rajagopal v. Datla Radhayya ...	s. c. 11 M. L. T. 14; (1912) 1 M. W. N. 39; 22 M. L. J. 159 ...	205
Kovummal Packrichi v. Kovummal Keenhacha	s. c. (1911) 2 M. W. N. 538; 22 M. L. J. 122 ...	236
Krishna Das Roy v. Land Acquisition Collector, Pabna ...	s. c. 16 C. W. N. 327 ...	470
Krishna Proshad Mandal v. Rabindra Nath ...	s. c. 13 Cr. L. J. 6 ...	99
Krishnasawmi Doss, *In re* ...	s. c. (1912) 1 M. W. N. 167; 11 M. L. T. 182 ...	648

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XIII.
Kuar Radhka Raman Parshad v. Gulzari Kuar	*All. High Court ...	147
Koppusami Iyengar v. Subbaraya Rowtha Minda Naicar ...	s. c. 11 M. L. T. 15; (1912) 1 M. W. N. 1; 22 M. L. J 161 ...	324
Kuri v. Des Raj ...	s. c. 57 P. W. R. 1912 ...	443
Kutubullah Sarkar v. Durga Charan ...	s. c. 16 C. L. J. 396 ...	424
Lad Khan v. Emperor ...	s. c. 19 P. W. R 1912 Cr; 11 P. L. R. 1912; 13 Cr L. J. 182 ...	998
Labri v. Shiv Nath ...	s c. 2 P W. R. 1912 Rev. ...	865
Lakhi Chowdhuri v. Akloo Jha ...	s. c. 16 C. W. N 639 ...	123
Lakhi Kant Das v. Balabhadra Prosad Das ...	*Cal. High Court ...	336
Lakshminarain Apuram v. Emperor ...	s. c. (1911) 2 M. W. N. 536; 13 Cr. L. J 21 ...	213
Lal Gopal Data Chowdhury v. Khorooriah Majezilla Zemindary Syndicate, Ld. ...	s c. 16 C. W. N. 297 ...	673
Lal Hussain v Hassa Khan ...	s. c 68 P. W R. 1912 ...	428
Lal Singh v. Pala Singh ...	s. c. 66 P. W. R 1912 ...	714
Lalji Panday v. Berhamdeo Panday ...	s c. 16 C. W. N. 89 ...	29
Lalmand v. Kalka Prasad ...	s c. 8 A. L J. 1326 ...	194
Lalu Ram v. Secretary of State ...	s. c 15 O. C. 117 ...	556
Lazaratnessa Bibi v. Mahomed Jaffar ...	*Cal. High Court ...	336
Lehna Singh v. Santa Singh ...	s. c 9 P. W. R. 1912 ...	852
Lekhraj v. Harpal Singh ...	s. c 11 M. L. T. 1; (1912) 1 M. W. N. 16; 9 A. L. J. 40; 16 C. W. N. 217; 15 C. L. J. 72; 14 Bom. L. R. 33; 34 A. 65 **P. C.**	269
Madan Mohan v. Manmatha Nath Bose ...	*Cal. High Court ...	425
Madan Mohun Dey v. Ganga Chandra Roy ...	*Cal. High Court ...	189
Madar Sahib v. Emperor ...	s. c. 4 Bur. L T. 259; 12 Cr. L.J. 52	388
Maddaniah v. Bhimappa ...	s. c. (1912) 1 M. W. N. 72 ...	469
Maghli v. Ladli ...	*All. High Court ...	644
Mahammad Mehdi Hassan Khan v. Sheoshankar Prasad Singh ...	s. c. 14 C. L. J. 552; 39 C. 353 ...	353
Maharani v. Ram Adhar ...	*Oudh Judl. Commr.'s Court ...	508
Mahbub Bakhsh v. Abdul Rahman ...	s. c. 4 P. W. R. 1912; 84 P. L. R. 1912 ...	816
Mahomed Farid v. Mahomed Abdul Gafur ...	s. c. 15 C. L. J. 14 ...	434
Malappurath Paramadhathil v. Channazhi Krishnan ...	s. c. (1911) 2 M. W. N. 537 ...	234
Malla Veeranna v. Malla Chelamayya ...	s. c. (1912) 1 M. W. N. 63 ...	467
Mandi Ghasi v. Emperor ...	s. c. (1912) 1 M. W. N. 49; 13 Cr. L. J. 125 ...	781
Manghanmal v. Fernandez ...	s. c. 5 S. L R. 181 ...	260
Manghirmal v. Vithalram ...	s. c. 5 S L. R. 107 ...	225
Manikka Mudeliar v. Devasi Kamani Pillai ...	s. c (1912) 1 M. W. N. 158 ...	595
Manindra Nath v. Mohanunda Roy ...	s. c. 15 C. L. J. 360 ...	161
Mansoor v. Min Sahebdin ...	s. c 5 S. L. R. 125 ...	234

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XIII.
Mata Din v. Ahmad Ali ...	s c. 16 C. W. N. 338; 11 M. L. T. 145; (1912) 1 M. W. N. 183; 9 A L J. 215; 15 C. L. J. 270; 14 Bom. L R. 192; 15 O. C 49; 34 A. 213 **P. C.**	
Matharadas v. Secretary of State ...	s c 5 S. L. R. 140 ...	976
Mathura Prosad v. Rukmini Koer ...	* Cal High Court ...	237
Matigara Coal Co. Ltd. v. Shragers, Ltd. ...	s. c 38 C. 824 ...	148
McGill v. Byrne ...	s. c 5 S. L R 133; 13 Cr L J. 25 ...	29
Mcinerny v. Secretary of State ...	s. c. 33 C. 797 ...	217
Me Tha v. Nga San E ...	s c U. B. R. (1911), I, 90; 13 Cr. L. J. 162 ...	370
Megha Ram v. Makhan Lal ...	*Punjab Chief Court ...	914
Mehdi Lal v Grant ...	* Cal. High Court ...	6[illegible]7
Meher Sardar v. Emperor ...	s. c. 16 C. W. N. 46; 13 Cr. L J. 26 ...	636
Meher Singh v. Devi Dyal ...	s c. 32 P. W. R. 1912; 19 P L R. 1912; 38 P. R. 1912 ...	218
Mewa Lal v. Ahmad Ali ...	s c 9 A. L J. 17 ...	50
Mg Po Thwe v. Ma Baw ...	s c. 4 Bur. L. T. 272 ...	929
Mi Hla [illegible] v. Nga Than ...	s. c. 4 Bur. L. T. 268; 13 Cr L.J. 53 ...	373
Mir Sarwarjan v. Fakhruddin Mahomed ...	s. c. 16 C. W. N. 74; (1912) 1 M. W. N. 22; 9 A. L J. 33; 15 C. L. J. 69; 14 Bom. L. R 5; 39 C. 232; 21 M. L. J. 1156 **P. C.**	3[illegible]9
Miran Bakhsh v. Gonde Ram ...	s. c. 89 P. W. R. 1912 ...	331
Mohadeo Pershad v. Pachkari ...	s. c. 16 C. W. N. 322 ...	556
Mohammad v. Sukha Singh ...	s. c 36 P. W. R. 1912; 15 P. L. R. 1912 ...	941
Mohammad Hashim Ali Khan v. Sadiq Husain Khan ...	s. c. 14 O. C. 356 ...	20
Mohoram Sheikh Chaprasi v. Telamuddin Khan ...	s. c. 16 C. W. N. 567; 15 C.L.J.220 ...	882
Moula Bux v. Ajahar Molla ...	* Cal. High Court ...	606
Muhammad v. Bakko ...	s. c. 19 P. R. 1912; 17 P. L. R. 1912; 39 P. W. R. 1912 ...	689
Muhammad v. Imam Khatun ...	s. c. 25 P. L. R. 1912; 37 P. W. R. 1912 ...	27
Muhammad Badar Khan v. Chiragh Shah ...	s. c. 16 P. L. R. 1912; 43 P. W. R. 1912 ...	172
Muhammad Hussain v. Amir Haidar ...	* All. High Court ...	32
Muhammad Umar Khan v. Muhammad Niaz-uddin Khan ...	s. c. 6 P. W. R. 1912; (1912) 1 M. W. N. 77; 11 M. L. T. 76; 9 A. L. J 137; 15 C. L. J. 172; 12 P. L. R. 1912; 22 M. L. J. 240; 14 Bom. L. R. 132; 16 C. W. N. 458; 39 C. 418 **P. C.** ...	34[illegible]

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XIII.
Mullaseri Gopala Menon v. Krisheki Kovilaknath Manavikraman ...	s. c. 10 M. L. T. 568; 22 M. L. J. 146 ...	179
Muna v. Mansa Ram ...	*Oudh Judl. Commr.'s Court ...	624
Musai v. Emperor ...	s. c. 13 Cr. L. J. 159 ...	847
Muthiah Chetty, *In re* ...	s c. 11 M L. T. 21; 22 M. L J. 181; (1912) 1 M. W. N. 455; 13 Cr. L. J. 46	286
Muthuvarapu Seshiah v. Gatram Ramiah ...	s. c. (1911) 2 M. W. N. 526; 13 Cr. L. J. 19	211
Muthuveerappa Chetti v. Ponnuswami Chetty	s c. 10 M. L. T. 477; (1911) 2 M. W. N. 561; 22 M. L. J. 68 ...	16
Mutsadi Lal v Mule Mal ...	s. c. 9 A. L. J. 95; 34 A. 205 ...	334
Mutyala Papayya v. Kosuri Muramallu ...	s. c. 11 M. L. T. 11; (1912) 1 M. W. N. 7; 22 M. L. J. 156 ...	322
N. C. Sircar and Sons v. Baraboni Coal Concern, Ld. ...	s. c. 16 C. W. N. 289 ...	868
Naba v. Piara Mal ...	s. c. 70 P. W. R. 1912; 44 P. R. 1912 ...	427
Nagendra Kumar Nath v. Hara Chandra Poddar ...	s. c. 14 C. L. J. 646 ...	376
Nalini Behari Roy v. Fulmani Dasi ...	s c. 16 C.W.N. 421; 15 C.L.J. 388	487
Nallasawmi Pillai v. Ramasawmi Pillay ...	*Mad. High Court ...	450
Nand Ram v. Bhupal Singh ...	s c. 8 A. L J. 1294; 34 A. 126 ..	5
Nanji Koer v. Umatul Batul ...	s. c. 15 C. L. J. 653 ...	40
Narak Lal v. Thagoo Lal ...	*Cal. High Court ...	455
Narshing Das v. Shamas Din ...	s. c. 207 P. L. R. 1911 ...	992
Narsing Narain v. Jahi Mistry ...	s. c. 15 C. L. J. 3 ..	414
Narsing Narain Singh v. Ajodhya Prosad Singh	s. c. 15 C. L. J. 110; 16 C. W. N. 256 ...	118
Nataraja Iyer v. South India Bank ...	s. c. 10 M. L T. 503; (1911) 2 M. W. N. 590; 22 M. L. J. 105 ...	91
Natesa Pillay v. Munusawmy Naicken ...	*Mad. High Court ...	313
Nathmal Das v. Dalip Singh ...	*All. High Court ...	401
Nathu Ram v. Karmon	s. c. 40 P. L. R. 1912; 115 P. W. R. 1912 ...	326
Nazir Ahmad v. Raghubar Dayal ...	s. c. 15 O. C. 7 ...	986
Nga Lu Pe v. Emperor ...	s. c. 4 Bur. L. T. 262; 13 Cr.L.J 55	392
Nga Paw v. Nga Lu Gale ...	s. c. 4 Bur. L. T. 265 ...	375
Nga Paw E v. Nga Sin ...	s. c. U. B. R. (1911) I, 92 ...	874
Nga Po Chein v. Emperor ...	s. c. 4 Bur. L T. 261; 13 Cr.L J. 54	390
Nga Po Shat v. Emperor ...	s. c. 4 Bur. L. T. 263; 13 Cr.L J. 59	395
Nga Po Yon v. Mohr Brothers and Co. Ltd. ...	s. c. 4 Bur. L. T. 279; 6 L. B.R. 38; 13 Cr. L. J. 50 ...	386
Nga Pu v. Emperor ...	s. c. 4 Bur. L. T. 27; 13 Cr.L.J. 122	778
Nga Pyan v. Emperor ...	s. c 4 Bur. L. T. 267; 13 Cr.L.J. 49	385
Nihal Chand v. Abdullah ...	*Punjab Chief Court ...	563

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XIII.
Nihal Chand v. Chanda Singh ...	s. c. 3 P. W. R. 1912; 32 P. L. R. 1912 ...	859
Nihal Devi v. Kishore Chand ...	s. c. 51 P. R. 1912 ...	564
Nihal Kaur v. Secretary of State ...	*Punjab Chief Court ...	550
Nura v. Nasir Din ...	s. c. 1 P. R. 1912 Rev.; 27 P. L. R. 1912; 5 P. W. R. 1912 Rev.	18
Nurullah Khan v. Hayatunnissa ...	*All. High Court ...	155
O'Brien v. Abdul Rahman ...	s. c. 28 P. W. R. 1912; 14 P. L. R. 1912 ...	6
Oudh Bihari Pande v. Maladeo Sahi ...	*All. High Court ...	646
Painu'lah v. Emperor ...	s. c. 16 C.W.N. 238; 13 Cr. L. J. 127	783
Pancham Singh v. Ganga Bakhsh Singh ...	*Oudh Judl. Commr.'s Court ...	490
Pandurang Bhiwaji v. Ganga Ram Garu ...	s. c. 14 Bom L. R. 22; 36 B. 203...	855
Parbhu Narain Singh v. Lalji Singh ...	s. c. 9 A. L. J. 79 ...	157
Parmeshar Dat v. Mohammad Abul Hasan Khan ...	s. c. 14 O. C. 335 ...	809
Parry & Co. v. Vadivelu Pillay ...	*Mad. High Court ...	160
Pare Ram v. Muhammad Yasin Khan ...	s. c. 14 P. W. R. 1912 ...	953
Partab Singh v. Parjabu ...	s. c. 41 P. L. R 1912; 25 P. R. 1912; 125 P. W. R. 1912 ...	177
Pathana v. Naba ...	s c. 87 P. R. 1911 ...	802
Peary Mohan Das v. Weston ...	s. c. 16 C. W. N. 145; 13 Cr. L. J. 65	721
Perumal Naicken, *In re* ...	s. c. (1912) 1 M. W. N. 193; 13 Cr. L. J. 129 ...	817
Pir Bakhsh v. Emperor ...	s. c. 36 P. L. R. 1912; 3 Cr. L. J. 28	220
Pitchuvir v. Perumal Konan ...	s. c. 11 M. L. T. 160; (1911) 1 M. W. N. 163 ...	651
Polina Achanna v. Madipati Venkataramana...	s. c. (1911) 2 M. W. N. 585; 10 M. L. T. 542; 22 M L. J. 127 ...	175
Ponusawmy Naidu v. Emperor ...	s. c. (1912) 1 M. W. N. 16; 13 Cr. L. J. 16 ...	110
Prahlad Chandra v. Behari Lal Mookerjee ...	*Cal. High Court ...	686
Pran Singh v. Janardan Singh ...	s. c. 14 C. L. J. 541 ...	337
Prayag Narain Singh v. Sukdeo Narain Singh	*Cal. High Court ...	170
Prem Singh v. Mokand Singh ...	s. c. 30 P. W. R. 1912; 22 P. L. R. 1912 ...	62
Promoda Nath v. Alamgir Khan ...	*Cal. High Court ...	82
Public Prosecutor v. Mushunooru Suryanarayanamoorty ...	s. c. (1912) 1 M. W. N. 136; 11 M. L. T. 127 ; 13 Cr. L. J. 145 ...	833
Pugalia Vettorammal v. Vetter Goundan ...	s. c. (1912) 1 M. W. N. 89; 11 M. L. T. 103 ...	475
Qudrat Ullah v. Chunni Mal ...	*All. High Court ...	60
Radha Kant Chakravarti v. Ramananda Shaha	s. c. 16 C. W. N. 475; 15 C. L. J. 369 ...	698
Raghubar Dayal Sukul v. Jadu Nandan Missir	s. c. 15 C. L. J. 89; 16 C. W. N. 736	365
Raghubir Sahi v. Protap Udoy Nath Sahi Deo	s. c. 16 C. W. N. 294; 15 C. L. J. 145; 39 C. 241 ...	193

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XIII.
Raghubir Singh v. Umrao Singh ...	*Oudh Judl. Commr.'s Court ...	500
Raghunandan Prosad Singh v. Ram Narain Singh ...	s. c. 13 Cr. L. J. 4 ...	97
Raghunandan Singh v. Jarao ...	*Oudh Judl. Commr.'s Court ...	554
Raghunath Prosad v. Kashi Prosad ...	s. c. 15 C. L. J. 678 ...	88
Raj Kumar Sarkar v. Rajani Kanta Chakravati	*Cal. High Court ...	449
Raja v. Jannat Bibi ...	s. c. 79 P. W. R. 1912; 40 P. R 1912 ...	409
Raja Dei v. Umed Singh ...	s c 9 A. L. J 158; 34 A. 207 ...	632
Rajendra Narain v. Ashutosh Sanyal ...	*Cal. High Court ...	194
Ram Chand v. Diwan Chand ...	*Punjab Chief Court ...	571
Ram Charan Chandra v. Tirupulla Sheikh ...	s. c. 16 C.W. N. 645; 13 Cr. L. J. 191	1007
Ram Devi v. Shib Devi ...	s c. 1 P. W. R. 1912 ...	290
Ram Gopal v. Agent, Bombay, Baroda and Central India Railway Co. ...	*Ajmer-Merwara Judl. Commr's Court ...	297
Ram Gopal v. Jagmohan Singh ...	*Oudh Judl. Commr.'s Court ...	631
Ram Narain v. Durga Dat ...	*Punjab Chief Court ...	568
Ram Narain Singh v. Odindra Nath ...	s. c 15 C. L. J. 17 ...	440
Ram Pal Singh v. Nandlal Marwari ...	s. c 16 C. W. N. 345 ...	603
Ram Prasad v. Bedo ...	*All. High Court ...	436
Ram Sarup v. Jasoda Kunwar ...	s c 9 A. L J. 72; 34 A. 158 ...	138
Ramadhar v. Sheo Narain ...	*Oudh Judl. Commr.'s Court ...	717
Ramanathan Chettiar v. Sokkanatha Gounden	s. c. (1911) 2 M. W. N. 559; 10 M. L. T. 532 ...	78
Ramasami Reddi v. Lakshmiambal Ammal ...	s. c. (1911) 2 M W. N. 568 ...	200
Ramaswami Ayengar v. Muthuswami Aiyer ...	s. c. (1912) 1 M. W. N. 42 ...	799
Ramchandra Das v. Farzand Ali Khan ...	s. c 9 A. L. J. 188: 34 A. 253 ...	531
Ramdeo Prosad Singh v. Gopi Koeri ...	s. c 16 C. W. N. 383; 15 C. L. J. 256 ...	349
Rameswar Singh v. Tirpit Singh ...	*Cal. High Court ...	140
Ramji Das v. Shankar Das ...	s. c. 10 P. W. R 1912 ...	855
Ramnath Zutshi v. Secretary of State ...	*All. High Court ...	46
Rangasamy Filllai v. Muthu Chidambara ...	s. c. (1911) 2 M. W. N. 589 ...	183
Rashik Lal v. Ram Narain ...	s. c. 9 A. L. J. 198; 34 A. 273 ...	573
Rashmohini Dasi v. Debendra Nath Singha ...	s c 16 C. W. N. 604 ...	604
Rasoolkhan Saheb v. Emperor ...	s c. (1912) 1 M. W. N. 85; 13 Cr. L. J. 175 ...	927
Raziuddin Hussain v. Taharat Husain ...	*Cal. High Court ...	498
Rudra Pratab Sahi v. Gajadhar Singh ...	s. c. 14 O. C. 257 ...	462
Rudra Prosad, *In re* ...	s. c. 14 C. L. J. 606; 13 Cr. L. J. 61	397
Rukman Devi v. Sain Das ...	s. c. 45 P. W. R 1912 ...	401
Sahib v. Usman ...	*Punjab Chief Court ...	72
Salimuddi v. Uzir Mahomed ...	*Cal. High Court ...	299
Sandyal v. Kunjeswar Misra ...	s. c 16 C. W. N. 143; 13 Cr. L. J. 125	781
Sanka Aiyar v. Subbiah Iyer ...	s. c. (1912) 1 M. W. N. 361 ...	642
Sankara Ramiah v. Sankara Subbamiah ...	s. c (1912) 1 M W. N. 70 ...	489

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XIII.
Santu v. Arjan Das ...	s. c 131 P. W. R. 1912 ...	318
Sarkhara v. Nawab ...	s. c 11 P. W. R. 1912 ...	850
Saroop Chand v. Tularam ...	s. c 8 N. L. R. 17 ...	902
Sarvoi Begam v. Haider Shah ...	s. c. 9 A. L. J 12 ...	404
Sat Narain v. Badri Nath ...	s. c 9 A. L. J. 2 1 ...	645
Satish Chandra Sarkar v. Emperor ...	s. c. 16 C. W. N. 499; 15 C. L. J. 396; 39 C. 454; 13 Cr. L. J. 161...	913
Satya Sri Ghoshal v. Kartik Chandra Das ...	s c. 15 C. L. J. 227; 16 C. W. N. 418 ...	596
Sawan Singh v. Jafar Khan ...	s. c. 7 P. W. R 1912; 13 P. L. R. 1912; 39 P. R. 1912 ...	405
Seeni Ammal v. Angamuttu Nadar ...	s. c. (1912) 1 M. W. N. 99 ...	802
Sengoda Gounden v Varadappan ...	s. c. 10 M. L. T. 488; (1911) 2 M. W. N. 534; 22 M. L. J. 201 ...	30
Sevugan Chetty v. Krishna Aiyangar ...	s. c. 10 M. L. T. 557; 22 M. L J. 139 ...	268
Shadi Khan v. Beebee Umdan Begam ...	s. c. 34 P. W. R. 1912 ...	73
Shah Muhammad v. Piara Mal ...	s. c. 84 P. R. 1911 ...	792
Shahbaz Khan v. Fazal Din ...	s. c. 74 P. W. R. 1912; 43 P. R. 1912 ...	430
Sham Lal v. Hazari Mal ...	s c. 15 C. L. J. 451 ...	326
Shaminath v. Ramjas ...	s. c. 9 A. L. J. 1; 34 A. 143 ...	80
Shankar Lal v. Saruplal ...	s. c. 8 A. L. J. 1297; 34 A. 140 ...	19
Sharashi Mohan Roy v. Ramesh Charan Roy...	*Cal. High Court ...	451
Sharkey v. Jery Allard ...	s. c. 78 P. W. R. 1912 ...	433
Sheonandan Singh v. Deo Saran Singh ...	s. c. 15 C. L. J. 647 ...	598
Sheru v. Jawahir Singh ...	*Punjab Chief Court ...	632
Sharikison v. Chatarsingh ...	s. c. 8 N. L. R. 18 ...	904
Shukuruddin v. Hemangini Debi ...	s. c. 16 C. W. N. 420 ...	192
Sinnachami v. Ramasamy Chettiar ...	s. c. 10 M. L. T. 463; (1911) 2 M. W. N 539; 22 M. L. J. 85 ..	7
Sital Prosad v. Bajirangi Sahai ...	*Cal. High Court ...	70
Sitaram v. Kalandi Patra ...	*Cal. High Court ...	127
Sobhomal v. Pohumal ...	s. c. 5 S. L. R. 168 ...	255
Sohni v. Mohan Kuer ...	s. c. 9 A. L. J. 23 ...	944
Somaruddi Mollah v. Port Canning and Land Improvement Co., Ltd. ...	s. c. 16 C. W. N. 225 ...	481
Sreenivasier v. Balakrishna Devai ...	s. c. (1912) 1 M. W. N. 150; 11 M. L. T. 159; 22 M. L. J. 187 ...	860
Sri Rang Behary Lal v. Ranchheyya Lal ...	s. c. 15 C. L. J. 439 ...	128
Sriranga Boupala Balai Rao Garu v. Nayanim Bahadur Varu ...	*Mad. High Court ...	81
Stamp Act, *In re* ...	s. c. 38 P. L. R. 1912 ...	330
Subbaraya Iyer v. Ramasawmi Pillai ...	s. c. 11 M. L. T. 18; (1912) 1 M. W. N. 9; 22 M. L. J. 166 ...	204

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XIII.
Subbiah Servai, *In re* ...	s. c. 11 M. L. T. 23; (1912) 1 M. W. N. 42; 22 M. L. J. 184: 13 Cr. L. J. 38 ...	278
Subbhadra Koer v. Dhajadari Gossain ...	s. c. 15 C.L J. 142; 16 C. W. N. 444	898
Subiha Pillay v. Velappa Naicken ...	s. c. 10 M. L. T. 524; (1911) 2 M. W. N. 560; 22 M. L. J. 124 ...	176
Sukan Sahu v. Gangajali ...	*Cal. High Court ...	136
Sundar Singh v. Deva Singh ...	s. c. 2 P. W. R. 1912; 85 P. L. R. 1912 ...	863
Sundar Singh v. Har Kaur ...	s. c. 75 P. W. R. 1912; 77 P. L. R. 1912 ...	444
Surya v. Lachmi Narain ...	s. c. 13 Cr. L. J. 48 ...	283
Tadikonda Venkaya v. Kodali Venkatasubbamma ...	s. c. (1 12) 1 M. W. N. 49 ...	486
Tajammul Husain v. Raunak Ali ...	s. c. 15 O. C. 25 ...	979
Tara Chand Mukerji v. Afzal Beg ...	s. c. 8 A. L. J 1329; 34 A. 184 ...	185
Tari Baz Khan v. Fateh Khan ...	s. c. 29 P. R. 1912; 114 P. W. R. 1912 ...	316
Tej Mal v. Jagapilla Papayamma ...	s. c. 11 M. L. T. 25: (1912) 1 M. W. N. 50; 22 M. L. J. 225 ..	788
Tek Chand v. Gopal Devi ...	s. c. 46 P. R 1912 ...	482
Thakar Das v. Perma Nand ...	s. c. 95 P. R. 911 ...	963
Theophilus Ramappa, *In re* ...	s. c. 22 M. L. J. 112; 10 M. L. T. 517; 13 Cr. L. J. 15 ...	108
Thiruvengadam Pillai v. Doridla Subbiah ...	s. c. 11 M. L. T. 144; (1912) 1 M. W. N. 176 ...	659
Tota Singh v. Partap Singh ...	*Punjab Chief Court ...	670
Tulsi v. Madho Ram ...	s. c. 30 P. R. 1912; 133 P. W. R. 1912 ...	343
Tulsi Ram v. Karm Chand ...	s. c. 25 P. W. R 1912; 36 P. L. R. 1912 ...	955
Tunoo Mia v. Emperor ...	s. c. 16 C. W. N. 502; 15 C. L. J. 339; 39 C. 348; 13 Cr L. J. 173 ...	925
Ujal Singh v. Debya Singh Sardar ...	*Cal. High Court ...	184
Umar Ali v. Nasib-un-nissa ...	s. c. 82 P. R. 1911 ...	800
Umar Din v. Budhe Khan ...	s. c. 23 P. W. R. 1912; 21 P. L. R. 1912 ...	58
Upendra Nath Ghosh v. Chairman of the Calcutta Corporation ...	s. c. 16 C. W. N. 116 ...	332
Valliammai Achi v. Nataraja Pillay ...	s. c. 11 M. L. T. 157; (1912) 1 M. W. N. 198 ...	906
Varadayya Chetty v. Munusami Chetty ...	s. c. 10 M L. T. 514 ...	232
Variangattil Paksseri Raman Menon v. Sankarasubba Pattar ...	s c. (1912) 1 M. W. N. 37 ...	203

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XIII.
Vedachella Mudaliar v. Vijayaraghavachariar	s. c. 22 M. L. J. 219; (1912) 1 M. W. N. 523 ...	71
Veerapa Chettyar, *In re* ...	*Mad. High Court ...	620
Velappa Gownden, *In re* ...	s. c. (1912) 1 M. W. N. 196 ...	640
Velchand Chhaganlal v. Lieut. A. Flagg ...	s. c. 14 Bom. L. R. 18; 36 B. 164...	853
Velluvakandi Kunhi Pathumma v. Ponnanki Moossan Mammad ...	s. c. (1912) 1 M. W. N. 11 ...	300
Venkadam Narayana Iyer v. Siva Subramania Iyer ...	s. c 22 M. L. J. 49 ...	985
Venkatesa Iyengar v. Kamalammal ...	s. c. (1912) 1 M. W. N. 65; 11 M. L T. 84; 22 M. L. J. 212 ...	463
Vithoo v. Emperor ...	s. c. 7 N. L. R. 185; 13 Cr. L. J. 164 ...	916
Waliullah v. Ejaz Ali ...	s. c. 15 O. C. 22 ...	984
Waris Ali v. Emperor ...	s. c. 7 N. L. R. 180; 13 Cr. L. J. 167 ...	919
Wazir Muhammad v. Har Prasad ...	s. c. 15 O. C. 67 ...	613
Weston v. Peary Mohan Das ...	s. c. 16 C. W. N. 119 ...	335
Wilaiti Begam v. Fazal Husain Khan ...	s. c. 9 A. L. J. 148 ...	961
Yimani Sitarama Sastrulu v. Gora Ramudu ...	s. c. (1911) 2 M. W. N. 588 ...	190
Zenab v. Shah Nawaz Khan ...	s. c. 47 P. R. 1912 ...	526
Zia-ud-din v. Gobind Ram ...	s. c. 76 P. R. 1911 ...	323

Comparative Table

OF

Cases Reported in Volume XIII of Indian Cases, 1912.

Cases marked with an asterisk (*) have not yet been reported elsewhere.

Pages of Vol. XIII of Ind. Cas.	Names of Parties.	Corresponding pages of other Reports and Journals.
1	Akuju Singh v. Jagannath Prasad Singh ...	*
5	Nand Ram v. Bhupal Singh ...	s. c. 8 A. L. J. 1294; 34 A. 126.
5	O'Brien v. Abdul Rahman ...	s. c. 28 P. W. R. 1912; 14 P. L. R. 1912.
7	Sinnachami v. Ramasamy Chettiar ...	s. c. 10 M. L. T. 463; (1911) 2 M. W. N. 539; 22 M. L. J. 85.
16	Muthuveerappa Chetti v. Ponnuswami Chetti ...	s. c. 10 M. L. T. 477; (1911) 2 M. W. N. 561; 22 M. L. J. 68.
18	Nura v. Nasir Din ...	s. c. 1 P. R. 1912 Rev.; 27 P. L. R. 1912; 5 P. W. R. 1912 Rev.
19	Shankar Lal v. Saruplal ...	s. c. 8 A. L. J. 1297; 34 A. 140.
20	Mohammad v. Sukha Singh ...	s. c. 36 P. W. R. 1912; 15 P. L. R. 1912.
21	Janki Prashad v. Thakur Das ...	*
23	Gokul Krishna Das v. Shashi Mukhi Dasi ...	s. c. 16 C. W. N. 299; 15 C. L. J. 204.
27	Muhammad v. Bakko ...	s. c. 19 P. R. 1912; 17 P. L. R. 1912; 39 P. W. R. 1912.
28	Amar Singh v. Husaina ...	s. c. 15 P. W. R. 1912; 18 P. L. R. 1912; 36 P. R. 1912.
29	Lalji Panday v. Berhamdeo Panday ...	s. c. 16 C. W. N. 89.
32	Muhammad Badar Khan v. Chiragh Shah ...	s. c. 16 P. L. R. 1912; 43 P. W. R. 1912.
34	Ganpat Rai v. Munni Lal ...	s. c. 9. A. L. J. 54; 34 A. 135.
38	Bala Proshad v. Partab Singh ...	*
39	Sengoda Goundan v. Varadappan ...	s. c. 10 M. L. T. 488; (1911) 2 M. W. N. 534; 22 M. L. J. 201
40	Nanji Koer v. Umatul Batul ...	s. c. 15 C. L. J. 653.
43	Kamini Moni Debi v. Khettra Mohan ...	s. c. 15 C. L. J. 660.
46	Ramnath Zutshi v. Secretary of State ...	*
48	Janki Das v. Tika Ram ...	*
50	Mehr Singh v. Devi Dial ...	s. c. 32 P. W. R. 1912; 19 P. L. R. 1912; 38 P. R. 1912.
58	Umar Din v. Budhe Khan ...	s. c. 23 P. W. R. 1912; 21 P. L. R. 1912.
59	Gokul Chand v. Shib Charan ...	s. c. 9 A. L. J. 574.
60	Qudrat Ullah v. Chunni Mal ...	*
62	Prem Singh v. Mokand Singh ...	s. c. 30 P. W. R. 1912; 22 P. L. R. 1912.
63	Biroo Gorain v. Jainurat Koer ...	*
68	Balmokand v. Aya Singh ...	s. c. 18 P. W. R. 1912; 26 P. L. R. 1912.
70	Sital Prosad v. Bajrangi Sahai ...	*
71	Vedachella Mudaliar v. Vijayaraghavachariar ...	s. c. 22 M. L. J. 219; (1912) 1 M. W. N. 523.
72	Sahib v. Usman ...	*
73	Shadi Khan v. Beebee Umdan Begam ...	s. c. 34 P. W. R. 1912.
77	Fateh Din v. Allah Ditta ...	s. c. 19 P. W. R. 1912.
78	Ramanathan Chettiar v. Sokkanatha Gounden ...	s. c. (1911) 2 M. W. N. 559; 10 M. L. T. 532.
79	Jagar Nath v. Ramphal ...	s. c. 8 A. L. J. 1312; 34 A. 150.
80	Shaminath v. Ramjas ...	s. c. 9 A. L. J. 1; 34 A. 143.
81	Sriranga Bupala Balai Rao Garu v. Nayanim Bahadur Varu ...	*
82	Promoda Nath v. Alamgir Khan ...	*
83	Abdul Hakim Khan v. Chandan ...	s. c. 9 A. L. J. 4; 34 A. 165.

Pages of Vol. XIII of Ind. Cas.	Names of Parties.	Corresponding pages of other Reports and Journals.
85	Jagarnath Das v. Bibi Rupa ...	*
88	Raghunath Prosad v. Kashi Prosad ...	s. c. 15 C. L. J. 678.
91	Nataraja Iyer v. South India Bank ...	s. c. 10 M. L. T. 503; (1911) 2 M. W. N. 590; 22 M. L. J. 105.
92	Bishna v. Rattani ...	s. c. 20 P. W. R. 1912; 28 P. L. R. 1912.
94	Ganpat Prasad v. Sarju ...	s. c. 9 A. L. J. 8; 34 A. 168.
95	Gopal Row v. Veerappan Servaikaran ...	s. c. 10 M. L. T. 522; 22 M. L. J. 121.
96	Anatarazu Garu v. Narayanarazu ...	s. c. (1911) 2 M. W. N. 531; 10 M. L. T. 504; 22 M. L. J. 108.
97	Raghunandan Prosad v. Ram Narain Singh ...	s. c. 13 Cr. L. J. 4.
99	Krishna Proshad v. Rabindra Nath ...	s. c. 13 Cr. L. J. 6.
101	Emperor v. Behari Lal ...	s. c. 8 A. L. J. 1324; 34 A. 146; 13 Cr. L. J. 8.
102	Babu Pershad v. Emperor ...	s. c. 13 Cr. L. J. 9.
108	Theophilus Ramappa, *In re* ...	s. c. 22 M. L. J. 112; 10 M. L. T. 517; 13 Cr. L. J. 15.
109	Emperor v. Ganda Singh ...	s. c. 20 P. L. R. 1912; 13 P. W. R. 1912 Cr.; 13 Cr. L. J. 3.
110	Ponnusawmy Naidu v. Emperor ...	s. c. (1912) 1 M. W. N. 16; 13 Cr. L. J. 16.
111	Bala Pasban Kuldip Lal v. Gurwar Misser ...	s. c. 13 Cr. L. J. 1.
113	Gujjalapadi Subba Naidu v. Gujjalapadi Vencatasuba Naidu ...	s. c. 11 M. L. T. 33.
116	Abdul Ghani v. Abdul Majid ...	*
118	Narsing Narain Singh v. Ajodhya Prosad Singh ...	s c. 15 C. L. J. 110; 16 C. W. N. 256.
120	Imrit Chamar v. Sridhar Panday ...	s c. 15 C. L. J. 7.
123	Lakhi Chowdhuri v. Akloo Jha ...	s. c. 16 C. W. N. 639.
125	Debendra Nath v. Bindhubala Dasi ...	*
127	Sitaram v. Kulandi Patra ...	*
128	Sri Rang Behary Lal v. Ranchheyya Lal ...	s. c. 15 C. L. J. 439.
131	Khazan Singh v. Panna Lal ...	s. c. 9. A. L. J. 59.
133	Gunniah Vencatachalapathy Aiyar v. Perumal Aiyar	s. c. 10 M. L. T. 527; (1912) 1 M. W. N. 44.
134	Ishar Das v. Asaf Ali Khan ...	s. c. 9. A. L. J. 19; 34 A. 186.
136	Sukan Sahu v. Gangajali ...	*
138	Ram Sarup v. Jasoda Kunwar ...	s. c. 9. A. L. J. 72; 34 A. 158.
140	Rameswar Singh v. Tirpit Singh ...	*
142	Badri Das v. Ram Rikh ...	*
144	Jog Narain Singh v. Badri Das ...	*
147	Kuar Radhka Raman Parshad v. Gulzari Kuar ...	*
148	Mathura Prosad v. Rukmini Koer ...	*
150	Muhammad Husain v. Amir Haidar ...	*
152	Govinda Pillay v. Meenatchi Achi ...	s. c. 10 M. L. T. 493; (1911) 2 M. W. N. 563; 22 M. L. J. 204.
154	Bandey Ali v. Gokul Misir ...	s. c. 9 A. L. J. 111; 34 A. 172.
155	Nurullah Khan v. Hayatunnissa ...	*
156	Bihari Lal v. Durga Das ...	*
159	Chidrie Kristappa v. Siddamsetti Yamanappa ...	s. c. 11 M. L. T. 13; (1912) 1 M. W. N. 36.
160	Parry & Co. v. Vadivelu Pillay ...	*
161	Manindra Nath v. Mohanunda Roy ...	s. c. 15 C. L. J. 360.
167	Jiwa v. Buta ...	s. c. 21 P. W. R. 1912; 23 P. L. R. 1912; 26 P. R. 1912.
170	Prayag Narain Singh v. Sukdeo Narain Singh ...	*
171	Kariman v. Masiti ...	s. c. 29 P. W. R. 1912; 24 P. L. R. 1912.
172	Muhammad v. Imam Khatun ...	s. c. 25 P. L. R. 1912; 37 P. W. R. 1912.
174	Cheriyonni v. Nhera Poyile ...	s. c. (1911) 2 M. W. N. 587; 10 M. L. T. 528; 22 M. L. J. 47.
175	Polina Achanna v. Madipati Venkataramana ...	s. c. (1911) 2 M. W. N. 585; 10 M. L. T. 542; 22 M. L. J. 127.
176	Subiha Pillay v. Velappa Naicken ...	s. c. 10 M. L. T. 524; (1911) 2 M. W. N. 560; 22 M. L. J. 124.
177	Partab Singh v. Panjabu ...	s. c. 41 P. L. R 1912; 25 P. R. 1912; 125 P. W. R. 1912.
179	Mullaseri Gopala Menon v. Krisheki Kovilaknath Manavikraman ...	s. c 10 M. L. T. 568; 22 M. L. J. 146.

Pages of Vol. XIII of Ind. Cas.	Names of Parties.		Corresponding pages of other Reports and Journals.
180	Hazara Singh v. Harnam Singh	...	s. c. 22 P. W. R. 1912; 44 P. L. R. 1912; 24 P. R. 1912.
182	Katchalai Mudali v. Kuppanna Mudali	...	s. c. (1912) 1 M. W. N. 41.
183	Debi Das v. Chairman of Motihari Municipality	...	*
183	Rangasamy Pillai v. Muthu Chidambara	...	s. c. (1911) 2 M. W. N. 589.
184	Ujal Singh v. Debya Singh Sardar	...	*
185	Tara Chand Mukerji v. Afzal Beg	...	s. c. 8 A. L. J. 1329; 34 A. 184.
186	Dalgliesh v. Nandan Misser	...	*
187	Parbhu Narain Singh v. Lalji Singh	...	s. c. 9 A. L. J. 79.
188	Jayanti Kistappa v. Jayanti Chinnapiya	...	s. c. (1912) 1 M. W. N. 38.
189	Madan Mohun Dey v. Ganga Chandra Roy	...	*
190	Yimani Sitarama Sastrulu v. Gora Ramudu	...	s. c. (1911) 2 M. W. N. 588.
191	Ghansham Singh v. Tej Bahadur Singh	...	s. c. 9 A. L. J. 496.
192	Shukuruddin v. Hemangini Debi	...	s. c. 16 C. W. N. 420.
193	Raghubir Sahi v. Protap Udoy Nath Sahi Deo	...	s. c. 16 C. W. N. 294; 15 C. L. J. 145; 39 C. 241.
194	Lalman v. Kalka Prasad	...	s c. 8 A. L. J. 1326.
194	Rajendra Narain Saha v. Ashutosh Sanyal	...	*
197	Gendan Lal v. Babu Ram	...	s. c. 9 A. L. J. 86.
200	Ramasami Reddi v. Lakshmiambal Ammal	...	s. c. (1911) 2 M. W. N. 568.
201	Dwarka Nath v. Pralhad Ram	...	*
203	Variangattil Paksseri Raman Menon v. Sankarasubba Pattar	...	s. c. (1912) 1 M. W. N. 37.
204	Subbaraya Iyer v. Ramasawmi Pillai	...	s. c. 11 M. L. T. 18; (1912) 1 M. W. N. 9; 22 M. L. J. 166.
205	Kosuri Rajagopal v. Datla Radhayya	...	s. c. 11 M. L. T. 14; (1912) 1 M. W. N. 39; 22 M. L. J. 159.
206	Ganpat v. Balmakund	..	*
209	Emperor v. Qadir Bakhsh	...	s. c. 3 P. R. 1912 Cr.; 9 P. W. R. 1912 Cr.; 13 Cr. L. J. 17.
210	Imperator v. Rino	...	s. c. 5 S. L. R. 123; 13 Cr. L. J. 18.
211	Muthuvarapu Seshiah v. Gatram Ramiah	...	s. c. (1911) 2 M. W. N. 526; 13 Cr. L. J. 19.
213	Bodomal Kishinchand v. Emperor	...	s. c. 5 S. L. R. 153; 13 Cr. L. J. 21.
213	Lakshminarain Apuram v. Emperor	...	s. c. (1911) 2 M. W. N. 536; 13 Cr. L. J. 21.
214	Changal Halapoto v. Basarmal	...	s. c. 5 S. L. R. 122; 13 Cr. L. J. 22.
215	Ismail Ghami Ammal v. Katima Rowther	...	s. c. 10 M. L. T. 573; 22 M. L. J. 154; 13 Cr. L. J. 23.
215	Imperator v. Alu	...	s. c. 5 S. L. R. 129; 13 Cr. L. J. 23.
216	Adala Yerrivadu, *In re*	...	s. c. 11 M. L. T. 24; 13 Cr. L. J. 24.
217	McGill v. Byrne	...	s. c. 5 S. L. R. 133; 13 Cr. L. J. 25.
218	Meher Sardar v. Emperor	...	s. c. 16 C. W. N. 46; 13 Cr. L. J. 26.
219	Imperator v. Abdul Latif	...	s c. 5 S. L. R. 135; 13 Cr. L. J. 27.
220	Pir Bakhsh v. Emperor	...	s. c. 46 P. L. R. 1912; 13 Cr. L. J. 28.
220	Bakshali v. Emperor	...	s. c. 5 S. L. R. 136; 13 Cr. L. J. 28.
221	Arulanantham Pillai, *In re*	...	s. c. (1911) 2 M. W. N. 558; 10 M. L. T. 550; 22 M. L. J. 138; 13 Cr. L. J. 29.
222	Imperator v. Bhojraj	...	s. c. 5 S. L. R. 137; 13 Cr. L. J. 30.
223	Karam Bahadin v. Emperor	...	s. c. 5 S. L. R. 179; 13 Cr. L. J. 31.
224	Dur Mahomed v. Allahdino	...	s. c. 5 S. L. R. 190; 13 Cr. L. J. 22.
225	Manghirmal v. Vithalram	...	s. c. 5 S. L. R. 107.
232	Varadayya Chetty v. Munusami Chetty	...	s. c. 10 M. L. T. 514
233	Karippala v. Muchai Manakal	...	s. c. 10 M. L. T 526; 22 M. L. J. 126.
234	Malappurath Paramadhathil v. Channazhi Krishnan		s. c. (1911) 2 M. W. N. 537.
234	Mansoor v. Min Sahebdin	...	s. c. 5 S. L. R. 125.
236	Kovummal Packrichi v. Kovummal Keenhacha	...	s. c. (1911) 2 M. W. N. 538; 22 M. L. J. 122.
237	Mathradas v. Secretary of State	...	s. c. 5 S L. R. 140.
243	Abdul Karim v. Abdus Sobhan	...	s. c. 16 C. W. N. 44; 39 C. 146.
244	Doulatram v. Halo Kanya	...	s. c. 5 S. L. R 155.
251	Komma Somakka v. Kodidala Pedda Ramiah	...	s. c. (1911) 2 M. W. N. 519; 22 M. L. J. 193.
255	Sobhomal v. Pohumal	...	s. c. 5 S. L. R. 168.
257	Jit Singh v. Maharaj Singh	...	s. c. 10 M. L. T 551; 16 C W. N. 122; (1912) 1 M. W. N. 29; 15 C. L. J. 78; 14 Bom. L. R. 30; 34 A. 57.

Pages of Vol. XIII of Ind. Cas.	Names of Parties.	Corresponding pages of other Reports and Journals.
260	Manghanmal v. Fernandez ...	s. c. 5 S. L. R. 181.
261	Haddington Island Quarry Co. Ld. v. Alden Wesley	s. c. 10 M. L. T. 554.
264	Hemandas v. Chellaram ...	s. c. 5 S. L. R. 184.
268	Sevugan Chetty v. Krishna Aiyangar ...	s. c. 10 M. L. T. 557; 22 M. L. J. 139.
269	Lekraj v. Harpal Singh ...	s. c. 11 M. L. T. 1; (1912) 1 M. W. N. 16; 9 A. L. J. 40; 16 C. W. N. 217; 15 C. L. J. 72; 14 Bom. L R. 33: 34 A. 65.
273	Emperor v. Andal ...	s. c. 5 S. L. R. 174; 13 Cr. L. J. 33.
275	Assistant Sessions Judge of North Arcot v. Ramammal ...	s c. 10 M. L T. 563; (1912) 1 M. W. N. 3; 22 M. L. J. 141; 13 Cr. L. J. 35.
878	Subbiah Servai, *In re* ...	s. c. 11 M. L. T. 23; (1912) 1 M. W. N. 42; 22 M. L. J. 184; 13 Cr. L. J. 38.
279	Kader Sundar v. Emperor ...	s. c. 16 C. W. N. 69; 13 Cr. L. J. 39.
282	Arunachella Tevan, *In re* ...	s. c. 11 M. L. T. 20; (1912) 1 M. W. N. 35; 22 M. L. J. 186; 13 Cr. L. J. 42.
283	Ganesh Pershad v. Emperor ...	s. c. 13 Cr. L. J. 43.
284	Imperator v. Rajabali ...	s. c. 5 S. L. R. 173; 13 Cr. L. J. 44.
284	Ajodhia Parshad v. Ram Lal ...	s. c. 9 A. L. J. 124; 34 A. 197; 13 Cr. L. J. 44.
286	Muthiah Chetty, *In re* ...	s. c. 11 M. L. T. 21; 22 M. L. J. 181; (1912) 1 M. W. N. 455; 13 Cr. L. J. 46.
288	Surya v. Lachmi Narain ...	s. c. 13 Cr. L. J. 48.
289	Jotindra Mohan v. Kedar Nath ...	*
290	Ram Devi v. Shib Devi ...	s. c. 1 P. W. R. 1912.
297	Ram Gopal v. Agent, Bombay Baroda and Central India Railway Co. ...	*
298	Bela Singh v. Labh Singh ...	s. c. 48 P. W. R. 1912.
299	Salimuddi v. Uzir Mahomed ...	*
300	Velluvakandi Kunhi Pathumma v. Ponnanki Moossan Mammad ...	s. c. (1912) 1 M. W. N. 11.
304	Jamna Das v. Ram Autar ...	s. c. 16 C. W. N. 97; 11 M. L. T. 6; 9 A. L. J. 37; (1912) 1 M. W. N. 32; 15 C. L. J. 68; 14 Bom. L. R. 1; 21 M. L. J. 1158; 34 A. 63.
305	Kirpal Singh v. Sant Singh ...	s. c. 71 P. R. 1911; 30 P. L. R. 1912.
311	Ensar Ali v. Yakub Ali ...	*
312	Dhian Singh v. Dhian Singh ...	s. c. 51 P. W. R. 1912.
313	Adusupalli v. Marikurthu ...	s. c. 11 M L. T. 19; (1912) 1 M. W. N. 9; 22 M. L. J. 169.
313	Natesa Pillay v Munusawmy Naicken ...	*
314	Alim Ali v. Nabbu ...	s. c. 12 P. W. R. 1912.
315	Koipalli Ramiah v. Sajja Subbiah ...	s. c. 11 M. L T. 192; (1912) 1 M. W. N. 415.
316	Tari Baz Khan v. Fateh Khan ...	s. c. 29 P. R. 1912; 114 P. W. R. 1912.
318	Santu v. Arjan Das ...	s. c. 131 P. W. R. 1912.
319	Ghasi Ram v. Jai Lal ...	s. c. 60 P. W. R. 1912; 79 P. R. 1912.
320	Chittar Kuar v. Goura Kuar ...	s c. 9 A. L. J. 105; 34 A. 189.
322	Mutyala Papayya v. Kosuri Muramallu ...	s. c. 11 M. L. T. 11; (1912) 1 M. W. N. 7; 22 M. L. J. 156.
323	Zia-ud-din v. Gobind Ram ...	s. c. 76 P. R. 1911.
324	Kuppusami Iyengar v. Subbaraya Rowtha Minda Nainar ...	s. c. 11 M. L. T. 15; (1912) 1 M. W. N. 1; 22 M. L. J. 161.
326	Nathu Ram v. Karmon ...	s. c. 40 P. L. R. 1912; 115 P. W. R. 1912.
326	Sham Lal v. Hazari Mal ...	s. c. 15 C. L. J. 451.
328	Brindarani Choudhrani v. Annoda Mohan Ray ...	s. c. 16 C. W. N. 94.
329	Gopal Chandra Chakrabarty v. Radharaman Das Babaji ...	s. c. 16 C. W. N. 108.
330	Stamp Act, *In re* ...	s. c. 38 P. L. R. 1912.
331	Mir Sarwarjan v. Fakhruddin Mahomed ...	s. c. 16 C. W. N. 74; (1912) 1 M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 14 Bom. L. R. 5; 39 C. 232: 21 M. L. J. 1156.

Pages of Vol. XIII of Ind. Cas.	Names of Parties.	Corresponding pages of other Reports and Journals.
332	Upendra Nath Ghosh v Chairman of the Calcutta Corporation ...	s. c. 16 C. W. N. 116.
335	Weston v. Peary Mohan Das ...	s c. 16 C. W. N. 119.
336	Lazarannessa Bibi v. Mahomed Jaffar ...	*
336	Lakhi Kant Das v. Balabhadra Prosad Das ...	*
337	Pran Singh v. Janardan Singh ...	s. c. 14 C. L. J. 541.
343	Tulsi v. Madho Ram ...	s. c. 30 P. R. 1912; 133 P. W. R. 1912.
344	Muhammad Umar Khan v. Muhammad Niazuddin Khan ...	s. c. 6 P. W. R. 1912; (1912) 1 M. W. N. 77; 11 M. L. T. 76; 9 A. L. J. 137; 15 C. L. J. 172; 12 P. L. R. 1912; 22 M. L. J. 240; 14 Bom. L. R. 182; 16 C. W. N. 458; 39 C. 418.
348	Devta Jamlu v. Hari Das ...	s. c. 39 P. L. R. 1912; 47 P. W. R. 1912.
349	Ramdeo Prosad Singh v. Gopi Koeri ...	s. c. 16 C. W. N. 383; 15 C. L. J. 256.
350	Abdullah Beg v. Abdul Hasan ...	*
351	Janki Koeri v. Basdeo Ojha ...	*
353	Mahammad Mehdi Hassan Khan v. Sheoshankar Prasad Singh ...	s. c. 14 C. L. J. 552; 39 C. 353.
363	Ghisu v. Ram Ballabh ...	*
364	Abdul Karim v. Abdul Rahman ...	s. c. 16 C. W. N. 618; 15 C. L. J. 672.
365	Raghubar Dayal Sukul v. Jadu Nandan Missir ...	s. c. 15 C. L. J. 89; 16 C. W. N. 736.
370	Mcinerny v. Secretary of State ...	s. c. 38 C. 797.
373	Mg Po Thwe v. Ma Baw ...	s. c. 4 Bur. L. T. 272.
374	Jasoda Dassi v. Rameswari Dassi ...	s. c. 14 C. L. J. 603.
375	Nga Paw v. Nga Lu Gale ...	s. c. 4 Bur. L. T. 265.
376	Nagendra Kumar Nath v. Hara Chandra Poddar ...	s. c. 14 C. L. J. 646.
377	Hedlot Khasia v. Ka Ran Khasiani ...	s. c. 15 C. L. J. 241.
384	Mutsadi Lal v. Mule Mal ...	s. c. 9 A. L. J. 95; 34 A. 205.
385	Nga Pyan v. Emperor ...	s. c. 4 Bur. L. T. 267; 13 Cr. L. J. 49.
386	Nga Po Yon v. Mohr Brothers and Co. Ld. ...	s. c. 4 Bur. L. T. 279; 6 L. B. R. 38; 13 Cr.L.J.50.
388	Madar Sahib v. Emperor ...	s. c. 4 Bur. L. T. 259; 13 Cr. L. J. 52.
389	Mi Hla So v. Nga Than ...	s. c. 4 Bur. L. T. 268; 13 Cr. L J. 53.
390	Nga Po Chein v. Emperor ...	s. c. 4 Bur. L. T. 261; 13 Cr. L. J. 54.
391	Dragon v. Emelie Mi Taik Dragon ...	s. c. 4 Bur. L. T. 269; 13 Cr. L. J. 55.
392	Nga Lu Pe v. Emperor ...	s. c. 4 Bur. L. T 262; 13 Cr. L. J. 56.
394	Emperor v. Nga Sit Cho ...	s. c. 4 Bur. L. T. 271; 13 Cr. L. J. 58.
395	Nga Po Shat v. Emperor ...	s. c. 4 Bur. L. T. 263; 13 Cr. L. J. 59.
397	Rudra Prosad, *In re* ...	s. c. 14 C. L. J. 606; 13 Cr. L. J. 61.
398	Emperor v. Nga Po Sin ...	s. c. 4 Bur. L. T. 270; 13 Cr. L. J 62.
398	Jang Bahadur Lal v. Emperor ...	s. c. 14 C. L. J. 652; 13 Cr. L. J. 62.
401	Nathmal Das v. Dalip Singh ...	*
401	Rukman Devi v. Sain Das ...	s. c. 45 P. W. R. 1912.
403	Gangadhar Das v. Bhikari Charan Das ...	s. c. 16 C. W. N. 227.
404	Sarvai Begam v. Haider Shah ...	s. c. 9 A. L. J. 12.
405	Sawan Singh v. Jafar Khan ...	s. c. 7 P. W. R. 1912; 13 P. L. R. 1912; 39 P. R. 1912.
407	Koilash Chandra v. Gajendra Nath ...	s. c. 15 C. L. J. 1.
408	Khair Ahmad v. Mir Ahmad Ullah ...	s. c. 52 P. W. R. 1912.
409	Raja v. Jannat Bibi ...	s. c. 79 P. W. R. 1912; 40 P. R. 1912.
414	Narsingh Narain v. Jahi Mistry ...	s. c. 15 C. L. J. 3.
416	Kashmire v. Ramsaran ...	*
417	Blanchett v. Secretary of State ...	s. c. 9 A. L. J. 173.
420	Hardey Narain v. Mrs. Powell ...	*
421	Dasaundhi v. Chanda Singh ...	s. c. 85 P. W. R. 1912; 45 P. R. 1912.
423	Atul Chandra Dutt v. Eson Ali ...	*
424	Kutubullah Sarkar v. Durga Charan ...	s. c. 16 C. L. J. 396.
425	Madan Mohan v. Manmatha Nath Bose ...	*
427	Naba v. Piara Mal ...	s. c. 70 P. W. R. 1912; 44 P. R. 1912.
428	Lal Hussain v. Hassa Khan ...	s. c. 68 P. W. R. 1912.
429	Matigara Coal Co. Ltd. v. Shragers, Ltd. ...	s. c. 38 C. 824.

Pages of Vol. XIII of Ind. Cas.	Names of Parties.	Corresponding pages of other Reports and Journals.
430	Shahbaz Khan v. Fazal Din. ...	s. c. 74 P. W. R. 1912; 43 P. R. 1912.
433	Sharkey v. Jerry Allard ...	s. c. 78 P. W. R. 1912.
434	Mahomed Farid v. Mahomed Abdul Gafur ...	s. c. 15 C. L. J. 14.
436	Ram Prasad v. Bedo ...	*
440	Ram Narain Singh v. Odindra Nath ...	s. c. 15 C. L. J. 17
444	Sundar Singh v. Har Kaur ...	s. c. 75 P. W. R. 1912; 77 P. L. R. 1912.
445	Jan Khan v. Ahmad ...	s. c. 24 P. W. R. 1912.
447	Heta Ram v. Chandan ...	s. c. 49 P. W. R. 1912.
448	Kuri v. Des Raj ...	s. c. 57 P. W. R. 1912.
449	Raj Kumar Sarkar v. Rajani Kanta Chakravarti ...	*
450	Nallasawmi Pillai v. Ramasawmi Pillay ...	*
451	Sharashi Mohan Roy v. Ramesh Charan Roy ...	*
453	Albrecht v. Bathee Jellamma ...	s. c. 11 M. L. T. 53; (1912) 1 M. W. N. 53; 22 M. L. J. 247.
455	Narak Lal v. Thagoo Lal ...	*
457	Hari Narayan Chatterje v. Iswar Chandra Chatterjee ...	*
458	Anantanarayana Iyer v. Savitri Ammal ...	(1912) 1. M. W. N. 59; 11 M. L. T. 63; 22 M. L. J. 231.
462	Rudra Pratab Sahi v. Gajadhar Singh ...	s. c. 14 O. C. 287.
463	Venkatesa Iyengar v. Kamalammal ...	s. c. (1912) 1 M. W. N. 65; 11 M. L. T. 84; 22 M. L. J. 212.
466	Bhagannah v. Chandi Singh ...	s. c. 14 O. C. 295.
467	Malla Veeranna v. Malla Chelamayya ...	s. c. (1912) 1 M. W. N. 68.
468	Jesa Ram v. Thakar Das ...	s. c. 197 P. W. R. 1911.
469	Maddaniah v. Bhimappa ...	s. c. (1912) 1 M. W. N. 72.
470	Krishna Das v. Land Acquisition Collector, Pabna ...	s. c. 16 C. W. N. 327.
471	Govinda Naicken v. Apathshaya Iyer ...	s. c. (1912) 1 M. W. N. 87; 11 M. L. T. 87; 22 M. L. J. 257.
473	Banke Behari Lal v. Ahlad Singh ...	*
475	Pugalia Vettorammal v. Vettor Goundan ...	s. c. (1912) 1 M. W. N. 89; 11 M. L. T. 103.
481	Somaruddi Mollah v. Port Canning and Land Improvement Co., Ltd. ...	s. c. 16 C. W. N. 225.
482	Tek Chand v. Gopal Devi ...	s. c. 46 P. R. 1912.
486	Tadikonda Venkaya v. Kodali Venkatasubbamma ...	s. c. (1912) 1 M. W. N. 49.
487	Nalini Behari Roy v. Fulmani Dasi ...	s. c. 16 C. W. N. 421; 15 C. L. J. 388.
489	Sankara Ramiah v. Sankara Subbamiah ...	s. c. (1912) 1 M. W. N. 70.
490	Pancham Singh v. Ganga Bakhsh Singh ...	*
491	Arnold v. Arnold ...	s. c. 38 C. 907.
493	Jagan Nath v. Debi Sahay ...	*
495	Dibakar Nag v. Mrittunjoy Bhatacharya ...	*
495	Bhagan v. Munnu ...	s. c. 15 O. C. 122.
498	Raziuddin Hussain v. Taharat Hussain ...	*
500	Raghubir Singh v. Umrao Singh ...	*
504	Jafri Begam v. Ghasu Khan ...	*
506	Birjnath Sarain v. Byrne ...	s. c. 9 A. L. J. 253.
508	Maharani v. Ram Adhar ...	*
509	Janki Das v. Bengal Nagpur Railway Company ...	s. c. 15 C. L. J. 211; 16 C. W. N. 356.
511	Ganpat Rai v. Sardara ...	s. c. 67 P. W. R. 1912.
512	Dukhimoni Dasi v. Tulsi Charan ...	*
513	Birendra Kishore v. Akram Ali ...	s. c. 16 C. W. N. 304; 15 C. L. J. 194; 39 C.
517	Birendra Kishore v. Dillwar Ali ...	*
518	Birendra Kishore v. Roshan Khan ...	s. c. 15 C. L. J. 203; 39 C. 453.
519	Asalat Khan v. Birendra Kishore ...	*
520	Badruddin Hasan v. Amir Begam ...	s. c. 14 O. C. 308.
526	Zenab v. Shah Nawaz Khan ...	s. c. 47 P. R. 1912.
529	Bengal Nagpur Railway Co. Ld. v. Ram Protap Ghaneswam Das ...	s. c. 16 C. W. N. 360; 15 C. L. J. 215
530	Champa Lal v. Sham Sundar Mali ...	*
531	Ramchandra Das v. Farzand Ali Khan ...	s. c. 9 A L. J. 188; 34 A. 253.

Pages of Vol. XIII of Ind. Cas.	Names of Parties.	Corresponding pages of other Reports and Journals.
332	Upendra Nath Ghosh v Chairman of the Calcutta Corporation ...	s. c. 16 C. W. N. 116.
335	Weston v. Peary Mohan Das ...	s c. 16 C. W. N. 119.
336	Lazarannessa Bibi v. Mahomed Jaffar ...	*
336	Lakhi Kant Das v. Balabhadra Prosad Das ...	*
337	Pran Singh v. Janardan Singh ...	s. c. 14 C. L. J. 541.
343	Tulsi v. Madho Ram ...	s. c. 30 P. R. 1912; 133 P. W. R. 1912.
344	Muhammad Umar Khan v. Muhammad Niazuddin Khan ...	s. c. 6 P. W. R. 1912; (1912) 1 M. W. N. 77; 11 M. L. T. 76; 9 A. L. J. 137; 15 C. L. J. 172; 12 P. L. R. 1912; 22 M. L. J. 240; 14 Bom. L. R. 182; 16 C. W. N. 458; 39 C. 418.
348	Devta Jamlu v. Hari Das ...	s. c. 39 P. L. R. 1912; 47 P. W. R. 1912.
349	Ramdeo Prosad Singh v. Gopi Koeri ...	s. c. 16 C. W. N. 383; 15 C. L. J. 256.
350	Abdullah Beg v. Abdul Hasan ...	*
351	Janki Koeri v. Basdeo Ojha ...	*
353	Mahammad Mehdi Hassan Khan v. Sheoshankar Prasad Singh ...	s. c. 14 C. L. J. 552; 39 C. 353.
363	Ghisu v. Ram Ballabh ...	*
364	Abdul Karim v. Abdul Rahman ...	s. c. 16 C. W. N. 618; 15 C. L. J. 672.
365	Raghubar Dayal Sukul v. Jadu Nandan Missir ...	s. c. 15 C. L. J. 89; 16 C. W. N. 736.
370	Mcinerny v. Secretary of State ...	s. c. 38 C. 797.
373	Mg Po Thwe v. Ma Baw ...	s. c. 4 Bur. L. T. 272.
374	Jasoda Dassi v. Rameswari Dassi ...	s. c. 14 C. L. J. 603.
375	Nga Paw v. Nga Lu Gale ...	s. c. 4 Bur. L. T. 265.
376	Nagendra Kumar Nath v. Hara Chandra Poddar ...	s. c. 14 C. L. J. 646.
377	Hedlot Khasia v. Ka Ran Khasiani ...	s. c. 15 C. L. J. 241.
384	Mutsadi Lal v. Mule Mal ...	s. c. 9 A. L. J. 95; 34 A. 205.
385	Nga Pyan v. Emperor ...	s. c. 4 Bur. L. T. 267; 13 Cr. L. J. 49.
386	Nga Po Yon v. Mohr Brothers and Co. Ld. ...	s. c. 4 Bur. L. T. 279; 6 L. B. R. 38; 13 Cr.L.J.50.
388	Madar Sahib v. Emperor ...	s. c. 4 Bur. L. T. 259; 13 Cr. L. J. 52.
389	Mi Hla So v. Nga Than ...	s. c. 4 Bur. L. T. 268; 13 Cr. L J. 53.
390	Nga Po Chein v. Emperor ...	s. c. 4 Bur. L. T. 261; 13 Cr. L. J. 54.
391	Dragon v. Emelie Mi Taik Dragon ...	s. c. 4 Bur. L. T. 269. 13 Cr. L. J. 55.
392	Nga Lu Pe v. Emperor ...	s. c. 4 Bur. L. T 262; 13 Cr. L. J. 56.
394	Emperor v. Nga Sit Cho ...	s. c. 4 Bur. L. T. 271; 13 Cr. L. J. 58.
395	Nga Po Shat v. Emperor ...	s. c. 4 Bur. L. T. 263; 13 Cr. L. J. 59.
397	Rudra Prosad, *In re* ...	s. c. 14 C. L. J. 606; 13 Cr. L. J. 61.
398	Emperor v. Nga Po Sin ...	s. c. 4 Bur. L. T. 270; 13 Cr. L. J 62.
398	Jang Bahadur Lal v. Emperor ...	s. c. 14 C. L. J. 652; 13 Cr. L. J. 62.
401	Nathmal Das v. Dalip Singh ...	*
401	Rukman Devi v. Sain Das ...	s. c. 45 P. W. R. 1912.
403	Gangadhar Das v. Bhikari Charan Das ...	s. c. 16 C. W. N. 227.
404	Sarvai Begam v. Haider Shah ...	s. c. 9 A. L. J. 12.
405	Sawan Singh v. Jafar Khan ...	s. c. 7 P. W. R. 1912; 13 P. L. R. 1912; 39 P. R. 1912.
407	Koilash Chandra v. Gajendra Nath ...	s. c. 15 C. L. J. 1.
408	Khair Ahmad v. Mir Ahmad Ullah ...	s. c. 52 P. W. R. 1912.
409	Raja v. Jannat Bibi ...	s. c. 79 P. W. R. 1912; 40 P. R. 1912.
414	Narsingh Narain v. Jahi Mistry ...	s. c. 15 C. L. J. 3.
416	Kashmire v. Ramsaran ...	*
417	Blanchett v. Secretary of State ...	s. c. 9 A. L. J. 173.
420	Hardey Narain v. Mrs. Powell ...	*
421	Dasaundhi v. Chanda Singh ...	s. c. 85 P. W. R. 1912; 45 P. R. 1912.
423	Atul Chandra Dutt v. Eson Ali ...	*
424	Kutubullah Sarkar v. Durga Charan ...	s. c. 16 C. L. J. 396.
425	Madan Mohan v. Manmatha Nath Bose ...	*
427	Naba v. Piara Mal ...	s. c. 70 P. W. R. 1912; 44 P. R. 1912.
428	Lal Hussain v. Hassa Khan ...	s. c. 68 P. W. R. 1912.
429	Matigara Coal Co. Ltd. v. Shragers, Ltd. ...	s. c. 38 C. 824.

Pages of Vol. XIII of Ind. Cas.	Names of Parties.	Corresponding pages of other Reports and Journals.
430	Shahbaz Khan v. Fazal Din. ...	s. c. 74 P. W. R. 1912; 43 P. R. 1912.
433	Sharkey v. Jerry Allard ...	s. c. 78 P. W. R. 1912.
434	Mahomed Farid v. Mahomed Abdul Gafur ...	s. c. 15 C. L. J. 14.
436	Ram Prasad v. Bedo ...	*
440	Ram Narain Singh v. Odindra Nath ...	s. c. 15 C. L. J. 17
444	Sundar Singh v. Har Kaur ...	s. c. 75 P. W. R. 1912; 77 P. L. R. 1912.
445	Jan Khan v. Ahmad ...	s. c. 24 P. W. R. 1912.
447	Heta Ram v. Chandan ...	s. c. 49 P. W. R. 1912.
448	Kuri v. Des Raj ...	s. c. 57 P. W. R. 1912.
449	Raj Kumar Sarkar v. Rajani Kanta Chakravarti ...	*
450	Nallasawmi Pillai v. Ramasawmi Pillay ...	*
451	Sharashi Mohan Roy v. Ramesh Charan Roy ...	*
453	Albrecht v. Bathee Jellamma ...	s. c. 11 M. L. T. 53; (1912) 1 M. W. N. 53; 22 M. L. J. 247.
455	Narak Lal v. Thagoo Lal ...	*
457	Hari Narayan Chatterje v. Iswar Chandra Chatterjee ...	*
458	Anantanarayana Iyer v. Savitri Ammal ...	(1912) 1. M. W. N. 59; 11 M. L. T. 63; 22 M. L. J. 231.
462	Rudra Pratab Sahi v. Gajadhar Singh ...	s. c. 14 O. C. 287.
463	Venkatesa Iyengar v. Kamalammal ...	s. c. (1912) 1 M. W. N. 65; 11 M. L. T. 84; 22 M. L. J. 212.
466	Bhagannah v. Chandi Singh ...	s. c. 14 O. C. 295.
467	Malla Veeranna v. Malla Chelamayya ...	s. c. (1912) 1 M. W. N. 68.
468	Jesa Ram v. Thakar Das ...	s. c. 197 P. W. R. 1911.
469	Maddaniah v. Bhimappa ...	s. c. (1912) 1 M. W. N. 72.
470	Krishna Das v. Land Acquisition Collector, Pabna ...	s. c. 16 C. W. N. 327.
471	Govinda Naicken v. Apathshaya Iyer ...	s. c. (1912) 1 M. W. N. 87; 11 M. L. T. 87; 22 M. L. J. 257.
473	Banke Behari Lal v. Ahlad Singh ...	*
475	Pugalia Vettorammal v. Vettor Goundan ...	s. c. (1912) 1 M. W. N. 89; 11 M. L. T. 103.
481	Somaruddi Mollah v. Port Canning and Land Improvement Co., Ltd. ...	s. c. 16 C. W. N. 225.
482	Tek Chand v. Gopal Devi ...	s. c. 46 P. R. 1912.
486	Tadikonda Venkaya v. Kodali Venkatasubbamma ...	s. c. (1912) 1 M. W. N. 49.
487	Nalini Behari Roy v. Fulmani Dasi ...	s. c. 16 C. W. N. 421; 15 C. L. J. 388.
489	Sankara Ramiah v. Sankara Subbamiah ...	s. c. (1912) 1 M. W. N. 70.
490	Pancham Singh v. Ganga Bakhsh Singh ...	*
491	Arnold v. Arnold ...	s. c. 38 C. 907.
493	Jagan Nath v. Debi Sahay ...	*
495	Dibakar Nag v. Mrittunjoy Bhatacharya ...	*
495	Bhagan v. Munnu ...	s. c. 15 O. C. 122.
498	Raziuddin Hussain v. Taharat Hussain ...	*
500	Raghubir Singh v. Umrao Singh ...	*
504	Jafri Begam v. Ghasu Khan ...	*
506	Birjnath Sarain v. Byrne ...	s. c. 9 A. L. J. 253.
508	Maharani v. Ram Adhar ...	*
509	Janki Das v. Bengal Nagpur Railway Company ...	s. c. 15 C. L. J. 211; 16 C. W. N. 356.
511	Ganpat Rai v. Sardara ...	s. c. 67 P. W. R. 1912.
512	Dukhimoni Dasi v. Tulsi Charan ...	*
513	Birendra Kishore v. Akram Ali ...	s. c. 16 C. W. N. 304; 15 C. L. J. 194; 39 C.
517	Birendra Kishore v. Dillwar Ali ...	*
518	Birendra Kishore v. Roshan Khan ...	s. c. 15 C. L. J. 203; 39 C. 453.
519	Asalat Khan v. Birendra Kishore ...	*
520	Badruddin Hasan v. Amir Begam ...	s. c. 14 O. C. 308.
526	Zenab v. Shah Nawaz Khan ...	s. c. 47 P. R. 1912.
529	Bengal Nagpur Railway Co. Ld. v. Ram Protap Ghaneswam Das ...	s. c. 16 C. W. N. 360; 15 C. L. J. 215
530	Champa Lal v. Sham Sundar Mali ...	*
531	Ramchandra Das v. Farzand Ali Khan ...	s. c. 9 A L. J. 188; 34 A. 253.

Pages Vol. XIII of Ind. Cas.	Names of Parties.	Corresponding pages of other Reports and Journals.
535	Kishori Lal v. Todar Singh ...	s. c. 9 A. L. J. 244.
539	Ahmad Khan v. Ratan Chand ...	s. c. 53 P. W. R. 1912; 50 P. R. 1912.
541	Jnan Chandra Nag Das v. Lochh Mohan ...	*
542	Hewa Mal v. Karunamoy Gupta ...	*
544	Durga Shankar v. Ram Ratan ...	*
547	Binda Prasad v. Gaya Prasad Singh ...	*
549	Jiwan v. Dit ...	s. c. 103 P. W. R. 1912; 49 P. R. 1912.
550	Nihal Kaur v. Secretary of State ...	*
554	Raghunandan Singh v. Jarao ...	*
556	Miran Bakhsh v. Goude Ram ...	s. c. 89 P. W. R. 1912.
559	Kiman v. Sultani Mal ...	s. c. 82 P. W. R. 1912.
561	Fatteh Chand v. Kirpa Singh ...	s. c. 76 P. W. R. 1912; 48 P. R. 1912.
563	Nihal Chand v. Abdullah ...	*
564	Nihal Devi v. Kishore Chand ...	s. c. 51 P. R. 1912.
566	Lalu Ram v. Secretary of State ...	s. c. 15 O. C. 117.
568	Ram Narain v. Durga Dat ...	*
571	Ram Chand v. Dewan Chand ..	*
573	Rashik Lal v. Ram Narain ...	s. c. 9 A. L. J. 198; 34 A. 273.
577	Gopessuar Dutt v. Bissessur Dutt ...	s. c. 16 C. W. N. 265; 39 C. 245.
594	Karim Khan v. Salamuddi ...	*
595	Manikka Mudeliar v. Devasi Kamoni Pillai ...	s. c. (1912) 1 M. W. N. 158.
596	Satya Sri Ghoshal v. Kartik Chandra Das ...	s. c. 15 C. L. J. 227; 16 C. W. N. 418.
597	Ashutosh Chatterjee v. Sudhindra Chandra Moulick	*
598	Sheonandan Singh v. Deo Saran Singh ...	s. c. 15 C. L. J. 647.
599	Ambalam Pakkiya Udayan v. J. M. Bathe ...	s. c. (1912) 1 M. W. M. 152.
603	Ram Pal Singh v. Nandlal Marwari ...	s. c. 16 C. W. N. 346.
604	Rashmohini Dasi v. Debendra Nath Singh ...	s. c. 16 C. W. N. 604.
605	Chag Mull v. Jai Narain ...	s. c. 15 C. L. J. 239.
606	Mohoram Sheikh Chaprasi v. Telamuddin Khan ...	s. c. 15 C. L. J. 220; 16 C. W. N. 567.
609	Jafar Husain v. Husan Ara Begam ...	*
613	Wazir Mohammad v. Har Prasad ...	s. c. 15 O. C. 67.
617	H. W. G. v. Mrs. H. W. G. ...	*
618	Chellammal v. Krishnasawmy Iyer ...	s. c. (1912) 1 M. W. N. 166.
619	Jogal Kishore v. Ram Narain ...	s. c. 9 A. L. J. 226; 34 A. 268.
621	Bakhtawari v. Shibban Lal ...	s. c. 69 P. W. R. 1912; 121 P. L. R. 1912.
624	Muna v. Mansa Ram ...	*
625	Gopi Narain v. Kunj Behari Lal ...	s. c. 9 A. L. J. 311.
629	Indar Dawan Singh v. Deputy Commissioner, Fyzabad ...	*
631	Ram Gopal v. Jagmohan Singh ...	*
632	Raja Dei v. Umed Singh ...	s. c. 9 A. L. J. 158; 34 A. 207.
634	Chhotey Lal v. Har Narain. ...	*
636	Mehdi Lal v. Grant ...	*
637	Janki Pershad v. Yahia Hossain ...	s. c. 15 C. L. J. 211; 16 C. W. N. 356.
640	Velappa Gownden, *In re* ...	s. c. (1912) 1 M. W. N. 196.
641	Kolpati Kuar v. Rajdhari Lal ...	*
642	Abhai Charan Chakrawati v. Kesho Das ...	*
642	Sanka Aiyar v. Subbiah Iyer ...	s. c. (1912) 1 M. W. N. 361.
643	Jainath Pathak v. Kalka Upadhya ...	s. c. 9 A. L. J. 238; 34 A. 285.
644	Maghli v. Ladli ...	*
645	Sat Narain v. Badri Nath ...	s. c. 9 A. L. J. 211.
646	Oudh Bihari Pande v. Mahadeo Sahi ...	*
647	Deo Raj v. Govind Parshad ...	s. c. 55 P. W. R. 1912.
648	Krishnasawmi Doss, *In re* ...	s. c. (1912) 1 M. W. N. 167; 11 M. L. T. 182.
649	Akilandam Pillai v. Chinnasawmi Moopan ...	s. c. (1912) 1 M. W. N. 172; 11 M. L. T. 201.
650	Karam Chand v. Sultan ...	s. c. 72 P. W. R. 1912.
651	Pitchuvier v. Perumal Konan ...	s. c. 11 M. L. T. 160; (1912) 1 M. W. N. 163.
653	Jadunandan Prosad Singha v. Koer Kallyar Singh	s. c. 15 C. L. J. 61; 16 C. W. N. 612.
657	Baij Nath v. Jang Bahadur ...	*
659	Thiruvengadam Pillai v. Doridla Subbiah ...	s. c. 11 M. L. T. 144; (1912) 1 M. W. N. 176.

Pages of Vol. XIII of Ind. Cas.	Names of Parties.	Corresponding pages of other Reports and Journals.
660	Veerappa Chettyar, *In re* ...	*
661	Ganda Singh v. Nathu Ram ...	s. c. 77 P. W. R. 1912.
662	Sheru v. Jawahir Singh ...	*
665	Chajju Mal v. Telu Mal ...	s.c. 61 P. W. R. 1912; 10 P. L. R. 1912; 53 P. R. 1912.
667	Megha Ram v. Makhan Lal ...	*
670	Tota Singh v. Partap Singh ...	*
671	Jagat Chandra Majumdar v. Munsef Ali Sarkar ...	*
673	Lal Gopal Datta Chowdhury v. Khorooriah Majozilla Zemindary Syndicate, Ld. ...	s. c. 16 C. W. N. 297.
678	Imambandi v. Matasuddi ...	s. c. 15 C. L. J. 621.
686	Prahlad Chandra v. Behari Lal Mookerjee ...	*
688	Annada Prosad v. Sham Sundar ...	*
689	Moula Bux v. Ajahar Molla ...	*
690	Kalimuddin v. Mahurni ...	s. c. 15 C. L. J. 382; 16 C. W. N. 662.
691	Bhagabati Koer v. Sohodra Koer ...	*
694	Atal Bajadar v. Madan Dai ...	*
694	Gul Mahomed v. Abdul Jubbar ...	s. c. 16 C. W. N. 498; 15 C. L. J. 683.
695	Ibrahim Ali Khan v. Mahammad Ahsan Ullah ...	s. c. 11 M. L. T. 225; (1912) 1 M. W. N. 316; 50 P. W. R. 1912; 15 C. L. J. 352; 9 A. L. J. 390; 14 Bom. L. R. 270; 22 M. L. J. 478; 16 C. W. N. 625.
698	Radha Kant Chakravarti v. Ramananda Shaha ...	s. c. 16 C. W. N. 475; 15 C. L. J. 369.
702	Chandra Kumar v. Ram Din ...	s. c. 15 C. L. J. 251; 16 C. W. N. 496.
705	Angulia & Co. v. Sassoon & Co. ...	s. c. 16 C. W. N. 593.
708	Adhari Duboin v. Sheodihal Pande ...	*
709	Fakir Chand v. Ram Chand ...	s. c. 62 P. W. R. 1912.
711	Harnamon v. Santa Singh ...	s. c. 98 P. W. R. 1912.
714	Lal Singh v. Pala Singh ...	s. c. 66 P. W. R. 1912.
716	Hansraj v. Narain Chand ...	s. c. 86 P. R. 1911.
717	Ramadhar v. Sheo Narain ...	*
719	Hari Singh v. Bholi ...	s. c. 69 P. W. R. 1912; 119 P. L. R. 1912.
720	Abdul Rahman v. Bhagwan Das ...	s. c. 59 P. W. R. 1912; 120 P. L. R. 1912.
721	Peary Mohan Das v. Weston ...	s. c. 16 C. W. N. 145; 13 Cr. L. J. 65.
776	Amodini Dassee v. Darson Ghose ...	s. c. 38 C. 828; 13 Cr. L. J. 120.
777	Aiya Chalamaya v. Emperor ...	s. c. (1912) 1 M. W. N. 50; 13 Cr. L. J. 121.
778	Nga Pu v. Emperor ...	s. c. 4 Bur. L. T. 270; 13 Cr. L. J. 122.
778	Balmakund v. Emperor ...	s. c. 9 A. L. J. 97; 34 A. 192; 13 Cr. L. J. 122.
780	Emperor v. Arumukham Pillai ...	s. c. (1912) 1 M. W. N. 69; 13 Cr. L. J. 124.
781	Sandyal v. Kunjeswar Misra ...	s. c. 16 C. W. N. 143; 13 Cr. L. J. 125.
781	Manni Ghasi v. Emperor ...	s. c. (1912) 1 M. W. N. 49; 13 Cr. L. J. 125.
782	Dewat Singh v. Emperor ...	s. c. 11 P. W. R. 1912 Cr.; 4 P. R. 1912 Cr.; 13 Cr. L J. 126.
782	Kamini Mohan Das v. Harendra Kumar ...	s. c. 38 C. 876; 13 Cr. L. J. 126.
783	Piamullah v. Emperor ...	s. c. 16 C. W. N. 238, 13 Cr. L. J. 127.
785	Banbihari Kapur v. Khetra Pal Singh Roy ...	s. c. 38 C. 923; 16 C. W. N. 259.
788	Tej Mal v. Jagapilla Papayamma ...	s. c. 11 M. L. T. 25; (1912) 1 M. W. N. 50; 22 M. L. J. 225.
790	Fateh Din v. Nikka ...	s. c. 81 P. R. 1911.
791	Cheria Imbichi Bibee v. Syed Ali ...	s. c. (1912) 1 M. W. N. 45.
792	Shah Muhammad v. Piara Mal ...	s. c. 84 P. R. 1911.
795	Adusupatti Venkata Rao v. Swami Pillai ...	s. c. 11 M. L. T. 27; (1912) 1 M. W. N. 56; 22 M. L. J. 228.
796	Dan Singh v. Phangan Singh ...	s. c. 83 P. R. 1911.
799	Ramaswami Ayengar v. Muthuswami Aiyer ...	s. c. (1912) 1 M. W. N. 42.
800	Umar Ali v. Nasib-un-nissa ...	s. c. 82 P. R. 1911.
802	Seeni Ammal v. Angamuttu Nadar ...	s. c. (1912) 1 M. W. N. 99.
802	Pathana v. Naba ...	s. c. 87 P. R. 1911.
803	Brij Mohan Lal v. Munni Bibi ...	s. c. 14 O. C. 343.
808	Aman-ullah v. Abdul Ghafur ...	s. c. 85 P. R. 1911.
809	Parmeshar Dat v. Mohammad Abul Hasan Khan ...	s. c. 14 O. C. 335.

Pages of Vol. XIII of Ind. Cas.	Names of Parties.		Corresponding pages of other Reports and Journals.
812	Karm Ilahi v. Sultan Alam	...	s. c. 79 P. R. 1911.
813	Ajodhya Prasad v. Jagdish Singh	...	s. c. 14 O. C. 321.
815	Bahawal v. Nurkhan	...	s. c. 1 P. W. R. 1912, Rev.
816	Mahbub Bakhsh v. Abdul Rahman	...	s. c. 4 P. W. R. 1912; 84 P. L. R. 1912.
817	Perumal Naicken, *In re*	...	s. c. (1912) 1 M. W. N. 193; 13 Cr. L. J. 129.
819	Chockalingam Pillai, *In re*	...	s. c. 11 M. L. T. 162; (1912) 1 M. W. N. 119; 13 Cr. L. J. 131.
824	Isa v. Ranon	...	s. c. 1 P. W. R. 1912 Cr; 83 P. L. R. 1912; 13 Cr. L. J. 136.
825	Emperor v. Balwant Kondo Patole	...	s. c. 14 Bom. L. R. 41; 13 Cr. L. J. 137.
826	Deputy Superintendent v. Chulhan Ahir	...	s. c. 16 C. W. N. 263; 13 Cr. L. J. 138.
827	Emperor v. Hari Govind Limaye	...	s. c. 14 Bom. L. R. 40; 13 Cr. L. J. 139.
828	Gorle Kandungadu, *In re*	...	s. c. (1912) 1 M. W. N. 97; 13 Cr. L. J. 140.
829	Abdul Ghafoor v. Raza Husain	...	s. c. 9 A. L. J. 231; 34 A. 267; 13 Cr. L. J. 141.
829	Bansi v. Emperor	...	s. c. 9 A. L. J. 162; 34 A. 210; 13 Cr. L. J. 141.
830	Baisnab Charan Manjhi v. Gati Nath Munshi	...	s. c. 16 C. W. N. 384; 39 C. 469; 13 Cr. L. J. 142.
831	Gurusawmy Nadan v. Emperor	...	s c. (1912) 1 M. W. N. 47; 11 M. L. T. 32; 22 M. L. J. 251; 13 Cr. L. J. 143.
832	Kolli Appiah, *In re*	...	s. c. 11 M. L. T. 191; (1912) 1 M. W. N. 400; 13 Cr. L. J. 144.
832	Emperor v. Andiasivaloo Naidoo	...	s. c. (1912) 1 M. W. N. 84; 13 Cr. L. J. 144.
833	Public Prosecutor v. Mushunooru Suryanarayanamoorty	...	s. c. (1912) 1 M. W. N. 136; 11 M. L. T. 127; 13 Cr. L. J. 145.
844	Alia Rai v. Jhingur Tewari	...	s. c. 16 C. W. N. 426; 15 C. L. J. 403, 39 C. 476; 13 Cr. L. J. 156.
847	Musai v. Emperor		s. c. 13 Cr. L J. 159.
849	Govind Baba Gujar v. Shrimant Jijibai Saheb	...	s. c. 14 Bom. L. R. 9: 36 B. 189.
850	Sarkhara v. Nawab	...	s. c. 11 P. W. R. 1912.
851	Gopal Ghela v. Rajaram Amtha	...	s. c. 14 Bom. L. R. 14.
852	Lehna Singh v. Santa Singh	...	s. c. 9 P. W. R. 1912.
853	Velchand Chhaganlal v. Lieut. A. Flagg	...	s. c. 14 Bom. L. R. 18; 36 B. 164.
855	Ramji Das v. Shankar Das	...	s. c. 10 P. W. R. 1912.
855	Pandurang Bhiwaji v. Ganga Ram Ganu	...	s. c. 14 Bom. L. R. 22; 36 B. 203.
857	Duni v. Ali Mohammad	...	s. c. 8 P. W. R. 1912.
858	Abdul Kayam v. Bahadur Vithoba	...	s. c. 14 Bom. L. R. 26.
859	Nihal Chand v. Chanda Singh	...	s. c. 3 P. W. R. 1912; 82 P. L. R. 1912.
860	Sreenivasier v. Balakrishna Devai	...	s. c. (1912) 1 M. W. N. 150; 11 M. L. T. 156; 22 M. L. J. 187.
861	Khannu v. Fateh Khan	...	s. c. 5 P. W. R. 1912.
862	Bhaosingh v. Hazari	...	s. c. 7 N. L. R. 179.
863	Sundar Singh v. Deva Singh	...	s. c. 2 P. W. R. 1912; 85 P. L. R. 1912.
864	Devidas v. Ramlal	...	s. c. 7 N. L. R. 190
865	Lahri v. Shiv Nath	...	s. c. 2 P.W. R. 1912, Rev.
866	Gadiyam Narayudu v. Mallavarapu Venkamma	...	s. c. 11 M. L. T. 121; 22 M. L. J. 265.
868	N. C. Sircar v. Baraboni Coal Concern, Ld.	...	s. c. 16 C. W. N. 289.
870	Allareddi Subbamma v. Nallapareddi	...	s. c. 11 M. L. T. 124; (1912) 1 M. W. N. 178; 22 M. L. J. 260.
873	Badri Das v. Santa Singh	...	s. c. 3 P. R. 1912; 44 P. W. R. 1912.
874	Nga Paw E v. Nga Sin	...	s. c. U. B. R. (1911) I, 92.
877	Chet Singh v. Allahditta	...	s. c. 31 P. W. R. 1912; 47 P. L. R. 1912.
879	Kedar Nath v. Manu Bibi	...	s. c. 16 C. W. N. 247.
882	Mohammad Hashim Ali Khan v. Sadiq Husain Khan		s. c. 14 O. C. 356.
898	Subhadra Koer v. Dhajadhari Gossain	...	s. c. 15 C. L. J. 142; 16 C. W. N. 444.
900	Gopal Lal v. Bahorni	...	s. c. 15 C. L. J. 120.
902	Saroop Chand v. Tularam	...	s. c. 8 N. L. R. 17.
903	Chalasamy Ramiah v. Chalasamy Ramaswami	...	s. c. 11 M. L. T. 155; (1912) 1 M. W. N. 199.
904	Shrikison v. Chatarsingh	...	s. c. 8 N. L. R. 18.
906	Valliammai Achi v. Nataraja Pillay	...	s. c. 11 M. L. T. 157; (1912) 1 M. W. N. 198.
907	Gouri Dutt v. Amar Chand	...	s. c. 15 C. L. J. 49.
909	Ganeshdas v. Shankar	...	s. c. 8 N. L. R. 22.
912	Ali Mohammad v. Nayan Rajah Bhuiya	...	s. c. 15 C. L. J. 122; 16 C. W. N. 620 *note*.

Pages of Vol. XIII of Ind. Cas.	Names of Parties.	Corresponding pages of other Reports and Journals.
913	Satish Chandra Sarkar v. Emperor ...	s. c. 16 C. W. N. 499; 15 C. L. J. 396; 39 C. 454; 13 Cr. L. J. 161.
914	Me Tha v. Nga San E ...	s. c. U. B. R. (1911), I, 90; 13 Cr. L. J. 162.
916	Vithoo v. Emperor ...	s. c. 7 N. L. R. 185; 13 Cr. L. J. 164.
919	Waris Ali v. Emperor ...	s. c. 7 N. L. R. 180; 13 Cr. L. J. 167.
921	Emperor v. Ram Naresh Singh ...	s. c. 9 A. L. J. 51; 34 A. 118; 13 Cr. L. J. 169.
922	Emperor v. Murli Singh ...	s. c. 33 A. 775; 13 Cr. L. J. 170.
924	Emperor v. Sadapur ...	s. c. 1 P. R. 1912 Cr.; 15 P. W. R. 1912 Cr.; 37 P. L. R. 1912; 13 Cr. L. J. 172.
925	Tunoo Mia v. Emperor ...	s. c. 16 C. W. N. 502; 15 C. L. J. 399; 39 C. 348; 13 Cr. L. J. 173.
927	Bhoja Ram v. Emperor ...	s. c. 21 P. W. R. 1912 Cr.; 115 P. L. R. 1912; 13 Cr. L. J. 175.
927	Rasoolkhan Saheb v. Emperor ...	s. c. (1912) 1 M. W. N. 85; 13 Cr. L. J. 175.
928	Balmokand v. Nanak Chand ...	s. c. 3 P. W. R 1912 Cr.; 13 Cr. L. J. 176.
929	Mewa Lal v. Ahmad Ali ...	s. c. 9 A L. J. 17.
930	Fatma v. Imtiazi Jan ...	s. c. 1 P. R. 1912; 33 P. W. R. 1912.
939	Kanhai Lal v. Hulas Singh ...	s c. 9 A. L. J. 29.
941	Mohadeo Pershad v. Pachkari ...	s. c. 16 C. W. N. 322.
943	Balmakund v. Kundan Lal ...	s. c. 9 A. L. J. 15.
943	Bhuttacharya & Co. v. Cawnpore Woolen Mills Co. Ld. ...	s. c. 16 C. W. N. 325.
944	Sohni v. Mohan Kuer ...	s. c. 9 A. L. J. 23.
944	Bajrang Behari Lal v. Lachmi Narain ...	s. c. 15 C. L. J. 88.
945	Dirg Bijai Singh v. Bhan Partab Shah Singh ...	s. c. 9 A. L. J. 63.
947	Abdul Karim v. Sahib Jan ...	s. c. 13 P. W. R. 1912.
951	Baldeo Singh v. Hira Lal ...	s. c. 9 A. L. J. 67.
953	Fars Ram v. Muhammad Yasin Khan ...	s. c. 14 P. W. R. 1912.
954	Fakhran Bibi v. Nageshar Ram ...	s. c. 9 A. L. J. 84.
955	Tulsi Ram v. Karm Chand ...	s. c. 25 P. W. R. 1912; 36 P. L. R. 1912.
956	Kanhaya Lal v. Girdhari Lal ...	s. c 9 A. L. J. 103.
957	Bhagtu v. Bua Ditta ...	s. c. 26 P. W. R. 1912; 34 P. L. R. 1912.
958	Jackson v. Jackson ...	s. c. 9 A. L. J. 108; 34 A. 203.
959	Ganga Pershad Sahu v. Irshad Ali Khan ...	s. c. 15 C. L. J. 54.
960	Bhola v. Brij Lal ...	s. c. 27 P. W. R. 1912; 32 P. L. R. 1912.
961	Wilaiti Begam v. Fazal Husain Khan ...	s. c. 9 A. L. J. 148.
963	Thakar Das v. Perma Nand ...	s. c. 95 P. R. 1911.
963	Habeebullah v. Abdul Hamid ...	s. c. 9 A. L. J. 131; 34 A. 261.
965	Bir Bikram Deo v. Secretary of State ...	s. c. 16 C. W. N. 362; 9 A. L. J. 585; 15 C. L. J. 633.
975	Ahmad Said Khan v. Masi-ullah Khan ...	s. c. 9 A. L. J. 152; 34 A. 250.
976	Mata Din v. Ahmad Ali ...	s. c. 16 C. W. N. 338; 11 M. L. T. 145; (1912) 1 M. W. N. 183; 9 A. L. J. 215; 15 C. L. J. 270; 14 Bom. L. R. 192; 15 O. C. 49; 34 A. 213.
979	Tajammul Husain v. Raunak Ali ...	s. c. 15 O. C. 25.
982	Bapu v. Temsa ...	s. c. 8 N. L. R. 29.
984	Waliullah v. Ejez Ali ...	s. c. 15 O. C. 22.
985	Venkadam Narayana Iyer v. Siva Subramania Iyer	s. c. 22 M. L. J. 49.
986	Nazir Ahmad v. Raghubar Dayal ...	s. c. 15 O. C. 7.
992	Narshing Das v. Shamas Din ...	s. c. 207 P. L. R. 1911.
993	Khircde Chunder Roy Chowdhury v. Emperor ...	s. c. 15 C. L. J. 151; 39 C. 377; 13 Cr. L. J. 177.
998	Lad Khan v. Emperor ...	s. c. 19 P. W. R. 1912 Cr.; 11 P. L. R. 1912; 13 Cr. L. J. 182.
999	Bharosa Patak v. Emperor ...	s. c. 9 A. L. J. 355; 13 Cr. L. J. 183.
1000	Ambika Prosad Singh v. Gur Sahai Singh ...	s. c. 13 Cr. L. J. 184.
1001	Emperor v. Sohan Singh ...	s. c. 18 P. R. 1911 Cr.; 13 Cr. L. J. 185.
1002	Gurameah v. Emperor ...	s. c. 16 C. W. N. 336; 39 C. 403; 13 Cr. L. J. 186.
1004	Gajendra Ghorai v. Emperor ...	s. c. 15 C. L. J. 80; 13 Cr. L. J. 188.
1004	Emperor v. Dilsukh ...	s. c. 19 P. R. 1911 Cr.; 13 Cr. L. J. 188.
1005	Emperor v. Lekria ...	s. c. 8 N. L. R. 20; 13 Cr. L. J. 189.
006	Gauri Shankar Lal v. Emperor ...	s. c. 9 A. L. J. 156; 13 Cr. L. J. 190.
1007	Ram Charan Chandra v. Tirupulla Sheikh ...	s. c. 16 C W. N. 645; 13 Cr. L. J. 191.

TABLE
OF
Cases Cited in Volume XIII of Indian Cases, 1912.

A

Page.

Abbakke v. Kinhiamma 29 M. 491 ... 16, 474
Abdul Aziz Molla v. Ebrahim Molla, 31 C. 965 ... 122
Abdul Ghani v. Muhammad Fasih, 28 A. 95; 2 A. L J. 667; A. W. N. (1905) 200 ... 654
Abdul Ghani v. Nand Lal, 30 C. 15 ... 625
Abdul Karim v. Sahib Jan, 5 P. R. 1908; 29 P. W. R. 1908; 99 P. L. R. 1908 ... 317
Abdul Kashem v. Benode Lal Dhone, 12 C. W. N. 757 ... 341
Abdul Razzaq v. Mumtaz Husain, 25 A. 334 ... 708
Abdul Rehman v. Cassum Ebrahim, 13 Bom. L. R. 583; 11 Ind. Cas. 726 ... 232, 267
Abdul Wahid Khan v. Nuran Bibi, 121. A. 91; 11 C. 597 ... 270
Abdul Wahid Khan v. Shaluka Bibi, 21 C. 496; 21 I. A. 26 ... 146, 509
Abdulla v. Kunja Behari Lal, 12 Ind. Cas. 149; 14 C. L. J. 467 ... 122
Abhiram Dass v. Gopal Dass, 17 C. 48 ... 690
Abinash Chandra Mazumdar v. Harinath Shaha, 32 C. 62 ... 633
Abraham Pillai v. Donald Smith, 29 M. 324 ... 128
Achal Ram v. Kazim Hussain Khan, 27 A. 271; 9 C. W. N. 477; 8 O. C. 155; 15 M. L. J. 197 ... 687
Achamma v. Basappa, 8 M. L. J. 1 ... 92
Achha Mian v. Durga Churn, 25 C. 146; 2 C. W. N. 137 ... 362
Achutan Unni v. Vasunni, 20 M. L. J. 344; 7 M. L. T. 102; 5 Ind. Cas. 774 ... 789
Adams v. Great North of Scotland Railway Company, (1891) App. Cas. 31 ... 119
Adhibai v. Cursandas, 11 B. 199 ... 137
Adivi Suryapraksa Rao v. Nidamurty Gangaraju, 33 M. 228; 4 Ind. Cas. 386; 7 M. L. T. 236 ... 10
Administrator-General of Bengal v. The Land Acquisition Deputy Collector, 24-Pergannahs, 12 C. W. N. 241 ... 470
Afar Morole v. Surja Komar Ghose, 12 C. L. J. 649; 15 C. W. N. 249; 7 Ind. Cas. 842 ... 424
Afatolla Sardar v. Dwarka Nath Moitry, 4 C. 814 ... 1004
Agarjan Bibi v. Panaulla, 6 Ind. Cas. 452; 14 C. W. N. 779; 12 C. L. J. 169; 37 C. 687 ... 699
Ahmad Ali v. Amir Shah, 35 P. R. 1898 ... 21
Ahmad Ali v. Waris Husain, 15 A. 123 ... 793
Ahmad Bakhsh v. Seth Raghubar Dayal, 28 A. 1; 15 M. L. J. 407; 10 C. W. N. 115; 2 A. L. J. 813; 2 C. L. J. 413; 7 Bom. L. R. 912; 9 O. C. 7; 32 I. A. 229 ... 986
Ahmad Hoosein v. Khadija, 10 W. R. 369 ... 75
Ahmad Khan v. Gulam Bibi, 36 P. R. 1891 ... 412
Ahmad Yar Khan v. Secretary of State, 28 C. 693; 28 I. A. 211 (P. C.) ... 514

A—contd.

Page.

Ahsanullah v. Dakhini Din, 27 A. 575; A. W. N. (1905) 108; 2 A. L. J. 287 ... 142, 704
Airey v. Borham, 29 Beav. 620; 4 L. T. 391 ... 26
Aiyavu Mooppan v. Vellayya Nadan, 34 M. 55; 7 A. L. J. 567; 6 Ind. Cas. 15; 8 M. L. T. 6; (1910) M. W. N. 229 ... 789
Ajab v. Mangal, 6 N. L. R. 152; 8 Ind. Cas. 1119 ... 902
Akbar Zaman Khan v. Sukhdeo Pandey, 10 Ind. Cas. 51; 13 C. L. J. 467 ... 368
Akhil Chandra De v. Queen-Empress, 22 C. 1004 ... 212
Akhoy Kumar v. Bejoy Chand, 29 C. 813 at p. 818 ... 146, 787
Akkanna v. Venkayya, 25 M 351 ... 692
Ala Bakhsh v. Emperor, 92 P. L. R. 1902 ... 220
Alfred Lindsay, *In re*, 4 M. 121 ... 1001
Ali Bakhsh v. Chuhar Singh, 8 Ind. Cas. 1157; 41 P. L. R. 1911; 101 P. R. 1910 ... 855
Ali Mahomed Bipari v. Nyan Raja Bhuyan, S. A. No. 906 of 1900 ... 365
Alickjan Bibi v. Rambaran Shah, 12 C. L. J. 357 at p 360; 7 Ind. Cas. 166 ... 130
Aligiriswami v. Emperor, 33 M. 514; 5 Ind. Cas. 831; 7 M. L. T. 121; (1910) M. W. N. 5 ... 274
Alipore Bomb case, 14 C. W. N. 1114; 11 Cr. L. J. 453; 7 Ind. Cas. 359; 37 C. 467 ... 726
Allah Bakhsh v. Buta, 79 P. R. 1891 ... 181
Altaf Ali v. Lalta Prasad, 19 A. 496 ... 720
Amar Chand v. Sebak Chand, 34 C. 642; 11 C. W. N. 593; 5 C. L. J. 491; 2 M. L. T. 207 ... 671
Ambabai v. Govind, 23 B. 257 ... 492
Ambica Pershad v. Sardhari Lal, 10 C. 851 ... 190
Ambaika Prasad v. Emperor, 35 C. 820; 8 Cr. L. J. 398 ... 99, 211
Amir Hussain Khan v. Nanak Chand, 6 Ind. Cas. 424; 14 C. W. N. 882; 12 C. L. J. 62 ... 367
Amir Hassan Khan v. Sheo Baksh Singh, 11 C. 6; 11 I. A. 237 ... 658
Amirthathammal v. Periasami, 32 M. 325; 5 M. L. T. 255; 4 Ind. Cas. 507 ... 655
Amulya v. Preonath, 7 Ind. Cas. 886 ... 141
Anand Kunwar v. Court of Wards, 8 I. A. 14; 6 C. 764; 8 C. L. R. 381 ... 638
Ananda Das v. Ratnakar, 7 C. W. N. 572 ... 192
Ananda Kishore Chowdhury v. Daij Thakurain, 1 Ind. Cas. 549; 36 C. 726; 10 C. L. J. 189 ... 125, 362
Ananda Mohan Roy v. Hara Sundari, 23 C. 196 ... 190
Anantayya, v. Padmayya, 16 M. 278 ... 44
Andrews v. Askey, 8 Car. & P. 7 ... 685
Andrews v. Salomen. (1888) W. N. 102 ... 602
Anivilla Sundararamayya v. Cherla Sitamma, 2 M. W. N. 422; 10 Ind. Cas. 56; 9 M. L. T. 469; 21 M. L. J. 695 ... 476
Anning v. Hartley, 27 L. J. Ex. 145 ... 165
Antaji, *In re*, 18 B. 670 ... 971
Anund Chundra v. Nilmony Jourdar, 9 C. 758; 12 C. L. R. 352 ... 692

A—concld.

Page.

Anundomoyee v. Dhondro Chunder, 14 M. I. A. 101 at p. 111; 16 W. R. 19 (P. C.); 8 B. L. R. 122 ... 702
Anwar Hasan v. Umatul Karim; 145 P. R. 1906; 109 P. L. R. 1907 ... 670
Anwar Jan v. Azmut Ali, 15 W. R. 26 ... 654
Appasami v. Ramasami, 9 M. 279 ... 461
Appaswami v. Scott, 9 M. 5 ... 92
Appaya Shetti v. Kunhati Beari, 30 M. 214; 17 M. L. J. 127 ... 135
Appovier v. Rama Subba Aiyar, 11 M. I. A. 75; 8 W. R. 1 (P. C.) ... 53
Ardesar v. Secretray of State, 9 B. H. C. R. 177 166
Ariavudra v. Dorasami, 11 M. 413 ... 670
Arruth Misser v. Juggurnath, 18 W. R. 439 ... 687
Arumuga Goundan v. Chinnammal, 10 M. L. T. 214; 21 M. L. J. 918; (1911) 2 M. W. N. 524; 12 Ind. Cas 185 ... 206
Arunachalam Chetti v. Ayyavayyam, 21 M. 476 336
Arunachella Reddi v. Perumal Reddi, 9 M. L. T. 90; 21 M. L. J. 635; 9 Ind. Cas. 285 ... 182
Arunachellam v. Arunachellam, 15 I. A. 171; 12 M. 19 ... 342
Arur Singh v. Lachmi, 75 P. R. 1898 ... 181
Asalat Khan v. Birendra Kishore Manikya Bahadur, 13 Ind. Cas 519 513, 518, 519
Asimuddi Sheikh v. King-Emperor, 11 C. W. N. 838; 5 Cr. L. J. 351; 5 C. L. J. 454 ... 288
Asimuddi Sheikh v. Sundari Bibee, 10 Ind. Cas. 345; 38 C. 339; 15 C. W. N. 844; 14 C. L. J. 224 ... 368
Asumatunessa Khatun v. Harendra Lal, 12 C. W. N. 721; 8 C. L. J. 29 ... 701
Assistant Sessions Judge, North Arcot v. Rammmal, 10 M. L. T. 563; (1912) 1 M. W. N. 3; 13 Ind. Cas. 275 ... 287
Atma Singh v. Kalu, 93 P. R. 1905; 162 P. L. R. 1905 ... 528
Attorney-General v. Siddon, (1830) 1 C. & J. 220; 1 Tyr. 41 ; 9 L. J. (o s.) Ex. 7 ... 101
Attorney-General v. Theobala, (1890) 24 Q. B. D. 557; 62 L. T. 768; 38 W. R 527 ... 266
Atul Krishna Sircar v. Sanyasi Churan Sircar, 32 C. 1051; 9 C. W. N. 784; 2 C. L. J. 50 ... 528
Aulad Husain v. Zainab-un-nissa, 10 O. C. 225 491
Australian Steam Navigation Co. v. W. Howard Smith and Sons, 14 App. Cas. 318; 61 L. T. 134 ... 130

B

Babbon Sheikh v. Emperor, 37 C. 340; 5 Ind. Cas. 365; 14 C. W. N. 422; 11 C. L. J. 335; 11 Cr. L. J 121 ... 875
Babujan v. The Secretary of State, 4 C. L. J. 256 ... 552
Baburam Roy v. Mohendra Nath Samanta, 8 C. W. N. 454 ... 365
Bachoo v. Mankorebai, 31 B. 373; 11 C. W. N. 769; 6 C. L. J. 1; 9 Bom. L. R. 646; 17 M. L. J. 343; 2 M. L. T. 295 ... 479
Bachoo v. Mankorebai, 29 B. 51 9, 479
Badhawa v. Dewa Singh, 141 P. R 1893 ... 714
Badri Prasad v. Murlidhar, 2 A. 593; 7 I. A. 51 965
Bagha Singh v. Gurmukh Singh, 93 P. R. 1902 432

B—contd.

Page.

Bagley v. Maple & Co., 27 T. L. R. 284 ... 369
Bagot v. Bagot, (1878) 1 L. R. Ir. 308 ... 685
Baid Nath Das v. Shamanand Das, 22 C. 143 ... 625
Baijnath Lohea v. Binoyendranath Palet, 6 C. W. N. 5 ... 92
Baijnath Singh v. Paltu, A. W. N. (1908) 38; 5 A. L. J. 96; 30 A. 125 ... 573
Baikanta Nath v. Aughore Nath, 21 C. 387 ... 141
Baikantha Barik v. Shib Dass, 2 C. L. J. 321 ... 640
Baikunta Nath Dev v. Udoy Chand Maiti, 2 C. L. J. 311 ... 146
Baillie v. Edinburgh Oil Gas-light Company, (1835) Cl. and F. 639 ... 119
Bainta v. Achhar, 188 P. L. R. 1905 ... 291
Bajrang Singh v. Bhagwan Bakhsh Singh, 11 O. C. 301 ... 497
Bajrangi Singh v. Manokarnika Bakhsh Singh, 11 O. C. 78; 3 M. L. T. 1; 12 C. W. N. 74; 9 Bom. L. R. 1348; 6 C. L. J. 766; 5 A. L. J. 1 485, 496
Baker v. Snell, (1908) 2 K. B. 825; 77 L. J. K. B. 1090; 24 T. L. R 811; 99 L. T. 753; 21 Cox. C. C. 716 ... 839
Bakhu v. Jhanda, 145 P. R. 1892 ... 408
Bal Dev Dharup Marwadi v. Ram Chandra Balwant Kulkarni, 19 B. 121 ... 92
Bal Kishen Das v. Simpson, 25 C. 833; 25 I. A. 151; 2 C. W. N. 513 ... 960
Bala Bux v. Rukhmabai, 30 C. 725; 5 Bom. L. R. 469; 7 C. W. N. 642; 30 I. A. 130 ... 53
Balaji Ranchhoddas, *In re*, 5 B. 680 ... 543
Balaram v. Mangta Dass, 34 C. 941; 6 C. L. J. 237; 11 C. W. N. 959 ... 794
Balgobind v. Ramkumar, 6 A. 431 ... 633
Balgobind Das v. Narain Lal, 15 A. 339; 20 I. A. 116 ... 467
Balkishen Das v. Ram Narain Sahu, 30 C. 738; 30 I. A. 139; 7 C. W. N. 578 54, 231
Balkrishna v. Masuma Bibi, 9 I. A. 182 at p. 196; 13 C. L. R 232; 5 A. 142 ... 544
Balwant v. Secretary of State, 32 B. 432 at p. 437; 10 Bom. L. R. 531 ... 265
Balwant Singh v. Aman Singh, 33 A. 7; 7 Ind. Cas. 112; 7 A. L. J. 852 198, 952
Bamundoss Mookerjee v. Musammat Tarinee, 7 M. I. A. 169 ... 10
Banarsi Das, *In re*, 18 A. 213 ... 98
Banarsi Prasad v. Fazal Ahmad, 28 A. 298; 3 A. L. J. 25; A. W. N. (1906) 9 ... 140
Bandhu Naik v. Lakhi Kuar, 7 A. 342 .. 543
Bandu v. Nabu, 15 B. 238 at p. 241 ... 241
Baneswar Mukarjee v. Umesh Chandra Chakraverty, 37 C. 626; 7 Ind. Cas. 875 ... 424
Bank of England v. Vagliano, (1891) A. C. 107; 60 L. J. Q B. 145; 64 L. T. 353; 39 W. R. 657; 55 J. P. 676 ... 217
Bantu v. Ganda Singh, 18 P. R. 1909; 1 Ind. Cas. 450; 22 P. W. R 1909 ... 445
Baperam Surma v. Gouri Nath Dutt, 20 C. 474 98, 212
Baraik Kamal Sahai v. Lilhu Christian, 8 C. L. J. 170 ... 455
Barber v. Lesiter,(1859) 7. C. B. (N. S.) 175; 29 L. J. C. P. 161; 6 Jur. (N. S.) 654 ... 774
Barkat Ali v. Ilahi Bakhsh, 2 P. R. 1899, Rev. ... 18

B—contd

Page.

Barrett v. Ring, 2 Sm. Gifford p. 48 ... 473
Barry v. Butlin, (1838) 2 Moore P. C. 480; 4 S. E. C. (o. s.) 175 ... 579
Basaratullah v. Kasirunnessa, 11 C. W. N. 190 ... 365
Bashi Chander v. Enayet Ali, 20 C. 236 ... 702
Bayley v. Manchester, Sheffield and Lincolnshire Railway Co, (1872) L. R. 8 C. P. 148; 42 L. J. C. P. 78; 28 L. T. 366 ... 242
Bayley v. Manchester, Sheffield and Lincolnshire Railway Co., (1871-72) L. R. 7 C. P. 415 ... 241
Bazlur Raheem v. Shams-un-nissa, 11 M. I. A. 551; 8 W. R. 3 (P. C.) ... 610
Beale v. Beale, (1635) Cro. Car. 383 ... 163
Beak v. Heak, Finch 190 ... 25
Bechoo Singh v. Rai Sheo Sahey, 1 N. W. P. H. C. R. P. 56; p. 111 (Ed. of 1873) ... 965
Beckford v. Hood, 7. T. R. 620; 4. R. R. 527 ... 568
Beejraj v. Bhyropersaud, 23 C. 912 ... 150
Beerpertab v Rajendar Pertab, 12 M. I. A. 1; 9 W. R. (P. C.) 15 ... 693
Begam v. Khuda Bakhsh, A. W. N. (1892) 77 ... 613
Behari Chakravarti v. Kalihar Gupta, 10 C. L. J. 479; 3 Ind. Cas. 336 ... 190
Behari Lal v. Parbhu Lal, 79 P. R. 1908; 130 P. W. R. 1908 (F. B.) ... 319
Behari Lal v. Sheo Lal, 3 N. L. R. 114 ... 862
Behary Lal (Pundit v. Kedar Nath Mullik, 18 C. 460 ... 186
Beni Madhab v. Jai Krishna, 7 B. L. R. 152; 12 W. R. 495 ... 608
Beni Madho v Kali Prasad Singh, 16 O. C. 331... 615
Beni Prasad v. Kashi Nath, 6 A. L. J. 401; 2 Ind. Cas. 222 89,929
Beni Pershad Koer v. Dudhnath Roy, 27 C. 156; 26 I. A. 216 ... 515
Bennett v. Potter, 2 C. and J. 622; 1 L. J. Ex. 258 ... 464
Benode Lal Pakrahsi v. Pran Chandra Pakrashi, 14 C. L. J. 143; 11 Ind. Cas 898 ... 165
Bepin Behary Sarnokar v. Kali Dass Chatterjee, 6. C. W. N. 336 ... 146
Berkely Peerage, *In re*, 4 Camp. 401 at p. 416; 14 R. R. 782 ... 683
Bevan v. Webb, (1901) 2 Ch. 59; 84 L. T. 609; 70 L. J. Ch. 536; 6 W. R. 548 ... 25
Bhagabat Prasad Singh v. King-Emperor, 14 C. L. J. 120; 11 Ind. Cas. 794 ... 121
Bhagabatti Deyi v. Bhola Nath, 7 B. L. R. 93; 15 W. R. 63 ... 692
Bhagbutti Devi v. Bhola Nath Thakoor, 2 I. A. 256; 24 W. R. 168; 1 C. 104 ... 692
Bhagiram Dome v. Abar Dome, 15 C. 388 ... 215
Bhagirath v. Nathmal, 105 P. R. 1907 ... 623
Bhagtu Singh v. Raghu Nath Sahai, 13 C. W. N. 135; 9 C. L. J. 15; 1Ind. Cas. 571 ... 2
Bhagu Jetha v. Malek Bawasaheb, 9 B. 318 ... 89
Bhagwandin v. Debi Prasad, 12 Ind. Cas 630 ... 536
Bhai Bhagat Singh v. Harnam Singh, 49 P. R. 1892 ... 62
Bhaiji Bhimji v. Administrator-General of Bombay, 23 B. 428 ... 766
Bhairon Rai v. Saran Rai, 26 A. 588 ... 79
Bhairon Singh v. Lalman, 7 A 23 ... 563
Bhandi Singh v. Ramadhin Rai, 2 C. L. J. 359... 652
Bhatu v. Lehru, 54 P. R. 1897 ... 413

B

Page.

Bhavanamma v. Ramasami, 4 M. 193 ... 137
Bhawani Koer v. Mathura Prasad, 7 C. L. J. 1 145, 787, 960
Bhikari Misra v. Rani Surja Moni, 6 C. W. N. 48 ... 343
Bhoboosundari v. Makhun Lal Dey, 8 B. L. R. 128 ... 165
Bhogilal v. Amritlal, 17 B. 173 ... 703
Bhola v. Fathu, 15 C. P. L. R. 17 at p. 20 ... 983
Bhola Nath v. Buskin, A. W. N. (1894) 127 ... 90
Bholi v. Kahna, 35 P. R. 1909; 1 Ind. Cas. 695; 32 P. W. R. 1909; 45 P. L. R. 1909 ... 147
Bholi v. Man Singh, 86 P. R. 1908; 146 P. W. R. 1908 ... 317
Bhomshetti v. Uma Bai, 21 B 223 ... 128
Bhoobun Mohun v. Chunder Nath, 17 W. R. 69 32
Bhoobun Moyee Debia v Ram Kishore Acharjee Chowdhry, 10 M. I. A. 279; 3 W. R. (P. C.) 15 10
Bhugwandeen Doobey v. Myna Baee, 11 M. I. A. 487; 9 W. R. (P. C.) 23 ... 321
Bhup Kunwar, *In the matter* of, 26 A. 249; 1 Cr. L. J. 73; A. W. N. (1904) 15 ... 829
Bhutta v. Khuda Bakhsh, 97 P. R. 1906 ... 485
Bibi Umatal Batul v. Nanji Koer, 11 C. W. N. 705; 6 C. L. J. 427 864, 903
Bibijan Bibi v. Sachi Bewa, 31 C. 863 ... 145
Bidhata Rai v Ram Charitra Rai, 12 C. W. N. 37; 6 C. L. J. 651; 3 M. L. T. 33 ... 185
Bidhumukhi v. Jitendra, 10 C. L. J. 527; 4 Ind. Cas. 442 ... 42
Bidyamoye Debya v. Surja Kanta, 9 C. W. N. 705; 32 C. 875 ... 543
Bihari Lall Paul v. Gopal Lal Seal, 1 C. W. N. 695 ... 908
Bijoy Gopal v. Krishna, 34 C. 329, 9 Bom L. R. 602; 11 C. W. N. 724; 5 C. L. J. 334; 2 M. L. T. 133; 17 M. L. J. 154, 4 A. L. J. 329 ... 984
Binda v. Kaunsilla, 13 A. 126 ... 612
Bindeshri Singh v. Balraj Sahai, 10 O. C. 49 ... 620
Bindeswari Prosad Singh v. Lakpat Nath Singh, 15 C. W. N. 725; 8 Ind. Cas. 26 ... 367
Bindo v. Sham Lal, 29 A. 210; A. W. N. (1907) 24; 4 A. L. J. 22 ... 17
Bindu Bashini Dassi v. Harendra Lal Roy, 25 C. 305; 2 C. W. N. 150 ... 146
Binode Lal Pakrashi v. Kalu Pramanick, 20 C. 708 ... 195
Bipin Bihari Hati v. Amrita Lal, 9 C. L. J. 76; 3 Ind. Cas. 685 ... 365
Bir Chunder Manickya v. Rajmohun Goswami, 16 C. 449 ... 515
Biram Ali Sheikh v. Gopi Kanta Shaha, 1 C. W. N. 396; 24 C. 355 ... 700
Birbul Khatifa v. Emperor, 30 C. 97 at p. 100 ... 239
Birendra Kishore Manikya Bahadur v. Akram Ali, 13 Ind. Cas. 513 518,519,520
Birendra Kishore Manikya Bahadur v. Dilwar Ali, 13 Ind Cas. 517 ... 519
Birendra Kishore Manikya Bahadur v. Roshan Khan, 13 Ind. Cas. 518 ... 518
Biru Mahata v. Shyama Charan Khawas, 22 C. 483 ... 134
Bishen Chand v. Asmaida Koer, 6 A. 560; 11 I. A. 164 ... 894
Bishen Singh v. Paro, 19 P. R. 1905; 78 P. L. R. 1905 ... 670

B—concld.

Page.

Bisheswar v. Harbans, 6 C. L. J. 659; 3 M. L. T. 38 ... 122
Bishop Mellus v. The Vicar Apostolic of Malabar, 2 M. 295 ... 600
Bishun Churn v Jogendra Nath; 26 C. 114 654, 906
Bisram Mahton v. Sahib-un-nissa, 3 A. 333 ... 464
Bisu Haldar v. Probhat Chander, 6 C. L. J. 127; 11 C. W. N. 836; 6 Cr. L. J. 38 ... 1003
Bogha Singh v. Gurmukh Singh, 93 P. R. 1902 ... 647
Bonai v. The King-Emperor, 15 C. W. N. 461; 38 C. 408; 9 Ind. Cas. 555; 12 Cr. L. J. 97 ... 282
Booth v. Parke, Beaty 444 ... 27
Boulting v. Boulting, 33 L. J. Mat. 33; 10 Jur. (N. S.) 182; 9 L. T. 779; 12 W. R. 389; 3 Sw. & Tr. 329 ... 617
Bradshaw's Arbitration, (1842) 12 Q. B. 562; 76 R. R. 349; 17 L. J. Q. B. 362; 12 Jur. 998 ... 119
Brahmadeo Narayan v. Harjan Singh, 25 C. 778 497
Brajeshware v. Budhanudi, 6 C. 268; 7 C. L. R. 6 ... 122
Brij Bhukhan Das v Samiuddin Ahmad Khan, 25 A. 169 .. 473
Brij Indar Bahadur v. Ranee Jankee Koer, 5 I. A. 1; 1 C. L. R. 318 ... 692
Brindabun Chandra v. Sureswar Shaha, 10 C. L. J. 263; 3 Ind. Cas. 178 ... 433
Brinsmead v. Harrison, (1872) L. R. 7 C. P. 547; 41 L. J. C. P. 190; 27 L. T. 99; 20 W. R. 784 ... 849
Brinsmead v. Harrison, (1871) L. R. 6 C. P. 584; 40 L. J. C. P. 281; 21 L. T. 798; 19 W. R. 956 ... 849
Brojo Nath Pal v. Dasmony, 2 C. L. R. 589 ... 690
Brojonath Surma v. Iswar Chundra Dutt, 19 C. 482 ... 79
British South Africa Company v. The Companhia De Mozambique, (1893) L. R. A. C. 602; 6 R. I; 69 L. T. 604; 36 L. J. Q. B 70 ... 569
British Steam Navigation Co. v. Secretary of State for India, 8 Ind. Cas. 107; 12 C. L. J. 505; 15 C. W. N. 87; 38 C. 230 ... 470
Buccleuch, Duke of v. Metropolitan Board of Works, (1872) L. R. 5 H. L. 418; 5 Exch. 221; 41 L. J. Ex. 137; 27 L. T. 1 119, 522
Budree Das Mukin v. Chooni Lal Johwry, 33 C. 789; 10 C. W. N. 581 ... 232
Bukharia v. Jugal Kishore, 2 C. P. L. R. 6 ... 983
Buli v. Gianchand, (1897) Sind S. C. R. 1 ... 235
Bunarsee Doss v. Gholam Hossein, 13 M. I. A. 358; 13 W. R. (P. C.) 29 ... 257
Bunwari Jha v. Rumjee Thakur, 7 C. W. N. 11 at pp. 18, 19 ... 300
Bunwari Lal v. Daya Shankar, 13 C. W. N. 815; 1 Ind. Cas. 670 ... 466
Burbha Mandari v. Megh Nath, 2 C. L. J. 4 n. ... 122
Burnaby v. Baillie, 42 Ch. D. 282 at p. 290; 58 L. J. Ch. 842; 61 L. T. 634; 38 W. R. 125 ... 685
Buta Shah v. Kalu, 46 P. R. 1894 (F. B.) ... 540
Butler v. Manchester, Sheffield and Lincolnshire Railway Co., (1888) 21 Q. B. D 207 at p. 211; 57 L. J. Q. B. 564; 60 L. T. 89; 36 W. R. 726; 52 J. P. 611 ... 241
Buz-lul-Raheem v. Shams un-nissa, 11 M. I. A. 551; 8 W. R. (P. C.) 3. ... 439

C

Page.

Campbell, v. Campbell, 1 H. L. (Sc.) 182 at p. 199 ... 683
Carr v. London and North-Western Railway Company, 10 C. P. 307; 44 L. J. C. P. 109; 31 L. T. 785; 23 W. R. 747 ... 486
Caspersz v. Kedar Nath Sarbadhikari, 5 C. W. N. 858 ... 608
Caston v. Caston, 22 A. 270 ... 570
Chajmal Das v. Brij Bhukan, 17 A. 511; 22 I A. 199 ... 150
Chakrapani Asari v. Narasinga Rau, 19 M. 56 ... 904
Challa Papi Reddi v. Challa Koti Reddi, 7 M. H. C. R. 25 ... 872
Chamanbu Javji Mahomed Ali, v. Multan Chand Sita Ram, 20 B. 562 ... 502
Chamru Sao v. Tulsidin Singh, 17 C. P. L. R. 49 910
Chand Kaur v. Mela Ram, 8 P. R. 1897 ... 564
Chandara Kant Ghose, *In the matter of*, 3 C. W. N. 3. ... 98
Chandra v. Gojar Abai 14 B. 463 ... 10
Chandra Pradhan v. Gopi Mogun, 14 C. 385 ... 141
Chandradeo Singh v. Mata Prasad, 31 A. 176; 1 Ind. Cas. 479; 2 A. L. J. 263 5, 401
Chandramathi Ammal v. Narayanasami Iyer, 33 M. 241; 5 Ind. Cas. 23; 19 M. L. J. 760; 7 M. L. T. 369 ... 789
Channu Lal v. Asharfi Lal, 4 A. L. J. 535 ... 44
Chaudhri Mehdi Hasan v. Muhammad Hasan, 28 A. 439; 10 C. W. N. 706; 3 A. L. J. 405; 8 Bom. L. R. 387; 9 O. C. 106; 1 M. L. T. 106; 4 C. L. J. 295 ... 989
Chlikani Venkatagopala Rayon Garu v. Narayanasami Reddi, 27 M. 210 ... 176
Chhitar Mal v. Jagan Nath Prasad, 29 A. 213; A. W. N. (1907) 125; 4 A. L. J. 24 ... 677
Chingachamvital Sankarannair v. Chingachamvital Gopalamenon, 30 M. 18; 1 M. L. T. 412 408
Chinku v. Utamchand, 2 S. L. R. 59 Civil 265
Chinnammal v. Madarsa Rowther, 27 M. 480 ... 903
Chinnammal v. Varadrayulu, 15 M. 307 ... 948
Chinnasami Pillai v. Karuppa Udayan, 21 M. 234 903
Chinnayya Asari v. Mooniappa Mudali, 7 M. L. T. 264; 5 Ind. Cas. 41 ... 322
Chinto Joshi v. Krishnaji Narayan, 3 B. 214 ... 852
Chiragh Bibi v. Hassan, 19 P. R. 1906; 70 P. L. R. 1906 296, 528
Chokhey Singh v. Jote Singh, 6 A. L. J. 100; 11 Bom. L. R. 69; 13 C. W. N. 274; 9 C. L. J. 151; 5 M. L. T. 167; 31 A. 73; 19 M. L. J. 123; 12 O. C. 288; 1 Ind. Cas. 166 ... 438
Cholawadi Kotiah v. Polori Alamelamah, 31 M. 71; 3 M. L. T. 328; 18 M. L. J. 46 ... 160
Chota Sadoo Peadah v. Bhoobun Chuckerbutty, 9 W. R. 3 Cr. ... 829
Chote Lal v. Ramadhin, 13 O. C. 70; 5 Ind. Cas. 945 ... 536
Chowakaran Makki v. Vayyaprath Kunikutti Ali, 29 M. 173 .. 552
Chundi Charan Mandal v. Banke Behary Lal Mandal, 23 C. 449; 3 C. W. N. 283 ... 367
Churaman Sahu v. Gopi Sahu, 37 C. 1; 13 C. W. N. 994; 10 C. L. J. 545; 1 Ind. Cas. 945 ... 478
Churchill v. Hunt, (1819) 1 Chit. 480; 2 B. & A. 685; 22 R. R. 807 ... 508
Churchward v. Ford, 2 H. and N. 446; 115 R. R. 631; 26 L. J. Ex. 354; 5 W. R. 831 ... 31

C—concld.

Page.

Clancarty v. Latouche, (1810) 1 Ball and B. 420 ... 24
Clarapede v. Commercial Union, (1884) 32 W. R. 151 at p. 162 ... 130
Clark v. Adie, 2 A. C. 423; 46 L. J. Ch. 598; 37 L. T. 1; 25 W. R. 45 ... 512
Collector of Madura v. Mutu Ramalinga Sathupathy, 12 M. I. A. 397; 10 W. R. (P. C.) 17 ... 15
Collector of Ratnagiri v. Vyankatrav, 8 B. H. C. R. A. C. J. 1 (1871) ... 972
Collen v. Wright, 8 El. & Bl. 647; 27 L. J. Q. B. 215; 4 Jur. (N. S.) 357; 6 W. R. 123 ... 95
Cook v. Collingridge, Jocob 697; 23 R. R. 155, 767: 1 L. J. Ch. (o. s.) 74 ... 25
Cook v. Sprigg, 68 L. J. (P. C.) 144; (1899) A. C. 572; 81 L. T. 281; 15 T. L. R. 515 ... 968
Cox v. Lee, L. R. 4 Ex. 284; 21 L. T. 178; 38 L. J. Ex. 219 ... 507
Cracknol v. Janson, (1879) 11 Ch. D. 1; 40 L. T. 640; 27 W. R. 851; 48 L. J. Ch. 168 ... 656
Craven v. Craven, 7 Taunt 644; 1 Moor, 403; 18 R. R. 623 ... 165
Crop v. Tilney, 3 Salk. 226 ... 507

D

Dadaji Bhikaji v Rukmabai, 10 B. 301 ... 611
Dagdu v. Totaram, 33 B. 658; 11 Bom. L. R. 1074; 4 Ind. Cas. 242 ... 903
Daji Vithal v. Moreshwar Venkatesh, 1 N. L. R. 112 ... 910
Dalmir Puri v. Khodadad Khan, 36 C. 923; 14 C. W. N. 178; 4 Ind. Cas. 415; 10 Cr. L. J. 579 ... 1001
Dammar Singh v. Pirbhu Singh, 29 A. 290; 4 A. L. J. 155; A. W. N. (1907) 70 ... 415
Damodhar Gordhan v. Deo Ram Kanji, 1 B. 367; 25 W. R. 261; 3 I. A. 102 ... 922
Damoodur Misser v. Senabutty Misrain, 8 C. 537 ... 480
Dandekar v. Dandekar, 6 B. 663 ... 120
Darbo v. Kesho Rai, 2 A. 356 ... 154
Dasimoni Dasi v. Srinath Ghose, 3 B. L. R. App. 11 ... 120
Dattu v. Kasai, 8 B. 535 ... 793
Daulat Singh v. Raghubir Singh, A. W. N. (1894) 141 ... 20
Dayaram Jagjiwan v. Gordhan Das, 31 B. 73; 8 Bom. L. R. 885 ... 903
Dayaram v. Shaligram, 16 C. P. L. R. 135 ... 910
Daya Ram v. Sohel Singh, 110 P. R. 1906; 31 P. L. R. 1907 ... 713
De Thoren v. Attorney-General, (1876) 1 A. C. 686 ... 683
Debendar Kumar Manda v. Rup Lal Dass, 12 C. 546 ... 92
Debendra v. Khirode, 5 Ind. Cas. 272 ... 186
Debi Prasad v. Jamna Das, 23 A. 56 ... 606
Debi Prasad Pandit v. Mohammad Unis Arabi, 14 O. C. 33; 9 Ind Cas. 745 ... 135
Debi Singh v. Jia Ram, 25 A. 214 ... 953
Defholts v. Peters, 14 C. 631 ... 564
Delver v. Barnes, (1807) 1 Taunt 48; 9 R. R. 707 ... 119

D—contd.

Page.

Deoki Nandan v. Bansi Singh, 14 C. L. J. 35; 16 C. W. N. 124; 10 Ind. Cas. 371 ... 341
Deparu Kalappa Reddi v. Akkhappa Narayanim, 8 M. L. T. 297; 2 M. W. N. 75; 8 Ind. Cas. 392 81
Deputy Commissioner, Gonda v. Bhagwan, 12 O. C. 124; 2 Ind. Cas. 297 ... 810
Devalapallia Kameswara Sastry v. Viracharlu, (1910) 1 M. W. N. 649; 8 Ind. Cas. 195; 20 M. L. J. 855; 9 M. L. T. 26; 34 M. 422 ... 479
Devi Chand v. Gurcharn Singh, 127 P. L. R. 1906 ... 798
Devi Dial v. Utam Devi, 37 P. R. 1907; 120 P. L. R. 1907 ... 485
Devi Ditta v. Saudagar Singh, 65 P. R. 1900 ... 58
Dhanjibhoy Raghoo v. Meherally Moraj, 9 Bom. L. R. 901 ... 233
Dhanna Singh v. Gurbakhsh Singh, 91 P. R. 1909 (F. B.); 4 Ind. Cas 337; 161 P. W. R. 1909; 148 P. L. R. 1909 ... 668
Dharam Raj Kunwar v. Sumeram Singh, 21 A. 386 ... 556
Dharma v. Balmakund, 18 A. 458 ... 703
Dhenai Sardar v. Tarak Nath Chowdhuri, 12 C. L. J. 53; 5 Ind. Cas. 525 ... 379
Dhunpat Singh v. Gooman Singh, 11 M. I. A. 433; 9 W. R. (P. C.) 3 ... 608
Dhurm Das Pandey v. Shama Soondri Debiah, 3 M. I. A. 229; 6 W. R. 43 ... 485
Dijendra Narain v. Purnendu Narain, 11 C. L. J. 189; 5 Ind. Cas. 171 ... 377
Dina Nath Roy v. Krishna Bijoy Saha, 9 C. W. N. 379 ... 942
Dinendra Narain Roy v. Tituram Mukerjee, 30 C. 801 ... 608
Dinendra Nath Sannial v. Ram Coomar, 8 I. A. 65; 7 C. 107; 10 C. L. R. 281 ... 702
Dip Narain Singh v. Hira Singh, 19 A. 527 ... 940
Diwali v. Apaji Ganesh, 10 B. 342 ... 153
Docker v. Somes, 2 Myl. and K. 655; 3 L. J. Ch. 200 ... 27
Doe v. Stone, 3 C. B. 176; 15 L. J. C. P. 234; 10 Jur. 480. 71 R R. 311 ... 702
Doe v. Vickers, 4 Ad. & E. 782; 6 N. & M. 437; 6 L. J. K. B. 266 ... 702
Doed Devine v. Wilson, 10 Moore P. C. 502 at p. 531 (1855) ... 580
Doedem Foster v. The Earl of Derby, (1834) 1 Ad. & E. 783 at p. 790; 3 N. & M. 782; 3 L. J. (N. S.) K. B. 191; 40 R. R. 423 ... 850
Doolubdass v. Ramloll, 5 M. I A. 109 at p. 126 967
Doorga Pershad v. Kundan Koowar, 13 B. L. R. 235; 21 W. R. 214; 1 I. A. 551 53, 230
Doorganath v. Ram Chandara, 4 I. A. 52; 2 C. 341 ... 86
Dorab Ally Khan v. Abdaol Azeez, 5 I. A. 116; 2 C. L. R. 539; 3 C. 806 ... 806
Doraisami Tewar v. Lakshmanan Chetty, 14 M. L. J. 285 ... 203
Dowlat Koer v. Rampal Dass, 25 C. 459; 25 I. A. 21; 2 C. W. N. 177 ... 589
Dowlat Koer v. Siva Pershad Pandit, 10 Ind. Cas. 615; 12 Cr. L. J. 319; 15 C. L. J. 267 1001
Dowlat Ram v. Emperor, 32 C. 431; 2 Cr. L. J. 326 ... 982
Douglas Peerage, *In re*, 2 Hargrave Col. Jur. 402 ... 685

D—concld.

Page.

Drake v. Mitchell, 3 East 251; 7 R. R. 449 ... 145
Duff v. Fisher, 8 B. L. R. App. 10 ... 247
Dula Singh v. Wazir Singh, 69 P. R. 1887 ... 180
Dulal v. Ram Narain, 31 C. 1057 ... 544
Dulhin Golab Koer v. Balla Kurmi, 25 C. 744; 2 C. W. N. 580 ... 608
Dulhin Mothura Koer v. Bansidhar Singh, 10 Ind. Cas. 880; 15 C. L. J. 83 ... 368
Dunne v. Nobo Krishna Mookerjee, 17 C. 144 ... 608
Durga Charan v Dookhi Ram, 26 C. 925 ... 73
Durga Chowdhrani v. Jawahir Singh, 18 C. 23; 17 I. A. 122 ... 687
Durga Dass Hazra v. Samash Akon, 4 C. W. N. 606 ... 452
Durga Das Rukhil v. Queen-Empress, 27 C. 820 98
Durga Mohan Das v. Rakhal Chandra Roy, 5 C. W. N. 801 ... 608
Durga Prasad Banerjee v. Lalit Mohan Singh Roy, 25 C. 86 ... 205
Durga Prashad v. Hazari Singh, 8 A. L. J. 1025; 33 A. 799; 11 Ind. Cas. 116 ... 976
Durgozi Row v. Fakeer Sahib, 30 M. 197; 1 M. L. T. 433; 17 M. L. J. 9 ... 615
Dwarka Nath Sen v. Kishori Lal Goswami, 11 C. L. J. 426; 14 C. W. N. 703; 6 Ind. Cas. 549 ... 658
Dwarka Nath v. Tarini Sankar, 11 C. W. N. 513; 5 C. L. J. 294; 34 C. 199 ... 193
Dwarka Nath Roy v. Chand Aich, 26 C. 428; 3 C. W. N. 266 ... 42
Dwarka Prasad Raghubir v. Jamna Das Gordhan Das, 13 Bom. L. R. 133; 9 Ind. Cas. 948 ... 208

E

Eads v. Williams, 24 L. J. Ch. 531; 4 De G. M. & G. 674; 1 Jur. (N. S.) 193; 5 W. R. 98 ... 166
Easin Sarkar v. Barada Kishore, 11 C. L. J. 43; 5 Ind. Cas. 186 ... 934
East India Company v. Odit Churn Pal, 5 M. I. A. 43 at p. 69 ... 91
Edalji Shaporji v. Talsidas Sunderdas, 2 Bom. H. C. R. 270 at p. 275 ... 236
Ekabbar Sheikh v. Hara Bewah, 15 C. W. N. 335; 8 Ind. Cas. 660; 13 C. L. J. 1 42,688
Elson v. Rolfe, (1805) 2 Smith 459 ... 163
Emperor v. Bakaullah Mallik, 31 C. 411; 8 C. W. N. 367; 1 Cr. L. J. 140 ... 982
——— v. Bheleka Aham, 29 C. 498 ... 918
——— v. Bisheshar, 32 A. 635; 7 A. L. J. 749; 7 Ind. Cas. 291; 11 Cr. L. J. 447 ... 223
——— v. Budh Singh, 2 A. 101 ... 219
——— v. Ganga Prasad, 29 A. 685; A. W. N. (1907) 235; 4 A. L. J. 605; 6 Cr. L. J. 197 ... 217
——— v. Hari Singh, 28 A. 100; A. W. N. (1905) 203; 2 Cr. L. J. 520 ... 994
——— v. Harka, A. W. N. (1906) 193; 4 Cr. L. J. 88 ... 917
——— v. Jethalal Harlochand, 29 B. 449; 7 Bom. L. R. 527; 2 Cr. L. J. 480 ... 396
——— v. Kampu Kuki, 11 C. W. N. 554 at p. 556; 6 Cr. L. J. 86 ... 745
——— v. Katay Kisan, 17 C. P. L. R. 113 ... 918
——— v. Krishnarao, 4 Bom. L. R. 53 ... 216

E—concld.

Page.

Emperor v. Mohan Lal, 27 A. 25 ... 222
——— v. Nageshwar, 28 A. 404; 3 Cr. L. J. 322; A. W. N. (1906) 61 ... 282
——— v. Noni Gopal Gupta, 15 C. W. N 593; 38 C. 559; 10 Ind. Cas. 582; 12 Cr. L J. 286 ... 281
——— v. Santosh Chunder Dass, 13 C. W. N. 861; 9 C. L. J. 663; 2 Ind. Cas. 681; 10 Cr. L. J. 125 ... 722
——— v. Serhmal, A. W. N. (1908) 102; 5 A. L J. 247; 3 M. L. T. 377; 7 Cr. L. J. 389; 30 A. 243 ... 1008
——— v. Shekih Ariff, 35 C. 437; 12 C. W. N. 534; 7 Cr. L. J. 367 ... 821
——— v. Tirupura Sankar Sircar, 37 C. 618; 14 C. W. N. 767; 6 Ind. Cas. 476; 11 Cr. L. J. 360 ... 393
——— v. Tula Khan, 30 A. 334; A. W. N. (1908) 133; 5 A. L. J. 318; 7 Cr L. J. 427; 4 M. L. T. 41 ... 1006
Empress v. Asghar Ali; 2 A. 260 ... 275
——— v. Badhawa, 64 P. R. 1887 Cr. ... 782
——— v. Indarman, 3 A. 837 at p. 843 ... 994
——— v. Kure, (1886) A. W. N. 65 at p. 66 ... 281
——— v. Riasat Ali, 7 C. 352; 8 C. L. R. 572 ... 100
——— v. Sahae Rae, 3 C. 623; 2 C. L. R. 304 841
Eranjoli Illath Vishnu v. Eranjoli Illath Krishnan, 7 M. 3 ... 485
Ethel Georgina Ker v. Clara B. Ruxton, 4 C. L. J. 510 ... 442
Evans v. Coventry, 8 De G. M. and G. 835; 26 L. J. Ch. 400; 3 Jur. (N. S.) 1225; 5 W. R. 436 ... 26
Evans v. Evans, 1 Hagg Con. Rep. 37 .. 612
Exton v. Scott, (1833) 6 Simon 31; 38 R. R. 72 ... 656

F

Faiz Ahmad v. Badar Din, 11 Ind. Cas. 315; 137 P. W. R. 1911; 50 P. R. 1911; 210 P. L. R. 1911 ... 855
Faiz-ud-din v. Wajib-un-nissa, 71 P. R. 1892 ... 714
Fazaldad Khan v. Sawan Singh, 37 P. R. 1908; 30 P. W. R. 1908; 39 P. L. R. 1908 ... 563
Farman Ali v. Iman Din, 77 P. R. 1904 ... 348
Farr v. Price, 1 East 55; 5 R. R. 515 ... 139
Fateh Bibi v. Allah Bakhsh, 84 P. R. 1900; P. L. R. 1900 p. 536 ... 484
Fatteh Singh v. Kallu, 107 P. R. 1888 ... 448
Faujdar v. Bhamma, 91 P. R. 1883 ... 412
Ferens v. O'Brien, 52 L. J. M C. 70; 11 Q. B. D. 21; 31 W. R. 643; 5 Cox. C. C. 332; 47 J. P. 472 ... 821
Ficholtz v. Bannister, 17 C. B. (N S.) 708; 34 L. J. C. P. 105; 11 Jur. (N. S.) 15; 12 L. T. 76; 13 W. R. 96 ... 804
Fischer v. Secretary of State, 26 I. A. 16; 22 M. 270; 3 C. W N. 161 ... 362
Foster v. Hodgson, 19 Ves. 183 ... 25
Framji Besamji Dustur v. Hormasji Pestanji Framji, 2 B. 258 ... 805
Fuller v. Fenwick, (1846) 3 C. B. 705; 16 L. J. C. P. 78; 10 Jur. 1057 ... 119
Futteh Singh v. Gango, 4 W. R. 4 ... 166
Futtehma Begum v. Mohamed Ausur, 9 C. 309 ... 630

G

Page.

Gadadhar Panda v. Shyam Churn Naik, 12 C. W. N. 485 ... 65
Gajadhar Dasaundi v. Gokul Dasaundhi, Select Decision No. 2 of 1909 ... 644
Gajadhar Prasad v. Lachmin, 5 O. C. 384 ... 985
Gajapathi Nilamani v. Gajapathi Radhamani, 1 M. 290; 1 C. L. R. 97; 4 I. A. 212 ... 321
Galvin v. Thomson, (1836) 13 Maine 367 ... 120
Gamu v. Karim Khan, 33 P. R. 1908; 83 P. W. R. 1908; 171 P. L. R. 1908 ... 812
Ganapa Sanna v. Subbi Sanna, 32 B. 577; 10 Bom. L. R. 927 ... 484
Ganapathy v. Chenga, 29 M. 312 ... 65
Ganesh Das-Pana Lal, *In re*, 32 B. 198; 10 Bom. L. R. 77 ... 570
Ganeshi Lal v. Ajodhia Prasad, 28 A. 345; A. W. N. (1906) 39; 3 A. L. J. 85 ... 644
Ganga Ghulam v. Tapeshri Prasad; 26 A. 606 ... 489
Ganga Pershad Sahu v. The Land Mortgage Bank, 21 C. 366; 21 I. A. 1 ... 940
Ganga Ram v. Abdul Rahman, 28 P. R. 1907 ... 720
Ganga Ram v. Mihin Lal, 28 A. 416; 3 A. L. J. 187; A. W. N. (1906) 73 ... 415
Gangadas Bhattar v. Jogendranath Mita, 5 C. L. J. 315; 11 C. W. N. 403 ... 300
Gannu Singh v. Bhagwati Koeri; 3 Ind. Cas. 234 207
Gaya Din v. Dulari, 6 A. L. J. 693; 2 Ind. Cas. 839 ... 956
Genda Puri v. Chatar Puri, 9 A. 1; 13 I. A. 100 ... 226
Ghasita v. Sultan, 93 P. R. 1911; 11 Ind. Cas. 445; 228 P. L. R. 1911; 151 P. W. R. 1911 ... 720
Ghauhra v. Harbhaj, 16 P. R. 1905; 41 P. L. R. 1905 ... 29
Ghazanfar Ali Khan v. Kaniz Fatima, 13 O. C. 170; 6 Ind. Cas. 674; 14 C. W N. 690; 7 A. L. J. 579; 11 C. L. J. 649; 12 Bom. L. R. 447; 8 M. L. T. 59; 1910 M. W. N. 312; 20 M. L. J. 579; 32 A. 345 ... 897
Ghela v. Haider, 59 P. R. 1906; 68 P. L. R. 1907 ... 550
Ghulam Bhikh v. Masania, 22 P. R. 1893 ... 412
Ghulam Ghaus v. Nabi Bakhsh, 24 P. R. 1903; 35 P. L. R. 1903 ... 557
Ghulam Kadir Khan v. Mustakim Khan, 18 A. 209 ... 198
Ghulam Khan v. Mahommed Hassan, 29 C. 167 ... 235
Gibbons, *In the matter of*, 14 C. 42 ... 777
Girdhari Ram v. Faizullah Khan, 48 P. R. 1908; 98 P. W. R. 1908; 166 P L. R. 1908 28,316
Girija Sankar Roy v. Binode Sheikh, 5 C. L. J. 222; 5 Cr. L. J. 188 ... 1008
Girish Chandra Chowdhry v. Kedar Chandra Roy, 27 C. 473 ... 337
Girish Chunder Ghose v. Queen-Empress, 20 C. 857 ... 846
Gnanasambanda Pandara Sannadhi v. Velu Pandaram, 23 M. 271; 27 I. A. 69 ... 603
Gobherdhone Pramanick v. Iswar Chunder, 5 C. W. N. 44 ... 927
Gobind Koomar Chowdhry v. Huro Gopal Nag, 11 W. R. 537; 3 B. L. R. Ap. 72 ... 464
Gobinda Kumar Roy v. Debendra Kumar Roy Chowdhury, 12 C. W. N. 98 ... 426

G—contd.

Page.

Gobind Lal Roy v. Hemendra Narain Roy Chowdhury, 17 C. 686 ... 382
Gebind Lal Roy v. Ramjanam Misser, 21 C. 70; 20 I. A. 165 ... 403
Gokal Chand v. Rahman, 59 P. R. 1907 560,575
Gokal Das Gopal Das v. Puran Mal Premsukhdas, 10 C. 1035; 11 I. A. 126 ... 940
Gokibai v. Lakhmi Das Khimji, 14 B. 490 ... 137
Golab Chand v. Bahuria Rammurat Koer, 10 Ind. Cas. 268; 13 C. L. J. 432 ... 368
Golab Koer v. Badshah Bahadur, 13 C. W. N. 1197; 2 Ind Cas. 129 ... 81
Golab Sao v. Madho Lal, 2 C. L. J. 384; 9 C. W. N. 956 171,362
Goodson v. Richardson, L. R. 9 Ch. 221; 43 L. J. Ch. 790; 30 L. T. 142; 22 W. R. 337 ... 862
Gooper v. Salde, 6 H. L. Cas. 746 (1858); 27 L. J. Q. B. 449; 4 Jur. (N. s.) 791; 6 W. R. 461 ... 580
Gopal v. Govind, 13 C. P. L. R. 113 ... 984
Gopal v. Pirthi Singh, 24 A. 429; 29 I. A. 118; 4 Bom. L. R. 827; 6 C. W. N. 889 ... 182
Gopal Das v. Gopi Nath, 12 C. L. R. 38 ... 43
Gopal Das v. Hari Singh, 88 P. R. 1909; 3 Ind. Cas. 619; 137 P. W. R. 1909 ... 622
Gopal Jayachand v. Hargovind, 5 B. H. C. R. A. C. J. 83 ... 369
Gopal Lall v. Tilluck Chand, 10 M. I A. 183 at p. 191; 3 W. R. (P. C.) 1 ... 608
Gopal Singh v. Ghulam Husain, A. W. N. (1894) 58 ... 955
Gopaldai v. Chunni Lal, 8 A. 67 ... 908
Gopessur Dutt, *In the goods of*, 16 C. W. N. 265; 13 Ind. Cas. 576 ... 773
Gossami Sri Girdhariji v. Raman Lalji Gosami, 17 C. 3; 16 I. A. 137 ... 603
Gour Chunder Bhuttacharjee v. Sodoy Chunder, 17 W. R. 30 ... 166
Gour Sunder v. Hem Chunder, 16 C. 355 at p. 360 ... 702
Gouree Sunkar Tribedee v. Aman Ali Chowdury, 21 W. R. 309 ... 82
Govind v. Vithal, 20 B. 753 ... 630
Govind Prasad v. Suraj Bakhsh, Selected Decision No. 4 of 1903 ... 980
Govinda Chundra v. Ayinuddin, 11 C. L. R. 281 ... 608
Grazebrook v. Davis, 5 B. & C. 534; 4 L. J. (o. s.) K. B. 321; 8 D. & R. 295 ... 165
Great Northern Railway Company v. Harrison, (1854) 23 L. J. Exch. 308 at p. 310; 10 Ex. 376; 2 C. L. R. 1133; 2 W. R. 626 ... 241
Greedharee Doss v. Nundo Kessore Das, 11 M. I. A. 405 at p. 428; 8 W. R. 25 (P. C.) ... 226
Greesh Chunder v. Pran Kishen, 7 W. R. 157 ... 380
Gudri Koer v. Bhubneswari, 19 C. 19 ... 150
Gujar v. Sham Das, 107 P. R. 1887 ... 180
Gul Ahmed v. Sahibzada, 45 P. R. 1881 ... 412
Gulam Muhammad v. Muhammad Amin, 86 P. R. 1882 ... 412
Gulbai and Lilbai *Re*, 32 B. 50; 9 Bom. L. R. 923 ... 17
Gunga Gobind Gooptoo v. Makhun Lal Hattee, 9 W. R. 362 ... 369

G—concld.

Page.

Gungadhar Shikdar v. Ayinuddin Shah Biswas, 8 C. 960 ... 608
Gur Sobhraj v. Gur Chandiram, (1890) 1 S. C. Sel D. 353 ... 226
Gurdas Singh v. Chandrikah Singh and Chandraikah Singh v. Rashbehary Singh, 36 C. 193; 5 C. L. J. 611; 1 Ind. Cas. 913 ... 254
Gurdeo v. Chandrikah Singh, 5 C. L. J. 611; 36 C. 193, 1 Ind. Cas. 913 362, 544
Gurditta v Jai Singh, 72 P. R 1907; 108 P. L. R. 1908 ... 713
Gurudas Pyne v. Ram Narain Sahu, 10 C. 860; 11 I. A. 59 ... 936
Gurusami Sastrial v. Ganapathia Pillai, 5 M. 337 ... 640
Guruvajamma v. Venkatakrishnama Chetti, 24 M. 34 ... 903
Guruvayya Gonda v. Dattatraya Anant, 28 B. 11 ... 199
Gyan Parkash v. Hazura Singh, 3 P. R. 1899 ... 62

H

Habibur Rahman v. Munshi Khodabux, 11 C. W. N. 195; 5 C. L. J. 219; 6 Cr. L. J. 29 ... 1008
Hafizuddin Choudhri v. Abdul Aziz, 20 C. 755... 79
Haidar v. Iswar Das, 22 P. R. 1906; 115 P. L. R. 1906 ... 169
Haidri Begum v. Nathu, 17 A. 45 ... 324
Hameedoolah v. Mohamed Asghur Hossein, 6 C. 499; 7 C. L. R. 471 ... 249
Hamijuddi Mondal v. Damodar Ghosh, 10 C. W. N. 1026; 4 Cr. L. J. 168 ... 1008
Hamira v. Ram Singh, 134 P. R. 1907; 74 P. L. R. 1908; 85 P. W. R. 1907 444, 713
Hanmantappa v. Jivabai, 24 B. 547 ... 479
Hanooman Persaud Panday v. Musammat Babooee Munraj Koonwaree, 6 M. I. A. 393 at p. 419; 18 W. R. 81 14, 86, 685, 894, 947
Hanuman Pandat v. Jota Kunwar, A. W. N. (1908) 207 ... 633
Hanuman Prasad v. Muhammad Ishaq, 28 A. 137; 2 A. L. J. 615; A. W. N. (1905) 229 ... 415
Hanuman Rai v. Udit Narain Rai, 7 A. 917 ... 708
Har Charan Mukerjee v. King-Emperor, 1 C. L. J. 161; 2 Cr. L. J. 110; 32 C. 367; 9 C. W. N. 346 ... 112
Har Lal v. Sundar, 11 A. 399 ... 438
Hara Chandra Bairagi v. Bipin Behary Dass, 6 Ind. Cas. 860; 13 C. L. J. 38 ... 42
Hara Coomar Sircar v. Doorga Moni, 21 C. 195 172
Haradhan Dutt v. Radhanath Shaha, 10 W. R. 398; 2 B. L. R. (s N.) 14 ... 166
Harakrishna Mitter v. Ram Gopal Mitter, 6 Ind. Cas. 170; 14 C. W. N. 759 ... 166
Hardas Singh v. Buta, 94 P. L. R. 1903 ... 181
Harek Chand Babu v. Bejoy Chund Mahtab, 9 C. W. N. 795; 2 C. L. J. 87 ... 10
Hari Das v. Panchkowri, 9 Ind. Cas. 615 ... 147
Hari Dass Bairagi v. Udoy Chandra Das, 8 C. L. J. 261; 12 C. W. N. 1086 ... 437
Hari Lal Sinha v. Bengal-Nagpur Railway Company, 13 C. L J. 150; 15 C. W. N. 195, 9 Ind. Cas 331 ... 529
Hari Mohun v. Naimuddin, 20 C. 41 ... 380

H—contd.

Page.

Hari Narain Ghose v. Administrator-General, 3 C. L. R. 446 .. 934
Hari Pandurang v. The Secretary of State for India, 27 B. 424 .. 856
Hari Ram v. Kashi Ram, 122 P. R. 1908 ... 569
Hari Sanker Dutt v. Kali Kumar Patra, 32 C. 734; 9 C. W. N. 690 ... 903
Hari Singh v Nika Singh, 42 P. R. 1907 ... 408
Hari Sundari v. Shasi bala, 1 C. W. N. 195 ... 908
Harish Chandra Chatterjee v. Bhoba Tarini Debi, 8 C. W. N. 321 ... 652
Harkhoo Singh v Bansidhar Singh, 25 C. 876; 2 C. W. N. 360 ... 960
Harnam Chander v. Muhammad Yar Khan, 27 A. 485; 2 A. L. J. 169; A. W. N. (1905) 63 ... 134
Harpal Singh v. Lekhraj Kunwar, 30 A. 406; 5 A. L. J. 405; A. W. N. (1908) 165 ... 269
Harrison v. Delhi and London Bank, 4 A. 437 ... 25
Harvey v. Shelton, 7 Beav. 455 at p. 462; 13 L. J. Ch. 466 ... 164
Haryallu Mall v. Nathu Ram, 51 P. R. 1907; 38 P. L. R. 1907 ... 169
Hawkesley v. Bradshaw, (1880) 5 Q. B. D. 302; 49 L. J. Q B. 333; 42 L. T. 285; 28 W. R. 557; 44 J. P. 473 ... 130
Haza Ram v. Badri Ram, 1 C W. N. 279 ... 135
Hazari Lal v. Tilok Chand, 136 P. R. 1898 ... 46
Hellier v. Silcox, 19 L. J. Q B. 295; 14 Jur. 573 ... 31
Higgins v. Willes, (1828) 3 M. & R. 382 ... 163
Himat Ram v. Khushal Jethi Ram, 18 B. 98 ... 564
Hingu Miya v. Heramba Chandra Chakravarti, 13 C. L. J. 139; 8 Ind. Cas. 81 ... 680
Hira v Karam Kaur, 23 P. R. 1907 ... 181
Hira v. Wazira 9 P. R. 1892, Rev. ... 18
Hira Singh v. Bhana, 9 P. R 1894 ... 855
Hira Singh v. Jiwan Singh, 14 P. R. 1880, Rev. ... 18
Hiramony Biswas v. Musa Khan, 7 Ind. Cas. 625 ... 65
Hirdei v. Parag Tewari, 14 O. C. 144; 11 Ind. Cas. 527 ... 615
Hodson v. Walker (1872 L. R. 7 Ex. 55; 41 L. J. Ex. 51; 25 C. T. 937; 20 W. R. 489 ... 850
Hood Barrs v. Cathcart, (1894) 3 Ch. 376 at p. 380; 63 L. J. Ch 793 ... 852
Hood Barrs v Heriot, (1897) A. C. 177; 66 L. J. Q. B 356; 76 L. T. 299; 45 W. R. 507 ... 852
Hopcraft v. Hickman, (1824) 2 S. & S. 130; 3 L. J. Ch. (o. s.) 43 ... 163
Hopkinson v. Rolt, (1861) 9 H. L. C. 514; 34 L. J. Ch. 468; 7 Jur. (N. S) 1209; 5 L. T. 90; 9 W. R. 900 ... 656
Hopper, *In re*, 2 Q. B. 367 at p. 376; 36 L. J. Q. B. 97; 8 B. & S. 100; 15 L. T. 566; 15 W. R. 443 ... 166
Horrocks v. Bigby, 9 Ch. D. 180; 47 L. J. Ch. 800; 38 L. T. 782; 26 W. R 714 ... 880
Howard's case, (1700) 2 Salk 625; 1 Ld. Raymond 480 ... 901
Huddersfield Banking Company, Limited v. Henry Lister and Son, Limited, (1895) 2 Ch. 273; 64 L. J. Ch. 523; 12 R 331; 72 L. T. 703; 43 W. R. 567 ... 80
Hughes v Howard, 25 Beav. 575; 53 Eng Rep. 756 .. 702

H—concld.

Page.

Hukam Singh v. Raghubir Saran, 27 A. 700 ... 564
Hulodhur Sen v. Gooroodass Roy, 20 W. R. 126 ... 694
Hurro Nath Rai Chowdhuri v. Randhir Singh, 18 C 311; 18 I. A. 1. ... 6
Husain Ali v. Hafizali, 3. A. 600 ... 143
Husain Khan v. Nateri Srinivasa, 6 M. H. C. R. 356 ... 972
Huseni Begam v. Muhammad Rustam Ali Khan, 29 A. 222; 4 A. L. J. 60; A. W. N. (1907) 27 ... 613
Husrutoollah v. Aboo Mahamed, 6 W. R. 39 ... 381
Hutchson v. Smith, 5 Ir. Eq. 117 ... 26
Hyde Park Place Charity, *In re*, (1911) 1 Ch. 678 at p. 685; 80 L. J. Ch. 593 ... 232

I

Imam Ali v. Baijnath, 33 C. 613; 10 C. W. N. 551; 3 C. L. J. 576 ... 199
Imam Bakhsh v. Karim Shah, 16 P. R. 1895 ... 73
Imdad Husain v. Aziz-un-nissa, 23 C. 483; 23 I. A. 8 ... 989
Imperator v. Durga Bahirav Tiwari, C. R. No. 33 of 1904 ... 1006
Imperator v. Jaro, 5 S. L. R. 54; 12 Ind. Cas. 646 ... 221
Indu Meah v. Dar Baksh Bhuiyan, 14 C. L. J. 42; 15 C. W. N. 798; 10 Ind Cas. 275 ... 380
Intizam Begam v. Waziran, 47 P. R. 1899 ... 73
Ishan Chander v. Shamacharan Dutt, 10 C. 41; 12 C. L. R. 414 ... 33
Ishan Chandra Mitter v. Raja Ram Ranjan Chakrabutty, 2 C. L. J. 125 197,515
Ishan Chunder Sirkar v. Beni Madhab Sirkar, 24 C. 62; 1 C. W. N. 36 ... 487
Ishar Kuar v. Raja Singh, 9 Ind. Cas. 608; 29 P. R. 1911; 94 P. L. R. 1911; 124 P. W. R. 1911... 177
Ishri Prasad v. Baij Nath, 28 A. 707; A. W. N. (1906) 195; 3 A. L. J. 373 ... 534
Ishwar Das v. Duni Chand, 27 P. R. 1907 ... 169
Ishwar Narain v. Janki, 15 A. 132 ... 633
Isle of Wight Railway Co. v. Tahourdin, 25 Ch. D. 320; 53 L J. Ch. 353; 50 L. T. 132; 32 W. R. 297 ... 870
Ismail Mussajee Mookerdum v. Hafiz Boo, 10 C. W. N. 570; 3 A. L. J. 353; 3 C. L. J. 484; 8 Bom. L. R. 279; 16 M. L. J. 166; 1 M. L. T. 137; 33 C. 773 ... 450
Isri Dut v. Hansbutti Koerain, 10 I. A. 150; 10 C. 324; 13 C. L. R. 418 ... 692
Isuri Prasad Singh v. Umrao Sing, 22 A. 234 ... 217
Iswar Chunder Santra v. Satish Chunder Giri, 30 C. 207 ... 630

J

J'Anson v. Sturat, (1787) 1 T. R. 748; 1 R. R. 392 ... 507
Jacobs v. Benson, 63 Am. Dec. 609; 39 Maine 132 ... 95
Jaddo Kuer v. Sheo Shankar, 7 A. L. J. 945; 7 Ind. Cas. 902 ... 198

J—contd

Page.

Jadow v. Chhagon, 5 B. 306 ... 414
Jadunadan Prasad v. Brij Bhukan, 5 O. C. 70 ... 980
Jadunandan Prasad Singh v. Koer Kallyan Singh, 15 C. L. J. 61; 13 Ind. Cas. 653 ... 906
Jadunath v. Jagdish Chandra Deb, 7 C. W. N. 423 ... 111
Jadunath v. Roop Lal, 33 C. 967 at p. 984; 4 C. L. J 22; 10 C. W. N. 650 ... 457
Jagannath Prasad v. Badri Prasad, 9 A. L. J. 48; 11 Ind. Cas. 768 ... 538
Jagannath Prasad v. Tori, 29 A. 18; 3 A. L. J. 610; A. W. N. (1906) 253 ... 463
Jagatjit Singh v. Sarabjit Singh, 19 C. 159 ... 83
Jagdish v. Man Singh, 100 P. R 1895 ... 669
Jaggesswar Dutt v. Bhuban Mohan Mitra, 33 C. 425; 3 C. L. J. 205 ... 699
Jagodanund v. Amritalal Sircar, 22 C. 767 at p. 781 ... 267
Jahnnovi Chowdhurani v. Secretary of State, 7 C. W. N. 377 ... 404
Jai Mangal Singh, *In re*, 11 W. R. 433; 3 B. L. R. A. C. 82 ... 165
Jai Mangal Singh v. Mohanram Marwari, 12 W. R. 397; 8 B. L. R. 319 *n* ... 15
Jaipal Kunwar v. Indar Bahadur, 31 I. A. 67; 26 A. 238 ... 639
Jalla v. Gehna, 60 P. R. 1907; 76 P. W. R. 1907 (F. B.) 408, 573
Jamuna Parshad v. Ganga Parshad Singh, 19 C. 401 ... 466
Janaki Nath Chowdhury v. Kali Narain Roy Chowdhury, 7 Ind. Cas. 881; 37 C. 662; 15 C. W. N. 45 ... 125
Janokey Dass v. Brindabun Doss, 3 M. I. A. 175 375
Jarratt v. Aldam, (1870) L. R. 9. Eq. 463; 39 L. J. Ch. 349; 22 L. T. 192; 18 W. R. 51 ... 514
Jasodha Devi v. Lachman Das, 37 P. R. 1892 ... 860
Jaun Beebee v. Sheikh Moonshee Beparee, 3 W. R. 93 ... 613
Javanmal v. Muktabai, 14 B. 516 at p. 525 ... 967
Jawadal Huq v. Ram Das Saha, 24 C. 143; 1 C. W. N. 166 ... 337
Jawala v. Hira Singh, 55 P. R. 1903; 117 P. L. R. 1903 ... 714
Jawala Sahai v. Ram Singh, 67 P. R. 1909; 98 P. W. R. 1909; 2 Ind. Cas. 954; 133 P. L. R. 1909 ... 527
Jessup, *In the matter of*, 81 Calf. 508; 6 L. R. A. 594 ... 685
Jethalal Hirachand v. Lalbhai Dalpatbhai, 6 Bom L. R. 86; 28 B. 298 ... 862
Jhanda Singh v. Kesar Singh, 37 P. R. 1910; 6 Ind. Cas. 712; 62 P. W. R. 1910 ... 550
Jibunti Nath Khan v. Shib Nath Chukerbutty, 8 C. 819; 10 C. L. R 537 ... 154
Jindwadi v. Hassan Shah, 41 P. R. 1895 ... 414
Jiwan v. Wazir, 39 P. R. 1887 ... 413
Jogendra Mohan v. Uma Nath, 35 C. 636; 8 C. L. J. 41; 12 C. W. N. 646 ... 960
Jogeshur v. Ghanasham Dass, 5. C. W. N. 356 ... 150
Jogeshuri Chowdhrain v. Mahomed Ebrahim, 14 C. 33 ... 672
Jogeshwar Narain v. Moorlidhar, 7 C. L. J. 270 ... 415
Jogeswar Narain v. Ram Chandra, 23 C. 670; 23 I. A. 37 ... 4

J—concld.

Page.

Jogeswar Sarma v. Dinaram Sarma, 3 C. L. J. 140 ... 508
Joghi Kannigan v. Emperor, 31 M. 515; 4 M. L. T. 223; 8 Cr. L. J. 402 ... 1006
Jones v. Noy, 2 Myl. and K. 125; 39 R. R. 160; 3 L. J. Ch. 14 ... 25
Jotindra Mohan Tagore v. Durga Dobe, 10 C. W. N. 438 ... 328
Joy Coomar v. Bundoo Lal, 9 C. 363; 12 C. L. R. 490 ... 845
Joyanti Kumar Mookerjee v. Middleton, 27 C. 785; 4 C. W. N. 562 ... 215
Joytara v. Pran Krishna Seal, 7 Ind. Cas. 769; 15 C. L. J. 257; 15 C. W. N. 512 ... 367
Jugdeo Narain Singh v. Raja Singh, 15 C. 656 ... 146
Jugal Mohini Dasi v. Srinath Chatterjee, 12 C. L. J. 609; 7 Ind. Cas. 477 329, 488
Jugdeo Singh v. Habibulla, 12 C. W. N. 107; 6 C. L. J. 612 ... 300
Jaggun Lal, *In the matter of*, 7 C. L. R. 356 123, 680
Juhooree Lall v. Dear, 23 W. R. 399 ... 608
Junmajoy Mullick v. Dwarka Nath Maytee, 5 C. 287; 4 C. L. R. 574 ... 333

K

K. S. Bonnerjee v. Ramchandra Dutt, 5 Ind. Cas. 577; 14 C. W. N. 784; 37 C. 552; 11 C. L. J. 577 41
Kabilaso Koer v. Raghunath Saran, 18 C. 481 ... 368
Kadar Hussain v. Hussain Sahib, 20 M. 118 ... 806
Kadambini Baijee v. Madan Mohan Basack, 3 C. W. N. 247 ... 861
Kadar Khan v. Juggeswar Prasad Singh, 35 C. 1023 ... 374
Kade Mandal v. Ahadali Molla, 14 C. W. N. 629; 6 Ind. Cas. 594 ... 30
Kadir Bakhsh v. Gulam, 74 P. R. 1897 ... 169
Kairajmal v. Daim, 1 C. L. J. 584; 32 C. 296 ... 415
Kalachand Kyal v. Shib Chunder Roy, 19 C. 392 625
Kalanand Singh v. Sarafat Hassein, 12 C. W. N. 528 ... 960
Kali Krishna Tagore v. Izzatunnissa Khatun, 24 C. 557 ... 30
Kali Prosanna Bose v. Lal Mohan Guha, 2 C. W. N. 219; 25 C. 258 ... 142
Kali Shankar Sahai v. Maharaja Pratab Udai Nath, 6 C. L. J. 36 ... 415
Kalka Singh v. Paras Ram, 22 I. A. 68; 22 C. 434 442
Kallu v. Manni, 23 A. 93 ... 654
Kalupnath Singh v. Lala Ramdein Lal, 16 C. 117 125
Kamarnddin Ahmed v. Jawahir Lal, 27 A. 334; 1 C. L. J. 381; 7 Bom. L. R. 433; 15 M. L. J. 258; 9 C. W. N. 601; 2 A. L J. 397 ... 160
Kameswar Prasad v. Run Bahadur Singh, 6 C. 843; 8 C. L. R. 361; 8 I. A. 8 ... 6
Kamini Debi v. Khetter Mohan, 15 C. W. N. 681; 11 Ind. Cas. 382 ... 46
Kamini Debi Dasi v. Aghore Nath Mookerjee, 11 C. L. J. 91; 14 C. W. N. 357; 4 Ind. Cas. 402 ... 65
Kanai Lal v. Nitai Chand, 12 C. L. J. 612; 7 Ind. Cas. 492 ... 31
Kanakasabai v. Muttu, 13 M. 445 ... 662
Kangaya Gurukal v. Kalimuthu Annavi, 27 M. 526 ... 336

K—contd.

Page.

Kanhai Lal v. Chhadammi Lal, 31 A. 48; 6 A. L. J. 1; A. W. N. (1908) 290; 5 M. L. T. 55; 9 Cr. L. J. 63; 1 Ind. Cas. 5 ... 1008
Kannan v. Krishnan, 13 M. 324 ... 639
Kanumantamma v. Rami Reddi, 4 M. 272 ... 872
Karam Singh v. Mohammad Din, 11 P. R. 1909; 1 Ind. Cas. 397; 51 P. L. R. 1909; 12 P. W. R. 1909 ... 344
Karim Baksh v. Jehandad Khan, 74 P. R. 1906; 137 P. L. R 1906 ... 27
Karim-un-nissa v. Phul Chand, 15 A. 134 ... 91
Kashi Prasad v. Indar Kunwar, 5 A. L. J. 590; A. W. N. (1908) 222 ... 546
Kashi Ram v. Amri, 32 A. 189; 7 A. L. J. 153; 5 Ind. Cas 207 ... 644
Kashi Ram v. Harman Das, 47 P. R. 1887 ... 671
Kashiram v. Behari, 4 C. P. L. R. 49 ... 984
Kashmiri Mal v. Girdhari Lal, 74 P. R. 1908; 57 P. W. R. 1907 ... 319
Kasi Viswanathan v. Emperor, 30 M. 328; 5 Cr. L. J. 341; 2 M. L. T. 177; 17 M. L. J. 141 ... 214
Kasim Hasan Khan v. Batul Bibi, 13 O. C. 255; 7 Ind. Cas. 1019 ... 897
Kasinath Das v. Sadasiv Patnaick, 20 C. 805 ... 92
Kasiswar v. Mohendra, 25 C. 136 ... 42
Kastuarbai v. Shivajiram 3 B. 372 ... 137
Kathaperumal v. Venkabai, 2 M. 194 ... 321
Kattamma Nachiar v. Bothagurusami Thovar, 6 M. H C. R. 293 ... 134
Kedar Singh v. Sumer Singh, 10 Ind. Cas. 196 ... 814
Kedarnath v. Prodyot Kumar, 11 Ind. Cas. 48; 14 C. L. J. 610 ... 141
Keech v. Sanford, Select Cas. Ch. 61; 2 Eq. Cas. Abr 741 ... 546
Kesar v. Sundar Singh, 27 P. R. 1909; 46 P. L. R. 1909; 33 P. W. R. 1909; 1 Ind. Cas. 888 ... 798
Kesar Singh v. Nihal Singh, 45 P. R. 1891 ... 447
Kessowji Issur v. G. I. P. Railway Company, 31 B. 381 at p. 390; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 2 M. L. T. 435; 9 Bom. L. R. 671; 17 M. L. J. 347 ... 132
Khaira v. Maula, 49 P. R. 1911; 11 Ind. Cas. 191; 136 P. W. R. 1911; 212 P. L. R. 1911 ... 558
Khairunnessa Bibi v. Lokenath Pal, 27 C. 276 ... 677
Khater Mistri v. Sadrudi Khan, 34 C. 922 ... 688
Khankar Abdur Rahman v. Ali Hafez, 28 C. 256 ... 450
Khazan Singh v. Relu, 35 P. R. 1906 ... 181
Khellat Chunder Ghose v. Nusseb-un-nissa, 16 W. R. 477 ... 381
Khelut Chunder Ghose v. Tara Chand Koondoo, 6 W. R. 269 ... 164
Khetramani Das v. Kashi Nath Das, 2 B. L. R. A. C. 15; 10 W. R. (F. B.) 89 ... 136
Khettramoni Dasi v. Shyama Churn, 21 C. 539 172, 433,
Khettur Mohan Chuttopadhya v. Ishur Chunder Surma, 11 W. R. 271 ... 369
Khoobhun v. Wooma Churn Singh, 3 C. L. R. 453 125
Khuda Bakhsh v. Alim-un-nissa, 27 A. 313 ... 157
Khunni Lal v. Govind Krishna Narain, 38 I. A. 87; 15 C. W. N. 545; 8 A. L. J. 552; 13 C. L. J. 575; 13 Bom. L. R. 427; 10 M. L. T. 25; 2 M. W. N. 432; 21 M. L. J. 645; 33 A. 356; 10 Ind. Cas. 477 ... 270
Khurshed Ali v. Rashid Husain, 9 O. C. 331 ... 509

K—contd.

Page.

Khushal Singh v. Arjan Singh, 41 P. R. 1894 ... 33
King Emperor v. Datto Hanmant Shahapurkar, 30 B. 49; 7 Bom. L. R. 633; 2 Cr. L. J. 578 ... 296
——— v Po Chon, 2 L. B. R. 311; 1 Cr. L. J. 1118 ... 389
——— v. Shwe Daung, U. B. R. 1897. 1901, 1, 119 ... 398
——— v. Thammana Reddi, 25 M. 667 ... 222
——— v. Tirumal Reddi, 24 M. 523 ... 281
Kirpa Ram v. Bhagana, 106 P. R. 1889 ... 623
Kirpa Ram v. Ude Ram, 77 P. R. 1896 ... 949
Kirpal Singh v. Kesree, 67 P. R. 1869 ... 406
Kisan Kunbi v. Raghunath, 2 N. L. R. 101 ... 983
Kisandas Rupchand v. Rachappa Nithoba, 33 B. 644 at p. 651; 11 Bom. L. R. 1042 ... 268
Kishen Parshad v. Har Narain Singh, 38 I. A. 45; 15 C. W. N. 321; 13 C. L. J. 345; 9 Ind. Cas. 739; 8 A. L. J. 256; 9 M. L. T. 343; 21 M. L. J. 378; 13 Bom. L. R. 359; 33 A. 272; (1911) 2 M. W. N. 395 208, 307, 874, 946
Kishnaji Narayan Parkhi v. Rajmal Manikchand Marwari, 24 B. 360 ... 140
Kishori Mohan Sett v. Gul Mahomed, 15 C. 177 543
Kishun Pershad Chowdhry v. Tipan Pershad Singh, 34 C. 735; 11 C. W. N. 613; 5 C. L. J. 569 ... 349
Kissen Gopal Sadaney v. Kali Prosonno Sett, 33 C. 633 .. 880
Kissori Mohan Roy v. Harsukh Das, 17 C. 436; 17 I. A. 17 ... 805
Knox v. Simmonds, (1791) 3 Bro. C. C. 358; 1 Ves J. 369 ... 119
Ko Shoay Doon v. Shoay Gan, 6 B. L. R. 196, 14 W. R. 331 ... 247
Ko Tho v. Ma Hnin, 14 C. L. J. 241; 15 C. W. N. 862; 2 M. W. N. 449; 13 Bom. L. R. 694; 38 C. 717; 8 A. L. J. 1117; 6 L. B. R. 26; 4 Bur. L. T. 257; 11 Ind. Cas. 545 ... 341
Kondura Ranga Reddi v. Subbiah Setty, 28 M. 394 ... 160
Kosuri Ramaraju v. Mury Ramalingam, 26 M. 74 ... 472
Kotagiri Venkatasubbamma Roy v. Vellanki Venkatarama Row, 24 M. 1 ... 205
Koylash Chandra Dutt v. Goluk Chunder Peddar, 2 C. W. N. 61 ... 41
Krishna Chandra Dutta v. Miran Bajania, 10 C. W. N. 499, 3 C. L. J. 222 ... 941
Krishna Lall Saha v. Bhairab Chandra Rohat, 9 C. W. N., CCXLVIII ... 700
Krishna Pershad Singh v. Gosta Behari Kundu, 5 C. L. J. 434 ... 415
Krishna Ramaya Naik v. Vasudev Vankatesh Pai, 21 B. 808 at p. 815 ... 38
Krishnaji Janardan v. Murarry Rao, 12 B. 48 ... 313
Krishnasami v. Kesava, 14 M. 63 ... 44
Krishnaswamy Chetty v. Cottah Mangamah, (1911) M W. N. 365; 10 Ind. Cas. 283 ... 17
Krishnier v. Sarvothama Royar, (1910) M. W. N. 610; 8 Ind. Cas. 366 ... 789
Kristo Komal Singh v. Huree Sirdar, 13 W. R. 44 F. B.) ... 90
Kuddutamma v. Narasimha Charyulu, 17 M. L. J. 528 ... 479

K—concld.

Page.

Kumud Nath Roy Chowdhry v. Jatindra Nath Chowdhry, 13 C. L. J. 221; 38 C. 394; 9 Ind. Cas. 189; 15 C. W. N. 399 ... 380
Khundukuri Mahlakshmamma v. Secretary of State, 34 M. 295; 1 M. W. N. 595; 8 M. L. T. 389; 20 M. L. J. 823; 8 Ind. Cas. 67 ... 821
Kunjo Behari Singh v Madhab Chundra Ghose, 23 C. 884 ... 30

L

Labhu v. Nihali, 7 P. R. 1905; 66 P. L. R. 1905 ... 484
Labrador Company v. Queen, A. C. 104 at p. 122; 67 L. T. 730 ... 517
Lachman Prosad v. Halas Mahton, 11 W. R. 151; 2. B. L. R. 27 App. ... 31
Luchmeshar Singh v. Dookh Mochan Jha, 24 C. 677 ... 326
Lachmi v. Tota, 16 P. R 1888 ... 123
Lachmi Narain v. Kunji Lal, 16 A. 449 ... 670
Ladhu v. Daulti, 126 P. R. 1890 ... 27
Ladoo v. Mahumdee, 49 P. R. 1867 ... 75
Lady Dela Pole v. Dick, (1885) 29 Ch. D. 351; 54 L. J. Ch 940; 52 L. T 457; 33 W. R. 585 ... 369
Lahori v. Radho, 72 P. R. 1906 ... 527
Laikhram v. Ghumne, 3 Agra H. C. R. 298 ... 498
Laird v. Briggs, (1880) 16 Ch. D. 440 at p. 446; 43 L. T. 632; 29 W. R. 197; 50 L. J. Ch. 260 ... 130
Lakshmana v. Sukiya Bai, 7 M. 400 ... 82
Lala Mobarak Lal v. Secretary of State, 11 C. 200 ... 403
Lala Parbhu Lal v. Mylne, 14 C. 401 ... 702
Lalit Chandra Neogi v. Tarini Persad Gupta, 5 C. W. N. 335 ... 1001
Lallji, *In re*, 19 A. 302 ... 845
Lalun Monee v. Sona Manee Dabee, 22 W. R. 334 786
Lampleigh v. Brathwait, 1 Smith L. C. 11th Ed. 160 ... 147
Lane v. Esdaile, (1891) A. C. 210; 60 L. J. Ch. 644; 64 L. T. 666; 40 W. R. 65 ... 171
Ledgard v. Bull, 13 I. A. 134; 9 A. 191 254, 277, 362, 900
Lester v. Garland, (1808) 15 Ves. 248 at p. 254; 10 R. R. 68 ... 901
Letter No. 151, dated the 9th February 1870, 13 W. R. Cr., Letters 2 ... 835
Liquidation Estates Purchase Company v. Willoughby, (1898) A. C. 321; 67 L. J. Ch. 251; 78 L. T. 329; 14 T. L. R. 295; 46 W. R. 589 ... 620
Little v. Newton, 9 Dowling 437; 10 L. J. C. P. 88; 5 Jur. 246; 2 Man & G. 351; 2 Scott. N. R. 165 ... 166
Loknath v. Bissessarnath, 27 C. 103 at p. 114; 26 I. A. 268 ... 968
London Association of Shipowners v London and Indian Docks (1863) 3 Ch. 242; 2 R. 23; 67 L. T. 238; 7 Asp. M. C. 195 ... 241
Lord Advocate v. Young, (1883) 12 A. C. 544 at p. 556 ... 820
Lyman v Arnus (1827) 5 Pickering 213 ... 123

M

Page.

Ma The *v.* Tha E, U. B. R. 1897-1901, 1, 104 ... 392
Macpherson's case, Dean & Bell 202 ... 100
Madappa *v.* Rama Krishna, 13 Bom. L. R. 698; (1911) 2 M. W. N. 1; 15 C. W. N. 962; 14 C. L. J. 245; 35 B. 327; 12 Ind. Cas. 42 ... 175
Madari *v.* Malki, 6 A. 428 ... 633
Madhab Chandra Bara *v.* Srimatee Rani Sarat Kumari Debi, 15 C. W. N. 126; 6 Ind. Cas. 26 426
Madhabmoni Dasi *v.* Pamela Lambert, 37 C. 796; 6 Ind. Cas. 537 ... 160
Madhavrav *v.* Gungabai, 2 B. 639 ... 137
Madho Parshad *v.* Mehrban Singh, 18 C. 157 at p. 161 (P.C.); 17 I. A. 194 ... 467
Madho Prasad *v.* Ram Ratan, 15 C. W. N. 838; 14 C. L. J. 264; 11 Ind. Cas. 507; (1911) 2 M. W. N. 66; 13 Bom. L. R. 780; 21 M. L. J. 938; 10 M. L. T. 481 ... 87
Madhopersad *v.* Gajudhar, 11 C. 111 at p. 117; 11 I. A. 186 ... 624
Madhub *v.* Novodeep, 16 C. 126 ... 66
Madhub Nath Surma *v.* Myarani Medhi, 17 C. 819 ... 383
Madras Railway Company *v.* Zemindar of Carvetinagaram, 1 I. A. 364; 14 B. L. R. 209; 22 W. R. 279 ... 513
Mafuzul Hosain *v.* Basid Sheikh, 4 C. L. J. 485; 34 C. 36; 11 C. W. N. 71 ... 635
Magniram *v.* Mehdi Hossein, 31 C. 95 ... 83
Mahabir Parshad *v.* Ramyad Singh, 12 B. L. R. 90; 20 W. R. 192 ... 466
Mahadeo Prasad *v.* Gajadhar, 10 C. W. N. 12 ... 543
Maharaja Birendra Kishore Manikya Bahadur *v.* Dilwar Ali, 13 Ind. Cas. 517 ... 513
Maharaja Birendra Kishore Manikya Bahadur *v.* Roshan Khan, 13 Ind. Cas 518 ... 513
Maharaja Manindra Chander Nandy Bahadur *v.* Jamaher Kumari Bibi, 2 C. W. N. 670; 32 C. 643 ... 457
Mahendra Ghoshal *v.* Bhuban Mardana, 12 C. L. J. 566; 6 Ind. Cas. 810; 38 C. 1; 14 C. W. N. 945 ... 147
Mahla *v.* Shah Muhammad, 134 P. R. 1894 ... 410
Mahmud Baksh *v.* Hussan Bakhsh, 7 P. R. 1912; 11 Ind. Cas. 708 ... 665
Mahomad Afzal Khan *v.* Nand Lal, 16 P. R. 1908; 146 P. L. R. 1908; 73 P. W. R. 1907 ... 312
Mahomed Jan v. Ganga Bishen Singh, 13 C. L. J. 525; 15 C. W. N. 443; 9 M. L. T. 446; 8 A. L. J. 480; 13 Bom. L. R. 413; 38 C. 537; (1911) 2 M. W. N. 277; 21 M. L. J. 1148; 10 Ind. Cas. 272 ... 960
Mahomed Shamsoolhuda *v.* Sewakram, 22 W. R. 409; 12 I. A. 7; 14 B. L. R. 226 ... 191
Mahomed Taqi *v.* Choa Lal, 13 C. L. J. 499; 7 Ind. Cas. 750 ... 942
Mahommed Mozaffer Hossein *v.* Kishori Mohan Roy, 22 C. 909; 22 I. A. 129 ... 702
Mailathi *v.* Subbaraya, 24 M. 650 ... 692
Mairam Pillai *v.* Bishop of Mylapore, 17 M. 447 ... 602
Mana Vikrama *v.* Mallichery, 3 M. 68 ... 120
Mancharam *v.* Pranshankar, 6 B. 298 ... 226
Mangal *v.* Chetu, 20 P. R. 1890 ... 181
Mangal Khan *v.* Salimullah Khan, 16 A. 26 ... 79
Manik Borai *v.* Bani Charain Mandal, 13 C. L. J. 649; 10 Ind. Cas. 469 ... 365

M—contd.

Page.

Manikya Mala Bose *v.* Nandukumar Bose, 33 C. 1306; 4 C. L. J. 357; 11 C. W. N. 12 ... 10
Manilal *v.* Vammaladas, 29 B. 621; 7 Bom. L. R. 644 (F. B.) ... 247
Manindra Chunder Nundy *v.* Jawaher Kumari Bibi, 9 C. W. N. 670 ... 146
Mannu Lall *v.* Mohammed Ismail, 7 O. C. 284... 491
Manohar Singh *v.* Sumrita Kuar, 17 A. 428 ... 122
Mansab Ali *v.* Gulab Chand, 10 A. 85 ... 150
Maqsud-ul-nissa *v.* Kaniz Zohra, 135 P. R. 1908 296
Mariam Bibi *v.* Sakina, 14 A. 8 ... 439
Mathura Das, *In the matter of*, 16 A. 80 ... 111
Mathura Singh *v.* Bhawani Singh, 22 A. 248 at p. 253 ... 260
Matichand *v.* Bajrang Sahai, S. A. No. 1878 of 1909 ... 147
Mayaram Surma *v.* Nichula Kantani, 15 C. 402 ... 278
Maynard *v.* Fredrick, (1851) 7 Cushing 247 ... 166
Megh Lal *v.* Girdhari Singh, 5 C. L. J. 208 ... 969
Mehr *v.* Chennu, 7 P. R. 1891, Rev. ... 957
Mendai Lal *v.* Bhujja Singh, A. W. N. (1895) 140 369
Meymott *v.* Meymott, 31 Beav. 445; 32 L. J. Ch. 218; 9 Jur. (N. S.) 426 ... 26
Middleton *v.* Weeks, (1613) Cro. Jac. 200 ... 163
Midnapur Zamindari Company, Limitted *v.* Gobinda Mahto, 8 C. L. J. 31 415, 595
Miller *v.* Race, 1. S. L. C. 468 ... 213
Minakshi *v.* Subramanya, 14 I. A. 160; 11 M. 26 171, 362
Minakshisundram Pillai *v.* Ayyathorai, 18 M. 136 ... 579
Mir Ahwad Hossein *v.* Mahommed Askari, 29 C. 726 (F. B.) ... 776
Mir Sarwarjan *v.* Fakharuddin Mahommed Chawdhury, 34 C. 163; 11 C. W. N. 207; 4 C. L. J. 431; 1 M. L. T. 360 ... 677
Miran Bakhsh *v.* Ahmad, 145 P. R. 1907 ... 344
Mirza Shamsher Bahadur *v.* Kunj Behari Lall, 7 C. L. J. 414; 12 C. W. N. 273; 3 M. L. T. 212 ... 311
Mitchell *v.* Mathura Das, 12 I. A. 150; 8 A. 6 ... 456
Mitta Kanth Audhicarry *v.* Meerunjun Audhicarry, 14 B. L. R. 166; 22 W. R. 437 ... 692
Mitta Kunth Audicharry *v.* Neerunjun Audhicarry, 14 B. L. R 166; 22 W. R. 437 ... 226
Modhoo Dossia *v.* Nobin Chunder Roy, 16 W. R. 25 .. 369
Moganalal *v.* Doshi Mulji, 25 B. 631 ... 426
Mohabir *v.* King-Emperor, 8 A. L. J. 630; 33 A. 578; 11 Ind. Cas. 585; 12 Cr. L. J. 401 ... 922
Mohamad Raza Khan *v.* Dalip, A. W. N. (1892) 103 ... 555
Mohammad Ewaz *v.* Brij Lal, 4 I. A. 166; 1 A. 465 ... 533
Mohammad Imamali Khan *v.* Hussain Khan, 26 C. 81; 25 I. A. 161; 2 C. W. N. 737 ... 438
Mohan Lal *v.* Bilaso, 14 A. 512 ... 154
Mohan Lal *v.* Niru Punja, 12 B. 169 ... 245
Mohanund Sahai *v.* Said-un-nissa, 8 C. L. J. 525; 12 C. W. N 154 ... 183
Moharaja of Bobbili *v.* Raja Kaminayani Bangaru, 21 M. L. J. 593; 9 M. L. T. 155; 2 M. W. N. 101 ... 14
Moharanee Dasya *v.* Harindra Lal Ray, 1 C. W. N. 458 ... 146

M – contd.

Page.

Mohendra Ghoshal v. Bhuban Mardana, 38 C. 1; 14 C. W. N. 945; 12 C. L. J. 565; 6 Ind. Cas. 810 ... 457
Moher Sheikh v. Queen-Empress, 21 C. 392 ... 926
Mohesh Lal v. Bawan Dass, 9 C. 951; 13 C. L R. 221; 10 I. A. 62 ... 630
Mohima Chandra Koondoo v. Noorooddin, 11 W. R. 422 ... 456
Mohima Chandra Shaha v Hazuri Pramanik, 17 C. 45 ... 196
Mohin Mohan Patra v. Ram Narain Patra, 14 C. L. J. 445; 12 Ind. Cas. 780 ... 360
Mohomed Ali Hossein v. Nazar Ali, 28 C. 289 ... 450
Mohunt Jumna Doss v. Gawsee Meah, 3 W. R. 124 ... 31
Mohunt Padmalav Ramanuja Das v. Lukshmi Rani, 12 C. W. N. 8 194, 311
Mohunt Ram Sundar Das v. Barhamdeo Narain, 14 C. W. N 552; 2 Ind. Cas. 986 ... 456
Mokhoda Dasee v. Nundo Lal Halder, 5 C. W. N. 297 ... 137
Mokood Lal Singh v. Nobodip Chunder Singh, 25 C. 881; 2 C. W. N. 379 ... 454
Mokund Lal v. Chotay Lal, 10 C. 1061 ... 880
Moll Schutts & Co v. Luchmi Chand, 25 C. 505; 2 C. W. N. 283 ... 707
Moni Ram Seth v. Seth Rupchand, 33 C. 1047 at p. 1058; 4 C. L J. 94; 8 Bom. L. R. 501; 10 C. W. N. 874; 1 M. L. T 199; 3 A. L. J. 525; 16 M L. J. 300; 2 N. L R. 130 ... 604
Monmohun Karmakar v. Dwarkanath Karmakar, 12 C. L. J. 312; 7 Ind Cas. 55 65, 425
Monmotha Nath Das v. Harish Chandra Das, 33 C. 905; 10 C. W. N. 867 ... 232
Moore v. Butlin, (1847) 7 A. & E 595. 2 N. and P. 436; W. W. and D. 638; 7 L. J. Q B 20 ... 119
Moosabhai Mahommed Sajan v. Yacoobbhai Mahommed Sajan, 29 B. 267; 7 Bom. L. R. 45 ... 892
Moro Raghunath v. Balaji Trimbak, 13 D. 45 ... 461
Morris v Davies, (1837) 5 Cl. & F. 163; 1 Jur. 911; 3 Car. & P. 215 ... 683
Moti v. Ramohari, 24 C. 699; 1 C. W. N. 437 ... 150
Moti Lal Ghosh v. Girsh Chandra Ghosh, 12 C. L. J. 345; 6 Ind. Cas. 109 ... 165
Moula Dad v Hayat, 14 P. R. 1886, Rev. ... 18
Mouladad v. Ram Gopal, 22 P. R. 1900; P. L. R. 1900 p. 186 ... 527
Mouladan v. Raghunandan, 27 C. 7 ... 655
Moyna Bibi v. Banku Behari Biswas, 29 C. 473 ... 685
Mufat Ali v. Emperor, 10 C. W. N. 222; 3 Cr. L. J. 112; 2 C. L. J. 619 ... 98
Muhammad v. Jahan Khan, 119 P. R. 1883 ... 180
Muhammad Abdul Rahman v. Taslim-un-nissa, 2 A. L. J. 608 ... 611
Muhammad Ayub Khan v. Kure Khan, 95 P. R. 1901; 125 P. R. 1901 ... 667
Muhammad Din v. Shah Din, 90 P. R. 1907 169, 428
Muhammad Esuph Ravutan v. Pattamsa Ammal, 23 M. 70 ... 689
Muhammad Nawaz v. Babo Sahib, 44 P. R. 1903; 75 P. L. R. 1903 ... 719
Muhammad Saddiq Ahmed v. Panna Lal, 26 A. 220 ... 774

M – concld.

Page.

Muhammad Umar v. Kirpa Siegh, 78 P. R. 1904 ... 670
Muhammad Wazir Beg v. Fatima Begum, 7 P. R. 1881 ... 76
Mujibunnissa v. Abdur Rahim, 23 A. 233; 23 I. A. 15 ... 533
Mukh Ram v. Not Ram, 100 P. R. 1906; 101 P. L. R. 1907 423, 550
Mula v. Nihal Chand, 78 P. R. 1881 ... 563
Malai Singh v. Rajwant Singh, A. W. N. (1903) 68; 3 A. L. J. 842 ... 643
Mulkah Do Alum Nawab Tajdar v. Mirza Jehan Kudr, 10 M I. A. 252; 2 W. R. (P. C.) 55 ... 75
Muila Vettil Seethi Kutti v. Korambath Painthuti Achutan Nair, 21 M. L. J. 475; 10 Ind. Cas. 218 ... 268
Mullick Amanutali v. Ukloo Pasee, 25 W. R. 140 ... 31
Munna v. Ram Prasad, 11 O C. 207 ... 625
Muniappa Naick v. Subramanya Iyer, 18 M. 437 92
Munisani Naidu v. Ammani Ammal, 15 M. L. J. 7 ... 153
Munni v. Umrao Singh, 39 P. R 1909; 55 P. W. R. 1909; 59 P. L. R. 1909; 1 Ind. Cas 720 ... 553
Munshi Bajrangi Sahai v. Udit Narain Singh; 10 C. W. N. 932 ... 573
Murari Vithoji v. Mukund Shivaji, 15 B. 201 ... 228
Mustafa v Phulja, 27 A. 526; A. W. N. (1905) 86; 2 A. L J. 416 ... 120
Muthukutti Nayakan v. Acha Nayakan, 18 M. 22 ... 165
Muthuswami Sastry v Narayana Sastry, 21 M. L. J. 195; 8 Ind Cas. 393; 8 M. L. T. 300; (1911) 2 M. W. N. 36 ... 17
Muttalagiri v Muttayar, 6 M. 357 ... 543
Mutteeram Kuwar v. Gupaul Sahoo, 11 B. L. R. 416 at p. 422; 20 W R. 187 ... 451
Mutu Swami Mudali v. Veeni Chetti, 30 M. 382; 17 M. L. J. 266; 2 M. L. T. 239; 6 Cr. L. J. 102 ... 1008

N

Nabab Mir Sayad Alam Khan v. Yasin Khan, 17 B. 755 ... 853
Nabakumari Debi v. Behari Lal Sen, 34 C. 602; 6 C. L. J. 122; 11 C. W. N. 865; 4 A. L. J. 570; 9 Bom. L. R. 846; 17 M L. J. 397; 2 M. L. T. 433 ... 608
Nabi Bakhsh v. Fakir Muhammad, 25 P. R. 1903; 74 P. L. R. 1903 ... 793
Nabogopal v. Amritmoyee, 24 W. R. 428 ... 137
Nabu Mondul v. Cholim, 28 C. 893 ... 608
Nagalla Kottayya v. Nagalla Mallaya, (1910) M. W. N. 719; 8 Ind. Cas 337; 9 M. L. T 39 ... 789
Nagendra Chandra Dey v. Amar Chandra Kundu, 7 C. W. N. 725 ... 33
Nanak v. Gurditta, 63 P. R. 1902 ... 408
Nand Kishore Lal v. Kanee Ram Tewary, 29 C. 355 ... 497
Nand Ram v Bhupal Singh, 8 A. L. J. 1294; 13 Ind. Cas. 5 ... 401

N—contd.

Page.

Nanda Kumar Saha v. Gobinda Mohan Das, 13 C. L. J. 312; 6 Ind. Cas. 135 ... 342
Nandram v. Fakir Chand, 7 A. 523 ... 164
Nannu v. Raman, 16 M 335 ... 460
Naranbhai Vaghjibhai v. Ranchod Premchand, 26 B. 141 ... 694
Narasimha Naidu v. Ramasami, 18 M. 478 ... 806
Narasimha Row v. Ganga Ram, 18 M. L. J. 590; 4 M. L. T. 271 ... 96
Narasimha Row v. Rama Row, 5 M. L. J. 79 ... 652
Narayan Venku v. Sakha Ram Nagu, 11 B. 519 ... 568
Narayana v Chengalamma, 10 M. 1 ... 546
Narayana Ayyar v. Venkata Ramma Ayyar, 25 M. 220 ... 704
Narayana Row v. Dharama Char, 26 M. 514 ... 40
Narbadabai v. Mahadev, 5 B. 99 ... 137
Narendranath Barari v. Abhoy Charan Chottopadhya, 34 C. 51; 4 C. L. J. 437; 11 C. W. N. 20; 1 M. L. T. 364 ... 130
Narotam Das v. Sheo Pargash Singh, 11 I. A. 83; 10 C. 740 ... 442
Narsingh v. Yadavdas, (1882) Bom. P. J. 345... 137
Narsingh Narain Singh v. Dharam Thakur, 9 C. W. N. 144 ... 455
Nasib-ul-nissa v. Mansur Ali, 120 P. W. R. 1909; 4 Ind. Cas. 965 ... 714
Nassarvanji v Kharsedji, 22 B. 773 ... 543
Nataraja Desikar v. Palaniappa Chetty, 20 M. L. J. 969; 9 M. L. T. 83; 9 Ind. Cas 251 ... 87
Natha Singh v Mohan Singh, 93 P. R. 1906; 163 P. L. R. 1906 181,296
Nathu v. Amir Chand, 147 P. R. 1907 ... 671
Nawab Begum v. Rustum Khan, 2 Agr. H. C. R. 149 ... 498
Nawab Khan v. Kalu Khan, 39 P. R. 1905; 16 P. L. R. 1905 ... 413
Nawab Sir Syed Hossein Ali Khan v. Mohant Bhagwan Das, 11 C. W. N. 261; 34 C. 249; 6 C. L. J. 442 ... 86
Nawab-ud-din v. Kami, 12 P. R. 1901; 77 P. L. R. 1901 178,528
Nazir Mahomed Sirkar v. Girish Chunder Chowdhuri, 2 C. W. N. 251 ... 787
Nga Nyo Gyi v King-Emperor, U. B. R. 1907-09 Cr. P C. p. 5; 14 Bur. L. R. 38; 6. Cr. L. J. 28 396
Nga Ta Pu v. King-Emperor, 2 L. B. R. 19 ... 396
Niaz-ullah Khan v. Nazir Begam, 15 A. 108 ... 850
Nicholson v. Nicholson, 3 P. & D. 53; 29 L. T. 108 ... 617
Nihal Devi v. Kishore Chand, 142 P. W. R. 1910; 97 P. R. 1910; 11 P. L. R. 1911; 8 Ind. Cas. 999 ... 565
Nihal Singh v. Bhana, 2 P. R. 1883, Rev. ... 18
Nihal Singh v. Rajan, 11 P. R. 1885 ... 484
Nil Ratan Mandal v. Ismail Khan Mahomed, 32 C. 51; 8 C. W. N. 895 .. 608
Nilmadhub Gopal, *In re*, 19 W. R. Cr. 1 ... 223
Nilmony Chuckerbutti v. Baikant Nath Bera, 17 C. 466 ... 2
Nimaye Churn Puteetundee v. Jogendranath Banerjee, 21 W. R. 365 ... 426
Ningawa v. Bharmappa, 23 B. 63 ... 122
Niranjan v. Gajadhar, 5 A. L. J. 71; A. W. N. (1906) 45; 30 A. 133 ... 635

N—concld.

Page.

Nistarini Dasi v. Kazim Ali, 12 C. L. J. 65; 7 Ind. Cas. 258 ... 65
Nityanunda Sarkar v. Ram Narain Das, 6 C. W. N. 66 ... 42
Nobin Chunder Dey v. Secretary of State, 1 C. 11 ... 371
Nobocoomar v. Siru Mullick, 6 C. 94 .. 443
Norendra Nath v. Kamal Basini, 23 C. 563; 23 I. A. 18 217, 235
North, *In re*, Hasluck, *Ex parte*, (1895) 2 Q. B. 264 at p. 270; 64 L. J. Q. B. 694; 14 R. 436; 72 L. T. 854; 2 Manson 326; 59 J. P. 724 ... 901
Nowbut Singh v. Chutterdharee Singh, 19 W. R. 222 ... 208
Nubodoorga v. Dwarka Nath, 24 W. R. 301 ... 608
Nundo Kishore v. Ramsookhee, 5 C. 215 ... 859
Nunhoo Shahee v. Ram Pershad, 21 W. R. 38 ... 355
Nunn & Co. v. Tyson, (1901) 2 K. B. 487; 70 L. J. K B. 854; 85 L. T. 123; 50 W. R. 16; 17 T. L. R. 624 ... 852
Nurendro Narain Roy v. Ishan Chunder Sen, 13 B. L. R. 274; 22 W. R. 22 ... 942
Nur Muhammad v. Ghulam Habib, 106 P. R. 1892 ... 27
Nurul Huqq, *In re*, 3 C. 757 ... 223
Nur-ul-nissa v. Gauhar-ul-nissa, 61 P. R. 1905... 296

O

Official Assignee Bombay v. Registrar Small Cause Court, 45 P. R. 1910; 14 C. W. N. 579; 7 A. L. J. 357; (1910) M. W. N. 177; 11 C. L. J. 443; 68 P. W. R 1910; 7 M. L. T. 417; 37 C. 418; 20 M. L. J. 432; 6 Ind. Cas. 273; 12 Bom. L. R. 395 ... 570
Olpherts v. Mahabir Pershad, 10 I. A. 25; 11 C. L. R. 494 ... 342
Omar Ali Majhi v. Bassiruddin Ahmad, 7 C. L. J. 282 ... 488

P

P. & O. S. N. Co. v. Secretary of State, 5 B. H. C. R. App. 1 ... 371
Padam Lal v. Tek Chand, 29 A. 217 .. 528
Padmakumari Debia Chowdhrani v. Court of Wards, 8 C. 302; 8 I. A. 229 ... 15
Pahalwan Singh v. Narain Das, 22 A. 401 ... 188
Palanippa Chettiyar v. Sayari Naidoo, 18 M. L. J. 548; 4 M. L. T. 233 ... 205
Palaniappa Mudaliar v. Tevan, (1911) 2 M. W. N. 123; 9 M. L. T. 319; 9 Ind. Cas. 729 ... 313
Palanisami v Thondama, 26 M. 595 ... 543
Pampapati Sastri v. Subba Sastri, 23 M. 210 ... 112
Panchu Chakar v. Nagendra Nath Pal, 12 C. L. J. 480; 8 Ind. Cas. 96 ... 32
Panchu Mandal v. Chandra Kant Saha, 10 C. L. J. 82; 12 Ind. Cas. 9; 14 C. L. J. 220 ... 42
Pandit Jai Ram v. Sheo Shankar Baksh, 9 Ind. Cas. 406 ... 473
Papa Sastrial v. Anuntarama, 3 M. 98 at p. 101 967
Paramshook Das v. Rood Dowlah Bahadur, 7 M. H. C. R. 285 ... 644
Parbati v. Jagadis, 29 I. A 82; 29 C. 433; 6 C. W. N. 490; 4 Bom. L. R. 365 ... 692
Parbati Charan v. Gobinda Chandra, 4 C. L. J. 246 ... 442

P—contd.

Page.

Parbati v. Naunihal Singh, 31 A. 412; 3 Ind. Cas. 195; 11 Bom. L. R. 878; 10 C. L. J. 121; 13 C. W. N. 983; 5 M. L. T. 427; 6 A. L. J. 597 ... 54
Paresh Nath Singha v. Nobo Gopal Chattopadhaya, 29 C. 1 ... 145
Parma Nand v. Airapat Ram, 20 P. R. 1899 ... 669
Parsotam Narain v. Taley Singh, 26 A. 178 ... 140
Partab Bahadur Singh v. Gajadar Bakhsh Singh, 24 A. 521; 29 I. A. 148 ... 157
Parvata v. Digambar, 15 B. 307 ... 78
Pascoe v. Pascoe, (1837) 3 Bing (N. C.) 898; 5 Scott 117; 3 Hadges 188; 6 L. J. C. P. 322 ... 119
Pasupati Nath Bose v. Nanda Lal Bose, 5 C. W. N. 67 ... 1001
Patan Maria v. Bhabiram, 24 C. 239; 1 C. W. N. 94 ... 383
Patcha v. Mohidin, 15 M. 57 ... 792
Pattakara v. Rangasami Chetti, 6 M. 365 ... 89
Patti Narayanamurthy Iyer v. Marimuthu Pillay, 26 M. 322 ... 203
Peary Mohan Mondal v. Radhika Mohan, 8 C. W. N. 315 at p. 319 ... 195
Peary Mohan Mondal v. Radhika Mohan, 5 C. L. J. 9 ... 195
Peck v. Peck, 21 L. T. 670; 18 W. R. 295 ... 592
Perera v. Perera, (1901) A. C. 354; 84 L. T. 371; 70 L. J. P. C. 46 ... 581
Periatambi v. Vallaya, 21 M. 409 ... 65
Periasami v. Periasami, 5 I. A. 61; 1 M. 312 270
Perumalla Satyanarayana v. Perumalla Venkata, 27 M. 112 ... 166
Petman v. King-Emperor, 23 P. R. 1905 Cr.; 168 P. L. R. 1905; 3 Cr. L. J. 301 ... 209
Phani Singh v. Nawab Singh, 28 A. 161; A. W. N. (1905) 233 ... 79
Piers v. Piers, (1849) 2 H. L. C. 331; 13 Jur. 569 ... 683
Pin Ye v. Queen-Empress, U. B. R. 1892-1896, I, 139 ... 778
Pir Bakhsh v. Mangal, 16 P. R. 1892 (F. B.) ... 853
Pirthi Singh v. Raj Koer, 12 B. L. R. 238; 20 W. R. 21; I. A. Sup. Vol. 203 ... 137
Pisani v. Attorny-General of Gibraltar, L. R. 5 P.C. 516; 30 L. T. 729; 22 W. R. 900 171,253
Plimmer v. Mayor, Councillors, and Citizens of the City of Wellington, (1884) 9 App. Cas. 699; 53 L. J. C. P. 104; 51 L. T. 475; 49 J. P. 116 ... 514
Po Han v. Thaleni, U. B. R. 1897-1901, I, 91 ... 390
Ponakar Subarani Reddy v. Vadlamudi Seshachalam Chetty, 33 M. 359; 7 M. L. T. 137; 20 M. L. J. 328; 5 Ind. Cas. 79 ... 472
Poromanand Khasnabish v. Khepoo Pramanick, 10 C. 354 ... 66
Poulton v. The London and South Western Railway Co, (1866-67) 2 Q. B. 534; 8 B. and S. 616; 36 L. J, Q. B. 294; 17 L. T. 11; 16 W. R. 309 ... 242
Pramatha Nath Sandal v. Dwarka Nath Dey, 23 C. 851 ... 139
Pratab Daji v. Bombay Baroda and Central India Railway, 1 B. 52 at p. 56 ... 241
Preonath Mukerjee v. Bishnath Prasad, 29 A. 256; A. W. N. (1907) 41; 4 A. L. J. 85 ... 461
Preonath Shaha v Madhu Sudan Bhuiya, 25 C. 603; 2 C. W. N. 562 ... 450

P—concld.

Page.

Price v. Popkin, (1839) 10 A. & E. 139; 2 P. & D. 304; 8 L. J. Q. B. 198; 3 Jur. 433 ... 119
Prosonnomoyi Dassi v. Sreenauth Roy, 21 C. 809 908
Prosser v. Gorringe, (1811) 3 Taunt 426 ... 119
Prosuno v. Rattan, 3 C. 696; 1 C. L. R. 577 ... 608
Prosunno Kumar Middar v. Bama Charan Mondol, 13 C. W. N. 652; 3 Ind. Cas 461 ... 487
Prosunno Kumari v. Golab Chand, 2 I. A. 145; 14 B. L. R. 450; 23 W. R. 253 ... 86
Protap Narain v. Ronghuram, 6 C. W. N. 185 ... 630
Protar Narain Mukerjee v. Sarat Kumari Debi, 5 C. W. N. 386 ... 206
Public Prosecutor v. Bonigiri Pottigadu, 32 M. 179; 5 M. L. T. 100; 9 Cr. L. J. 567; 5 Ind. Cas. 307 ... 280
Puranchand v. Roy Radhakishen, 19 C. 132 ... 186
Purshotamdas Maneklal v. Bai Mani, 21 B. 610 612
Purshotamdas v. Mahant Suraj Bharthi, 6 B. 588 ... 908
Pyari Mohun Mukhopadhya v. Gopal Paik, 25 C. 531; 2 C. W. N. 375 ... 449

Q

Queen v. Alagu, 16 M. 421 ... 275
——— v. Brown, 24 Q. B. D. 257 ... 100
——— v. Cooke, 40 L. J. M. C. 62 ... 109
——— v. Hamilton Thompson, 32 L. J. M. C. 57 109
——— v. Latimer, 17 Q B. D. 359 ... 840
——— v. Lee, (1882) 9 Q. B. D. 394; 50 W. R. 750; 47 J. P. 118 ... 223
——— v Millege, (1879) 4 Q B. D. 332; 48 L. J. M. C. 139; 40 L. T. 748; 27 W. R. 659 ... 223
——— v. Mooktaram Sirdar, 23 W. R. Cr. 18 ... 281
——— v. Nanni, 22 A. 115 ... 275
——— v. Nujum Ali, 6 W. R. 41 Cr. ... 212
——— v. Ram Sahoy Bhur, (1864) W. R. Cr. 24 ... 920
——— v. Rana Sami, 24 M. 321 ... 274
——— v Sheikh Adam, 10 B. 139 ... 214
——— v. Williams, (1893) I Q. B. 320 ... 100
——— v. Zulfukar Khan, 8 B. L. R. App. 21; 16 W. R. Cr. 36 ... 920
Queen-Empress v. Abbi Reddi; 17 M. 402 ... 277
——— ——— v. Anant Ram, 4 A. 293 .. 216
——— ——— v. Bankatram, 28 B. 533 ... 216
——— ——— v. Bapuji Dayaram, 10 B. 288 ... 66
——— ——— v. Bharma, 11 B. 702 ... 275
——— ——— v. Diwan Chand, 14 P. R. 1895 Cr. ... 1006
——— ——— v. Fox, 10 B. 176 ... 777
——— ——— v. Gobinda, 17 A. 576 220, 784
——— ——— v. Gopal Das, 3 M. 271 ... 926
——— ——— v. Grees Chunder Banerjee, 10 C. 1024 123, 680
——— ——— v. Hori, 21 A. 291 ... 284
——— ——— v. James Ingle, 16 B. 200 ... 277
——— ——— v. Kotha Subba Chetti, 6 M. 252 216
——— ——— v. Lakhshman Dagdu, 10 B. 512 918
——— ——— v. Lala Ojha, 3 C. W. N. 653 ... 99
——— ——— v. Lalit Tiwari, 21 A. 177 ... 777
——— ——— v. Madho, 15 A. 25 ... 681
——— ——— v. Mannu, 19 A. 390 .. 746
——— ——— v. Matabadal, 15 A. 392 ... 829
——— ——— v. Maharaj, 16 W. R. Cr. 47 ... 216
——— ——— v. Murarji Gokuldas, 13 B. 389... 216

Q—concld.

Page.

Queen-Empress v. Mutthu Ramon, 4 M. 325 ... 66
——— v. Nathu Sheikh, 10 C. 405 ... 216
——— v. Parashram, 20 B. 193 ... 994
——— v Pillala, 9 M. 101 ... 66
——— v. Ram Dei, 18 A. 350 ... 278
——— v. Roshun Lall, 4 A. H. C. R. 123 ... 915
——— v. Sakharam, 14 B. 564 ... 917
——— v. Sangam Lal, 15 A. 129 ... 754
——— v. Seshadri Ayyangar, 20 M. 383 ... 112
——— v. Shaik Adam, 10 B. 193 ... 278
——— v. Sheikh Beari, 10 M. 232 ... 112
——— v. Thaku, 8 B. 312 ... 277
——— v. Tulja, 12 B. 36 ... 277
——— v. Tyab Alli, 24 B. 423 ... 101
——— v. Venkatasami, 12 M. 459 ... 918
Quinn v. Leathem, (1901) A. C. 495; 70 L. J. P. C. 76; 65 J. P. 708; 50 W. R. 139; 85 L. T. 289; 17 T. L. R. 749 .. 773

R

Radha Bai v. Kamod Singh, 30 A. 38; A. W. N. (1907) 276; 4 A. L. J. 696 ... 467
Radha Madhub Holdar v. Monohur Mookerji, 15 C. 756; 15 I. A. 97 ... 42
Radha Prasad v. Munna, L. P. A. No. 38 of 1910 955
Radha Prasad Mallick v. Ranee Moni Dossee, 33 C. 947; 3 C. L. J. 502; 10 C. W. N. 695 528, 553
Radha Prosad Singh v. Sundar Lal, 9 C. 644 ... 189
Radhibai v. Kundanmal, 1 S. L. R. 155 ... 265
Radhika Nath Sarkar v. Rakhal Raj Gayen, 13 C. W. N. 1175; 10 C. L. J. 473; 3 Ind. Cas. 835 ... 329
Raghubans v. Phool Kumari, 32 C. 1130; 1 C. L. J. 542 ... 774
Raghubar Mahto v. H. Manners, 13 C. L. J. 568; 11 Ind. Cas. 389 599, 636
Raghunandun Pershad v. Bhugoo Lall, 17 C. 268 142
Raghunath v. Sriram, 28 A. 764; (1906) A. W. N. 235; 3 A. L. J. 579 (F. B.); 1 M. L. T. 242 ... 44
Raghunath v. Varjiwandas, 30 B. 578; 8 Bom. L. R. 525 ... 439
Raghunath Prasad v. Gobind Prasad, 8 A. 76 ... 480
Ragnath Sahai v Man Raj, 80 P. R. 1895 ... 319
Rahamat Chaudhri v. Salamat Chaudri, A. W. N. (1901) 48 ... 79
Rahimbhoy v. Turner, 18 I. A. 6; 15 B. 155 ... 375
Rahimuddi Munshi v. Nalini Kanta Lahiri, 13 C. W. N. 407; 1 Ind. Cas. 81 ... 960
Rai Banomali Roy Bahadur v. Jagat Chandra Bhowmick, 32 I. A. 80; 15 M. L. J. 267; 32 C. 669; 1 C. L. J. 319; 2 A. L. J. 794; 9 C. W. N. 673 ... 8
Rai Mohan Saha v. Sasanka Mohan Roy, 12 C. L. J. 407; 8 Ind. Cas. 786 ... 363
Rai Shamkissen v. Damar Kumari, 11 C. W. N. 440 ... 89
Raj Bahadur v. Birmha Singh, 3 A. 85 ... 555
Raj Mal v. Sandhi, 41 P. R. 1909; 1 Ind. Cas. 728; 57 P. W. R. 1909 ... 713
Raja Burdakanth Roy v. Aluk Munjoore Dasiah, 4 M. I. A. 321 ... 382
Raja of Vizianagram v. Dantivada Chelliah, 28 M. 84 ... 322
Raja Tasadduq Rasul Khan v. Janki Saran, 9 O. C. 211 ... 490

R—contd.

Page.

Rajah of Kalahasti v. Achigadu, 30 M. 454; 17 M. L. J. 367 ... 9
Rajah of Venkatagiri v. Isakapalli Subbiah, 26 M. 410 ... 215
Rajah Promoda Nath Roy v. Rameni Kanta Roy, 35 C. 331; 12 C. W. N. 249; 10 Bom. L R. 66; 7 C. L. J. 139; 3 M. L. T. 151; 18 M. L. J. 43... 83
Rajaram v. Ganesh, 23 B. 131 ... 226
Rajendro Nath Haldar v. Jogendro Nath Banerjee, 14 M. I. A. 67; 15 W. R. 41 (P. C.); 7 B. L. R. 216 ... 896
Rajeshwar Mullick v. Gopeshwar Mullick, 34 C. 828 at p. 833; 11 C. W. N. 782 ... 228
Rajgir v. Ishwardhari, Ishwardhari v. Rajgir, 5 Ind. Cas. 660: 11 C. L. J. 243 ... 369
Rajkrishna v. Muktaram Das, 7 Ind. Cas. 700; 12 C. L. J. 605 ... 126
Rajo v. Karam Bakhsh, 11 P. R. 1908; 92 P. L. R. 1908; 13 P. W. R. 1908 178, 713
Rakhaldas Majumdar v. Jogendra Narayan Majumdar, 3 Ind. Cas. 391; 10 C. L. J. 467 ... 142
Rakhmabai v. Govind Moreshwar, 6 Bom. L. R. 421 ... 206
Ralla v. Budha, 50 P. R. 1893 ... 181
Ram Bharos v. Lal Achal Ram Singh, S. D. No. 30 of 1891 ... 811
Ram Chand v. Billa Mal, 64 P. R. 1911; 12 Ind. Cas. 867 ... 808
Ram Chand v Gholu Shah, 87 P. R. 1887 ... 671
Ram Chandra Shankarbava Dravid v. Kashi Nath Narayan Dravid, 19 B. 271 ... 687
Ram Charan Sanyal v. Anukul Chandra Acharya, 4 C. L. J. 578; 34 C. 65; 11 C. W. N. 160 ... 685
Ram Charan Singh v. Emperor, 5 C. L. J. 233; 5 Cr. L. J. 199 ... 927
Ram Coomar v. Dwarkanath, 5 W. R. 207 ... 381
Ram Coomar v. Rajah Gopal Singh, 17 W. R. 54 Cr. ... 782
Ram Chunder Dutt v. Jugheeh Chander Dutt, 12 B. L. R. 229; 19 W. R. 353 ... 608
Ram Chunder Sao v. Bunseedhar Nath, 9 C. 741 ... 333
Ram Das v. Amir Shah, 113 P. R. 1901 ... 174
Ram Das Chakarbati v. The Official Liquidator, Cotton Ginning Company, Limited, Cawnpore, 9 A. 366 ... 465
Ram Gopal v. Shams Khatoo, 20 C. 93; 19 I. A. 228 ... 608
Ram Kalee v. Court of Wards, 18 W. R. 474 ... 137
Ram Kirpal Singh v. Rup Kuari, 11 I. A. 37; 6 A. 269 ... 83
Ram Kishen v. Fakir Ali, 185 P. L. R. 1905 ... 563
Ram Lal v. Ladha Singh, 62 P. R. 1886 ... 808
Ram Lal Sett v. Kanai Lal Sett, 12 C. 663 ... 894
Ram Mohan Pal v. Sheikh Kachhu, 32 C. 386; 1 C. L. J. 1; 9 C. W. N. 249 337, 636
Ram Narain Roy v. Baij Nath Malla, 29 C. 36 ... 235
Ram Narain Singh v. Sewak Ram, 21 P. R. 1906; 110 P. L. R. 1906 ... 169
Ram Nath v. Bindraban, 18 A. 369 ... 456
Ram Nidh v. Lal Achal Ram Singh, S. D. No. 32 of 1891 ... 811
Ram Nirunjan Singh v. Prayag Singh, 8 C. 138; 10 C. L. R. 66 ... 497
Ram Nundun v. Janki Koer, 29 C. 828; 7 C. W. N. 57; 4 Bom. L. R. 664 ... 693

R—contd.

Page.

Ram Pershad Singh v. Lakhpati Koer, 30 C. 231 at p. 247; 7 C. W. N. 162; 5 Bom. L. R. 103; 30 I. A. 1 ... 123, 207, 680
Ram Prasad v. Man Mohan, 30 A. 256; A. W. N. (1908) 106; 5 A. L. J. 267 ... 952
Ram Prosad Malla v. Raghubar Mallan, 13 C. W. N. 1038; 4 Ind. Cas. 6; 37 C. 13; 10 Cr. L. J. 454 ... 1008
Ram Ratan v. Mohant Sahu, 6 C. L. J. 74; 11 C. W. N. 732 ... 381
Ram Ratan Shah v. Kirpa Ram, 8 Ind. Cas. 246; 86 P. L. R. 1910 ... 562
Ram Sarup v. Bela, 6 A. 312; 11 I. A. 44 ... 972
Ram Tahul Singh v. Beseswar Lall Sahoo, 2 I. A. 131; 15 B. L. R. 208; 23 W. R. 305 ... 457
Rama v. Kunji, 9 M. 375 ... 44
Rama Aiyar v. Sankara Aiyar, 31 M. 89 at p. 93; 17 M. L. J. 573; 3 M. L. T. 73 ... 903
Ramachandram Pillai v. Kalimuthu Chetti, 21 M. L. J. 246; 2 M. W. N. 238; 9 M. L. T. 389; 9 Ind. Cas. 596 ... 11
Ramakrishna v. Tripurabai, 33 B. 88; 10 Bom. L. R. 1029 ... 9
Ramakrishnamma v. Bhagamma, 13 M. 56 ... 903
Ramalinga v. Ayyadorai, 28 M. 124; 14 M. L. J. 493 ... 655
Ramanathan v. Murugappa, 27 M. 192 ... 234
Ramanuj Sewak Singh v. Hingu Lal, 3 A. 517 ... 313
Ramasami v. Queen-Empress, 4 M. H. C. R. 152 391
Ramasami Ayyar v. Vengidusami Ayyar, 22 M. 113 ... 478
Ramasamy Pillai v. Muthoo Chetty, (1910) M. W. N. 4; 7 M. L. T. 125; 5 Ind. Cas. 834 ... 325
Ramasukh Das v. Fazal-ud-Din, 19 P. R. 1898 ... 664
Ramayya v. Venkataratnam, 17 M. 122 ... 670
Ramayyar v. Ramayyar, 21 M. 356 ... 65
Ramayyar v. Vendachalla, 14 M. 441 ... 568
Ramchander v. Sagunbai, 1879 Bom. P. J. 450 137
Ramdhan Rakhit v. Panchanan Chuckerbutty, 10 W. R. 141; 1 B. L. R. (s. N.) 9 ... 369
Rameswar Prasad v. Rai Sham Kishen, 29 C. 43 625
Ramjas v. Nihala, 13 P. R. 1892, Rev. ... 18
Ramji v. Syed Nur, 4 N. L. R. 45 ... 984
Ramji Ram v. Salig Ram, 14 C. L. J. 188; 11 Ind. Cas. 481 ... 167
Rampher Singh v. Ram Khelawan Singh, 2 O. C. 252 ... 614
Ramrup Mahto v. H. Manners, 4 C. L. J. 209 598, 636
Ramsden v. Dyson, (1866) L. R. 1 H. L. 129; 12 Jur. (N. S.) 506; 14 W. R. 926 ... 514
Ramsing v. Kirkbride, Sel. D. Sind Sadar Court Vol. I page 83 ... 247
Ramyad v. Bindeswari, 6 C. L. J. 102 ... 381
Rangiah Chetty v. Subramania Chetty, 21 M. L. J. 21; (1910) 1 M. W. N. 755; 9 M. L. T. 3; 8 Ind. Cas. 512 ... 903
Rani Sartaj Kuari v. Ram Deoraj Kuari, 15 I. A. 51; 10 A. 272 ... 269
Ranji Khan v. Kamun, 179 P. R. 1889 ... 950
Ranjit Singh v. Baldeo Singh, A. W. N. (1908) 162; 5 A. L. J. 516; 30 A. 390 ... 952
Rao Girraj Singh v. Ram Raghubir, 31 A. 429; 2 Ind. Cas. 118 ... 936
Rashid-un-nissa v. Muhammad Ismail Khan, 10 C. L. J. 318; 13 C. W. N. 1182; 3 Ind. Cas. 864; 6 A. L. J. 822; 11 Bom. L. R. 1225; 6 M. L. T. 279; 31 A. 572 ... 415

R—concld.

Page.

Rasik Lall Dutt v. Bidhumukhi Dasi, 10 C. W. N. 719; 4 C. L. J. 306; 33 C. 1094 ... 941
Rassul Haji Cassum, *In re*, 13 Bom. L. R. 13; 9 Ind. Cas. 344 ... 570
Rathna Mudaliar v. Raghunadha Bhattar, 8 M. L. J. 173 ... 15
Ratnlal Rangildass v. Vrijbhukanram, 17 B. 684 330
Raunak Bakhsh Khan v. Roshan Zaman Khan, 9 O. C. 246 ... 897
Raziuddin v. Karim Baksh, 12 A. 169 ... 44
Re Mill's Estate, 34 Ch. D. 24; 55 L. T. 465; 35 W. R. 65; 51 J. P. 151; 56 L. J. Ch. 60 ... 247
Rees v. Waters, (1847) 16 M. & W. 263; 4 D. & L. 567 ... 163
Reference under section 39 of Madras Forest Act, 12 M. 203 ... 39
Reg. v. Chaseman, Lewis & Cavres, 145 ... 100
—— v. Davis, 14 Cox. C. C. 563 ... 917
—— v. Hanmanta, 1 B. 610 ... 275
—— v. Hicklin, 3 Q. B. 360; 37 L. J. M. C. 89; 18 L. T. 395; 16 W. R. 801; 11 Cox. C. C. 19 ... 993
—— v. Cruse, 8 Car. and P. 541 at p. 546; 2 M. C. C. 53 ... 920
—— v. Gamlen, 1 F. and F. 90 ... 920
—— v. Michael, 9 Car. & P. 356; 2 M. C. C. 120 ... 841
Regulla Jogayya v. N. Vencatarathnamma, 33 M. 492; 5 Ind. Cas. 271; 7 M. L. T. 112; 20 M. L. J. 412 ... 486
Reid v. So Hlaing, 5 L. B. R. 241; 3 Bur. L. T. 124; 8 Ind. Cas. 952; 11 Cr. L. J. 738 ... 387
Reoti v. Lachman, A. W. N. (1900) 90 ... 185
Rex v. John Thomas, 7 Car. and P. 817 ... 920
—— v. Meakin, 7 Car. and P. 297 ... 920
—— v. Pearson, 2 Lewin C. C. 144 ... 920
—— v. Plummer, (1902) 2 K. B. 339; 71 L. J. K. B. 805; 68 L. T. 836; 51 W. R. 137; 66 J. P. 647; 20 Cox. C. C. 269 ... 281
Richardson, *In re*, (1911) 2 K. B. 705; 80 L. J. K. B. 1232 ... 203
Richardson v. Younge, 6 Ch. 478; 40 L. J. Ch. 338; 25 L. T. 230; 19 W. R. 612 ... 703
Right v. Cuthell, 7 R. R. 752 at p. 754; 5 East 491; 2 Marsh 83; 5 Esp. 149 ... 983
Rivett Carnac v. Jivibai, 10 B. 478 ... 693
Robert Skinner v. Shankar Lal, 31 A. 10 (n.); 5 A. L. T. 638 n.; 1 Ind. Cas. 556 ... 96
Robinson v. Anderson, 20 Beav. 98; 7 De G. M. and G. 239 ... 26
Robinson v. Robinson, (1859) 1 Sw. & Tr. 362; 27 L. J. Mat. 91; 5 Jur. (N. S.) 392 ... 493
Rochester v. Pierce, (1808) 1 Campbell 466 ... 31
Roda v. Harnam, 18 P. R. 1895 ... 344
Roshun Lall v. Ram Lall, 30 C. 262 ... 908
Ross v. Linder, (1881) 17 South Car. 593 ... 119
Roshan Din v. Khuda Bakhsh, 99 P. R. 1910; 8 Ind. Cas. 1155; 42 P. L. R. 1911 ... 563
Rudranund v. Pirthi Chand, 14 C. L. J. 346; 11 Ind. Cas. 438 ... 341
Rudrappa v. Narsing Rao, 29 B. 213; 7 Bom. L. R. 12 ... 659
Rukka Bai v. Ganda Bai, 1 A. 594 ... 137
Rukun Din v. Mariam, 68 P. R. 1898 ... 550
Rulla Mal v. Dulo Mal, 7 P. R. 1876 ... 562
Rustam Khan v. Jio, 139 P. R. 1892 ... 950
Rustomji Burjorji v. Kessowji Naik, 8 B. 287 ... 852
Ruttun Chand v. Goojnee, 53 P. R. 1868 ... 720

S

Page.

Saadatmand Khan *v.* Phool Koer, 25 I. A. 146; 20 A. 412; 2 C. W. N. 550 ... 341
Sadabart Prasad Sahu *v.* Foolbash Koer, 3 B. L. R. 31 (F. B.); 12 W. R. 1 (F. B.) ... 548
Sadashiv Ganpatrao *v.* Vithaldas Nanchand, 20 B. 198 ... 369
Sadasiva Pillai v. Rama Lingh Pillai, 2 I. A. 219 pp. 232, 233; 15 B. L. R. 383; 24 W. R. 193 82, 171, 253
Sadhu Charan Pal *v.* Radhika Mohan Roy, 8 C. W. N. 695 ... 452
Safdar Ali *v.* Kishun Lal, 7 Ind Cas 241; 12 C. L. J. 6 ... 860
Safiur Rahman *v.* Maharamunnessa Bibi, 24 C. 832 ... 316
Sagurmull *v.* Manraj, 4 C. W. N. ccvii (short note) 123, 680
Sahadeb Dhali *v.* Ram Rudra, 10 C. W. N. 820 ... 42
Sahib Dad *v.* Rahmat, 88 P. L. R. 1904; 90 P. R. 1904 ... 344
Sahib Jan *v.* Karm Bakhsh, 80 P. R. 1875 ... 950
Sahibzadi Begam *v.* Said-un-Nisa Begam, 123 P. R. 1880 ... 75
Saiyed Zahid Ali *v.* Rudra Singh, First Civil Appeal No. 26 of 1909 ... 473
Sajibullah Sirkar *v.* Hazi Khosh Mahomed Sirkar, 13 C. 264 ... 84
Sakharam *v.* Padmakar, 30 B. 623; 8 Bom. L. R. 757 ... 128
Sakharam Krishnaji *v.* Madan Krishnaji, 5 B. 232 ... 502
Sakina *v.* Gauri, 24 A. 302 ... 128
Samanda *v.* Nur Bibi, 36 P. R. 1905; 37 P. L. R. 1905 ... 948
Samar Ali *v.* Karimullah, 8 A. 402 ... 964
Sami Aiyar, P. S. *v.* Ayilam Gramon Vythi Pattar, 19 M. L. J. 68; 4 M. L. T. 455; 4 Ind. Cas. 617 ... 606
Sami Iyer *v.* Krishna Sami, 10 M. 169 ... 92
Sami Roy v. Eliavatha Rao, 16 M. L. J. 357 ... 17
Samiya Mavali *v.* Minammal, 23 M. 490 ... 903
Samman *v.* Ala Bakhsh, 106 P. R. 1901 ... 412
Sangira *v.* Ramappa, 34 B. 59; 4 Ind. Cas. 257; 11 Bom. L. R. 1130 ... 841
Sankaralinga *v.* Ratna Sabhapati, 21 M. 324 ... 128
Sankaranarayana Vadhyar v. Sankaranarayana Ayyar, 25 M. 343 ... 474
Sanwal Das *v.* Bismillah Begam, 19 A. 480 ... 564
Sarat Chandra Dey *v* Gopal Chunder Laha, 19 I. A. 203; 20 C. 296 ... 485
Sarat Chunder Roy Chowdhry *v.* Chundra Kant Roy, 25 C. 805 ... 44
Sarat Chandra Roy Chowdhry *v.* Chandi Charan Mitra, 7 C. W. N. 800 ... 46
Sarbesh Chandra Basu *v.* Hari Dayal Singh, 14 C. W. N. 451; 5 Ind Cas. 236; 11 C. L. J. 345 81
Sardar Mal v. Aranvayal Sabhapathy, 21 B. 205 570
Sadar Singji *v.* Ganpat Singji, 17 B. 56 ... 408
Sarnomoyee *v* Denonath Gir Sunnyasee, 9 C. 908; 13 C. L. R. 69 ... 786
Sarsuti *v.* Kunj Behari Lal, 5 A. 345 ... 154
Sartaj Kuari *v.* Deoraj Kuari, 10 A. 272; 15 I. A. 51 9
Sarup Ganjan Singh *v.* Robert Watson & Co, 6 C. W. N. 735 ... 142
Sastry Velaider Aronegary *v.* Sembecutty Vaigalie, 6 A. C. 364; 44 L. T. 895; 50 L. J. P. C. 28 ... 683

S—contd.

Page.

Satya Saran Gohsal *v.* Mohesh Chandra Mitter, 12 M. I. A. 263; 2 B. L. R. (P. C.) 23; 11 W. R. (P. C.) 10 ... 608
Sawan *v.* Harnama, 162 P. L. R. 1901 ... 181
Sawan *v.* Sahib Khatun, 44 P. R. 1909; 2 Ind. Cas. 71; 69 P. W. R. 1909; 67 P. L. R. 1909 ... 714
Sayad Hussein *v.* Collector of Karia, 21 B. 257 ... 266
Scott *v.* Milne, 5 Beav. 215, on Appeal 7 Jurist. 709 ... 24
Scott *v.* Scott, 34 L. J. P. & M. 23 ... 613
Secretary of State *v.* Ambavana Pandarasanadhi, 24 M. 366; 9 M. L. T. 47; 2 M. W. N. 119; 8 Ind. Cas 357 ... 822
Secretary of State v. Hari Bhanji, 5 M. 273 ... 372
Secretary of State *v.* Kamachee, 7 M. I. A. 476; 4 W. R. (P. C.) 42 ... 968
Sesha Ayyar *v.* Krishna Iyengar, 24 M. 96 ... 469
Seshachalam Chetti *v.* Rajam Chetty, 8 M. L. J. 203 ... 89
Sessions Judge of Tinnevelly Division *v.* Sivan Chetty, 32 M. 258; 5 M. L. T. 269 (F. B.) 9 Cr. L. J. 170; 1 Ind. Cas 187 ... 222
Seth Chand Mal v. Kalian Mal, 96 P. R. 1886 ... 936
Sew Bux Bogla *v.* Shib Chunder Sen, 13 C. 225 908
Shabiuddin *v.* Deomoorat Koer, 30 C. 655 ... 654
Shafi-un nissa *v.* Fazalrab, 7 A. L. J. 787; 7 Ind. Cas. 293 ... 965
Shafiq-un-nissa *v* Shaban Ali Khan, 26 A. 581 at p. 586; 9 C. W. N. 105 ... 122
Shah Bodhraj *v.* Sundar Singh, 100 P. R. 1885 563
Shah Muhammad *v.* Diwan Baksh, 12 P. R. 1892, Rev. ... 18
Shah Nazam-ud-din Ahmad *v.* Bibi Husaini, 4 W. R. 110 ... 75
Shahunshan Begum *v.* Fergusson, 7 C. 499 ... 774
Shaikh Bahadur *v.* Eradatullah Mallick, 6 Ind. Cas. 801; 37 C. 642; 14 C. W. N. 799; 12 C. L. J. 45 ... 111
Shaikh Kamaruddin *v.* Jowahir Lal, 1 C. L. J. 381; 27 A. 334; 15 M. L. J. 258; 9 C. W. N. 601; 2 A L. J. 397; 7 Bom. L. R 433 ... 141
Sham Chand *v.* Kally Kanth, (1863) 2 Hay 314 381
Sham Lall *v.* Anantee Lall, 24 W. R. 312 ... 681
Sham Lal *v.* Emperor, 6 A. L. J. 487; 2 Ind. Cas. 225; 9 Cr. L. J. 528 ... 102
Sham Singh v. Karm, 185 P. R. 1889 ... 624
Shama Charan Kundu *v.* Khettromoni Dasi, 27 I. A. 10; 4 C. W. N. 501; 27 C. 521 433, 591
Shamboeti *v.* Jago Bibi, 29 C. 749 ... 439
Shankar Balkrishna *v.* Emperor, 32 C. 73; 8 C. W. N. 645; 1 Cr. L. J. 634 ... 841
Shanmugam Pillai *v.* Syed Ghulam Ghose, 27 M. 116 ... 461
Sharofan *v.* Muhamed Habibubdin, 10 Ind. Cas. 148; 13 C. L. J. 535; 15 C. W. N. 685 ... 367
Sheikh Akbar *v.* Sheikh Khan, 7 C. 256 ... 139
Sheikh Muhammed Aga *v.* Jadunandan Jha, 10 C. W. N. 137; 2 C. L. J. 325 ... 404
Sheikh Miadhar *v.* Rajani Kunto Roy, 14 C. W. N. 339; 5 Ind. Cas. 708 ... 688
Sheikh Muhammad *v.* Habib Khan, 67 P. R. 1905; 113 P. L. R. 1905 ... 812
Sheo Charan *v.* Busunt Singh, 3 N. W. P. H. C. R. 282, Agra (F. B.) Ed. 1874, 258 ... 555
Sheo Golam Lall *v.* Beni Prosad, 5 C. 27; 4 C. L. R. 29 82, 205

S—contd.

Page.
Sheo Narain v. Darbari, 2 C. W. N. 207 ... 655
Sheo Pershad Singh v. Sahib Lal, 20 C. 453 ... 38
Sheo Prasad v. Indar Bahadur, 30 A. 179; 5 A. L. J. 258; A. W. N. (1908) 74 ... 190
Sheo Ruttan Singh v. Net Loll Sahu, 30 C. 1 ... 404
Sheo Shankar Gir v. Ram Shewak, 24 C. 77 ... 86
Sheo Singh v. Raghubans Kunwar, 27 A. 634; 15 M. L. J. 352; 9 C. W. N. 1009; 2 C. L. J. 194; 8 O. C. 317 ... 971
Sheolochun v. Sahib Singh, 14 I. A. 63; 14 C. 387 ... 692
Sheonath v. Ramnath, 10 M. I. A. 413 at p. 426; 5 W. R. (P. C.) 21; 1 Ind. Jur. (N. S.) 161 ... 162
Sheoraji v. Ramjas Pandey, 33 A. 430; 9 Ind. Cas. 501; 8 A. L. J. 454 .. 489
Sheoram Tiwari v. Thakur Prasad, 30 A. 136; 3 M. L. T. 211; 5 A. L. J. 106; A. W. N. (1908) 43 465
Sher Bahadur Sahu v. M. H. Mackenzie, 7 C. W. N. 400 ... 3
Sher Muhammad Khan v. Muhammad Khan, 5 P. R. 1895 ... 296
Sher Singh v. Sidhu, 11 P. R. 1907; 9 P. W. R. 1907; 30 P. L. R. 1907 ... 527
Sher Singh v. Subha, 10 P. R. 1892, Rev. ... 18
Sheran v. Sharman, 117 P. R. 1901; 182 P. L. R. 1901 ... 714
Shibessuree Debia v. Mothooranath Acharjee, 13 M. I. A. 270 at p. 275; 13 W. R. 18 (P. C.) ... 596
Shivabhajan v. Secretary of State, 28 B. 314 ... 371
Shivadurga v. Raj Mohan, 15 C. W. N. 577; 10 Ind. Cas. 475 ... 341
Shivagunga, *In re*, 9 M. I. A. 530; 2 W. R. 31 (P. C.) ... 270
Shoma Mehta v. Rajani Biswas, 1 C. W. N. 55 ... 30
Shoobhagee Koeri v. Bekhori Ram, 4 C. L. J. 390 ... 508
Shorten v. Judd, 56 Kan 43; 54 Am. St. Re. 587 ... 695
Shuppu Ammal v. Subramaniam, 33 M. 238; 19 M. L. J. 739; 4 Ind. Cas. 1083 ... 206
Shyam Kumari v. Rameswar Singh, 31 I. A. 176; 32 C. 27; 8 C. W. N. 786 ... 960
Siddessury Dassee v. Jonardan Sarkar, 5 C. W. N. 549; 29 C. 557 ... 137
Sidebotham v. Holland, (1895) 1 Q. B. 378; 64 L. J. Q. B. 200; 14 R. 135; 72 L. T. 62; 43 W. R. 228 ... 901
Sidharath Rai v. Anantram, 8 Bom. L. R. 567 ... 658
Singam Marwari v. Barhmadeo Prasad, 1 C. L. J. 331 at p. 348 ... 182
Sirdar Nuran Khan v. Nawab Imam Bakhsh Khan, 6 P. R. 1883 Rev. ... 957
Siri Dhar v. Amar Nath, 146 P. R 1908; 34 P. W. R. 1904; 61 P. L. R. 1908 ... 801
Sita Nath Midda v. Basudeb Midda, 2 C. L. J. 540 672
Sita Ram v. Raja Ram, 12 P. R. 1892 (F. B.) ... 411
Sital Rai v. Nanda Lal, 1 Ind. Cas. 304; 13 C. W. N. 591; 11 C. L. J. 202 ... 367
Sitaram Bhat v. Sitaram Ganesh, 6 B. H. C. R. 250 ... 226
Sitharama v. Vythilinga, 12 M. 472 ... 603
Sm. Mobin Kally Dabee v. Ambica Churn Bamerjee, 5 C. W. N. 813 ... 235
Smith v. Dinonath, 12 C. 213 ... 146
Smith v. General Motor Calcutta Company, (1911) A. C. 188; 80 L. J. K. B 830; 9 S. E. C. (N. S.) 163 ... 608

S—contd.

Page.
Soadamini v. The Administrator-General of Bengal, 20 I. A. 12; 20 C. 433 ... 692
Sohna v. Mosam, 23 P. R. 1895 ... 412
Siru Padmanabh Rangappa v. Narayan Rao, 18 B. 520 ... 38
Soobah Pirthee Lal Jha v. Shoobah Doorgah Lal Jha, 7 W. R. 73 ... 454
Soorjeemoney v. Denobundoo, 9 M. I. A. 123 ... 692
Sreenath v. Raj Chunder, 8 W. R 171 ... 164
Sreenath Dutt v. Dwary Dhallie, 2 W. R. S. C. C. Ref. 2. ... 30
Sreeram v. Puddom, 9 W. R. 152 ... 137
Sreeramudhu Yarranna v. Donhira Kannamma, (1911) 2 M. W N. 354; 21 M. L. J. 962; 10 M. L. T. 561; 12 Ind. Cas. 457 ... 190
Sreeramulu v Krishtamma, 26 M. 143 ... 8
Sri Narain Chuckerburty v. A. B Miller, 15 W. R. (O. C.) 7 ... 456
Sri Nath Das v. Ungud Singh, 7 A. L. J. 459; 6 Ind. Cas. 126 ... 140
Sri Nilmony Singh Deo v. Bhowani Churn Panda, 1 Marsh 327 ... 464
Sri Raja Rao Venkata v. The Court of Wards, 22 M. 383; 26 I. A. 83; 3 C. W. N. 415 ... 9
Sri Virada Pratapa Raghunada Deo v. Sri Brozo Kishoro Patta Deo, 1 M. 69; 25 W. R. 291; 3 I. A. 154 ... 9
Srihari Banerjee v. Khitishchandra Rai Bahadur, 24 C. 569 at p. 574; 1 C. W. N. 509 ... 300
Srimati Mallika Dassi v. Makhan Lal Chowdhry, 9 C. W. N. 928 ... 688
Srimati Nissa Bibi v. Radha Kishore Manikya, 11 C W. N. 312 ... 487
Srinath Das v. Khetter Mohun Singh, 16 C. 693; 16 I. A. 85 ... 505
Srinath Patra v. Kaloda Prosad Banerjee, 2 C. L. J. 592 ... 122
Srinivasa Reddi v Sivarama Reddi, 32 M. 320; 4 Ind. Cas. 506 ... 472
Sriram v. Hari Narain, 33 C. 54; 3 C. L. J. 59; 10 C. W. N. 425 ... 969
Srirangammal v Sandammal, 23 M. 216 ... 795
Stalworth v Inns, 13 M. & W. 466; 2 D. & L. 428; 14 L. J. Ex. 81; 9 Jur. 285 ... 166
Steele v. Brannan, L. R. 7 C. P. 261; 41 L. J. M. C. 85; 26 L. T. 509; 20 W. R. 607 ... 994
Steele v. M'Kinlay, 5 App. Cas. 574; 43 L. T. 358; 29 W. R. 17 ... 266
Stevens v Cook, 5 Jur. (N. S.) 1415. ... 26
Strong v Strong, (1853) 9 Cushing 560 ... 163
Subbu Narayana Vathiayar v. Ramaswami Iyer, 30 M. 83; 1 M. L. T. 377; 16 M. L. J. 503 ... 96
Subbu Pillai v. Rama Sawmi Ayyar, 27 M. 512 ... 44
Subba Rau v. Devur Shetti, 18 M. 126 ... 573
Subba Reddi v. Munsoor Ali Sahib, 24 M. 81 ... 278
Subbayya v. Krishna, 14 M. 183 at p. 209 ... 232
Subbayya Chetti v. Ayaswami Aiyer, 32 M. 86; 5 M. L. T. 80; 1 Ind. Cas. 749 ... 40
Subbaraya Rowthu Minda Nainar v. Kuppusamy Iyengar, 5 M. L. T. 273; 1 Ind. Cas. 535 ... 325
Subramania Ayyar v. King-Emperor, 25 M. 61; 28 I. A. 257 ... 395
Subramania Iyer's case, 25 M. 61 214, 216
Subramania Pillai v. Subramania Ayyar, 21 M. 419 ... 128
Subramanian Chetti v. Arunachellam, 28 M. 1 ... 692

S—concld.

Page.
Suchet Singh, v. Basant Singh, 11 P. R. 1892, Rev. ... 18
Sudarshan Das Shastri v. Ram Prasad, 7 A. L. J. 963; 33 A. 97; 7 Ind. Cas. 385 ... 964
Sudhisht Lal v. Sheobarat Koer, 7 C. 245; 8 I. A. 39 ... 638
Sugra Bibi v. Masuma Bibi, 2 A. 573 75, 859
Sukhlal v. Biharilal, (1902) 2 S. C. Sel. D. 413... 228
Sukhnandan v. Sadaram Seth, 13 C. P. L. R. 43 905
Suleman Kadr. v. Mehdi Begam, 21 C. 135; 20 I. A. 144 ... 75
Sums-ud-din v. Abdul Husain, 31 B. 165; 8 Bom. L. R. 781 ... 497
Sundar Singh v. Bholu, 20 A. 322 ... 461
Sundararaja Ayyangar v. Pattanathusamy, 17 M. 306 ... 44
Sunder Koer v. Rai Sham Krishen, 34 C. 150; 4 A. L. J. 109; 11 C. W. N. 249; 5 C. L. J. 106; 17 M. L. J. 43; 9 Bom. L. R. 304; 2 M. L. T. 75... 16
Sunkur Pershad v. Goury Pershad, 5 C. 321 ... 38
Suppa Tevan v. Emperor, 29 M. 89; 3 Cr. L. J. 370 ... 275
Surajmani v. Ribi Nath Ojha, 35 I. A. 17; 18 M. L. J. 7; 12 C. W. N. 231; 10 Bom. L. R. 59; 5 A. L. J. 67; 7 C. L. J. 131; 3 M. L. T. 144 (P. C.) ... 269
Surampalli Bangarama v. Surampalli Bramhazee, 31 M. 338; 3 M. L. T. 266; 18 M. L J. 254 ... 137
Surja Prasad v. Mohabir Prasad Tribedy, 11 C. W. N. 887; 6 Cr. L. J. 151 ... 928
Surja Pershad Narain Singh v. Reid, 29 C. 622... 186
Surjiram Marwari v. Barhamdeo, 2 C. L. J. 202 ... 145
Surno Moyee Debi v. Dakhina Ranjan, 24 C. 291 343
Surnomoyee Dasi v. Sri Nath Das, 12 C. 614 ... 505
Sutyabhama Dassee v. Kreshna Chandra, 6 C. 55; 6 C. L. R. 375 ... 33
Swainson v. North East Railway Company, 3 Ex. Dn. 341; 47 L. J. Ex. 372; 38 L T. 201; 26 W. R. 4 ... 419
Syedun v. Vilayat, 17 W. R. 238 ... 685

T

Tajuddin Khan v. Ram Pershad Bhaghat, 1 A. 217 ... 31
Takhuroodeen v Kurimbux, 3 W. R. 20 ... 381
Tamijuddi v. Ajgar, 36 C. 256; 13 C. W. N. 183; 1 Ind. Cas. 942 ... 365
Tani Shah v. Bolahi, 14 C. W. N. 479; 5 Ind. Cas 879 ... 277
Tara Chand v. Baldeo, 117 P. R. 1890 (F. B.) ... 669
Tarukpodo v. Shyama Churn, 8 C. L. R. 50 ... 108
Tarwadi Bholanath v. Bai Kashi, 26 B. 305 92, 325
Tasadduk Rasul Khan v. Ahmad Husain, 21 C. 66; 20 I. A. 176 (P. C.) ... 403
Tatia v. Bhabaji, 22 B. 175 ... 575
Taylor v. Shuttlewoth, (1840) 6 Bing. (N. S) 277; 8 Scott 565; 8 D. P. C. 280; 9 L. J. C. P. 138 ... 120
Tej Chand v. Sreekanth Ghose, 3 M. I. A. 261; 6 W. R. 48 (P. C.) ... 382
Thakar Sheo Narain v. Sheo Dat Singh, 7 O. C. 129 ... 491
Thakoor Dyal v. Sarju Pershad Misser, 20 C. 22 ... 205
Thakur Prasad v. Fakirullah, 17 A. 106; 22 I. A. 44 369, 543

T—concld.

Page.
Thakur Ram v. Katwareo Ram, 22 A. 358 ... 189
Thakurmani Singh v. Dai Rani Koeri, 33 C. 1079 at p. 1093 ... 199
Thakur Tirbuwan Bahadur Singh v. Rameshar Bakhsh Singh, 33 I. A 156; 10 C. W. N. 1065; 8 Bom. L. R. 722; 16 M. L. J. 440; 3 A. L. J. 695; 4 C. L. J. 4[illegible]5; 1 M. L. T. 265; 9 O. C. 377; 28 A. 727 ... 345
Thiruvengada Thiengar v. Vaidinath, 29 M. 303 120
Thammiraju v. Bapiraju, 12 M. 113 ... 164
Thayammal v. Venkatarama, 10 M. 205 ... 15
Thievu Pandithan v. Secretary of State for India, 21 M. 433 ... 39
Thomas Barclay v. Syed Hossein Ali Khan, 6 C. L. J. 601 ... 488
Thomas Robert Doucett v. Josiah Patrick Wise, 4 W. R. Mis. 7 ... 861
Thompson v. Williamson, 7 Bilgh (N. S.) 432 ... 26
Thorley v. Lord Kerry, 4 Taunt. 355; 13 R. R. 626 ... 507
Thornton v. Proctor, 1 Austr. 94; 3 R. R. 558 ... 24
Thorp v. Cole, 2 C. M. & R. 367; 4 Daul 437; 5 L. J. Ex. 24 ... 164
Thuchakovil Unni Koya v. Aropayil Pathuti Umma, 2 M. W. N. 187; 9 Ind. Cas. 786; 9 M. L. T. 312; 21 M. L. J. 577 ... 179
Tildesley v. Harper, (1778) 10 Ch. D. 393; 39 L. T. 552; 27 W. R. 249; 48 L. J. Ch. 495 ... 130
Tirumal Rao v. Dastaghiri Miyah, 22 M. 286 ... 369
Tituram Mukerjee v. Cohen, 32 I. A. 185; 33 C. 203; 2 C. L. J. 408; 9 C. W. N. 1073; 15 M. L. J. 379; 7 Bom. L. R, 920; 3 A. L. J. 59 ... 862
Toree Mahomed v. Mahomed Mabood, 9 C. 730; 13 C. L. R. 91 ... 190
Tota v. Abdulla Khan, 66 P. R. 1897 ... 527
Tota Ram v. Ram Charan, 33 A. 222; 7 A. L. J. 1149; 8 Ind. Cas. 785 ... 17
Trailokia v. Shurno, 11 C. 539 ... 122
Tricumdass v. Khimji, 16 B. 626 ... 266
Trimbak Ramkishna Ranade v. Hari Laxman Ranade, 34 B. 575; 12 Bom. L. R. 686; 7 Ind. Cas. 940 ... 65
Trimbak v. Lakshman, 20 B. 495 ... 228
Trustees of Clyde Navigation v. Laird, (1882-83) 8 App. Cases 658 at p. 673 ... 247
Tuam (Archbishop) v. Robeson, 5 Bing. 17; 2 M. & P. 32; 6 L. J. (o. s.) C P. 199; 30 R. R. 530 507
Tulsi Ram v. Jhandu, 186 P. R. 1888 ... 33
Tulsi Ram v. Lal Achal Ram Singh, S. D. No. 31 of 1891 ... 811
Tulsidas v. Virbussapa, 4 B. 624 ... 223
Tyrrell v. Painton, (1894) P. 151 at p. 159; 6 R. 540; 70 L. T. 453; 42 W. R. 343 ... 579

U

Ubilock Rai v. Dallial Rai, 3 C. 557 ... 607
Udit Upadhia v. Imam Bandi Bibi, 24 A. 402 ... 84
Uggrakant Chowdhuri v. Harro Chunder Shickdar, 6 C. 209 ... 607
Uma Charan Das v. Mukta Keshi Das, 28 C. 149 ... 690
Umed Dholchand v. Pir Saheb Jiva Miya, 7 B. 134. ... 460
Ummi Begam v. Kesho, 30 A. 462; 5 A. L. J. 474; A. W. N. (1908) 220 ... 685
Ununtoram Chatterjee v. Protab Chunder Shiromonee, 16 W. R31 ...2. 464

U—concld.

Page.

Upendra Narain Bhattacharaya v. Protab Chandra Pardhan, 8 C. W. N. 320 at p. 321 ... 195
Upendra Chandra Mitter v. Tara Prosanna Mukerjee, 30 C. 794 ... 146
Upendra Krishna Mandul v. Ismail Khan Mahomed, 32 C. 41; 8 C. W. N. 889 ... 608

V

Valasubramania Pillai v. Ramanathan Chettiar, 32 M. 421; 2 Ind. Cas. 309; 5 M. L. T. 102 ... 704
Vankayya v. Raghava Charlu, 22 M. 320 ... 89
Vasudeva Mudaliar v. Srinivasa Pillai, 30 M. 426; 17 M. L. J. 444; 11 C. W. N. 1005; 4 A. L. J. 625; 6 C. L. J. 255; 2 M. L. T. 333; 9 Bom. L. R. 1104 ... 506
Velagaleti Ramakrishnayya v. Suramani Bapayya Appa Row, 27 M. 430 ... 176
Velu Goundan v. Kumaravelu Goundan, 20 M. 289 ... 903
Venkata N. Naidu v. Bhashyakarlu Naidu, 25 M. 367; 4 Bom. L. R. 543 (P. C.) ... 794
Venkata Narasimha Appa Row v. Lakhshmi Venkayamma Row, 7 M. L. T. 296; 5 Ind. Cas. 102 ... 739
Venkata Ram Chetty v. King-Emperor, U. B. R. 1907-1909, 3rd Qr., Excise I; 4 Ind. Cas. 898; 11 Cr. L. J. 77 ... 778
Venkatagiri Iyer v. Sodagopa Chariar, 14 M. L. J. 359 ... 204
Venkatasubbaraya v. Zemindar of Karvetenagar, 20 M. 159 ... 343
Vibudhapriya Tirthaswami v. Yusuf Sahib, 28 M. 380; 15 M. L. J. 202 ... 908
Vijiaragharvalu Naidu v. Srinivasalu Naidu, 28 M. 399 ... 189
Vilanki Venkata Krishna Rao v. Venkata Rama Lakhshmi, 1 M. 174; 4 I. A. 1; 26 W. R. 21 ... 9
Villiers v. Mousley, 2 Wills. 403 ... 507
Vira Pillai v. Rangasami Pillai, 22 M. 149 ... 32
Virbhadrapa v. Bhimaji Baloji Saroff, 28 B. 432 140
Visalatchi v. Siva Sankara, 4 M. 292 ... 89
Vithal Krishna Joshi v. Anant Ram Chandra, 11 B. H. C. R. 6 ... 229
Vithu v. Bhimba, 15 B 145 ... 566

W

Wade v. Dowling, 4 Ellis & Bl. 44; 2 C. L. R. 1642; 23 L. J. Q. B. 302; 18 Jur. 728; 2 W. R. 567 ... 165
Wadhava Mal v. Wadhawa, 8 P. R. 1903; 144 P. L. R. 1906; 33 P. W. R. 1908 ... 797
Wahed Ali v. Jumaee, 11 B. L. R 149; 18 W. R. 185 ... 671
Waliullah v. Durga Prasad, 28 A. 340; 3 A. L. J. 181; A. W. N. (1906) 38 ... 185
Walker v. Olding, 1 H. & C. 621; 32 L J. Ex. 142; 9 Jur. 9 (N. S.) 53; 7 L. T. 633 11 W. R. 186 ... 805
Walker v. Simpson, (1888) 80 Maine 143; 13 Attentie 580 ... 119
Warner v. Jacob, (1882) 51 L. J Ch. 642; 20 Ch. D. 220; 46 L. T. 656; 30 W. R. 721 .. 264

W—concld.

Page.

Warter v. Warter, (1890) 15 P. D. 152; 59 L. J. P. 87; 63 L. T. 250; 54 J. P. 631 ... 958
Watson and Company v. Ram Chand Dutt, 18 C. 10; 17 I. A. 110 ... 80
Wazeera v. Haku, 31 P. R. 1867 ... 950
Wazir Begam v. Piyari Begam, 50 P. R. 1898 ... 94
Wazir Muhammad v. Hub Lal, 6 A. L. J. 231; 9 Cr. L. J. 504; 31 A. 313; 2 Ind. Cas. 182 ... 286
Waziran v. Babu Lal, 26 A. 391 ... 662
Wazir-ullah v. Crown, 1 P. R. 1906 Cr; 48 P. L. R. 1906; 3 Cr. L. J. 43 ... 209
Webster v. Bray, 7 Hare 159 ... 26
Wegg Prosser v. Evans, (1895) 1 Q. B. 108; 63 L. J. Q. B. 1 ... 849
Weldon v. Neal, (1887) 19 Q. B. D. 394; 56 L. J. Q. B. 621; 35 W. R. 820 130, 268
West v. Williams, (1899) 1 Ch 132; 79 L. T. 575; 47 W. R. 308; 68 L. J. Ch. 127 ... 656
Wigram, v. Buckley, (1894) 3 Ch. 483; 63 L. J. Ch. 689; 7 R. 469, 71 L. T. 287; 43 W. R. 147 ... 850
Wilkins v. McGinity, (1907) 2 Ir. R. 660 ... 901
William Grant v. Mrs. Robinson, 11 C. W. N. 242; 5 C. L. J. 178 ... 608
Wills v. Barrett, 2 Starke's Rep. 29 ... 95
Winterscale v. Sarat Chandra Banerjee, 8 C. W. N. 155 ... 608
Wise v. Sunduloonissa, 7 W. R. (P. C) 13; 11 M. I. A. 177 ... 684
Wood v. Lidbitter, (1845) 13 M. N. W. 838; 14 L. J. Ex. 161; 9 Jur. 187 ... 241
Woods v. Mehr Ali, 13 C. W. N. 24; 4 M. L. T. 427; 2 Ind. Cas. 107 ... 298
Wright v. Graham, 3 Exch 131; 18 L. J. Ex. 29 ... 165
Wright v. Hicks, 15 Georgia 160; 60 Am. Dec. 687 ... 685
Wright v. Vanderplank, (1855) 2 K. and J. 1; 25 L J. Ch. 753; 2 Jur. (N. S) 599; 4 W. R. 410 514
Wyman v. Hamword, (1868) 55 Maine 534 ... 119

X

Xenos v Whickham, (1867) 2 H. L. 296 at pp. 309, 312, 320, 323; 36 L. J. C. P. 313; 16 L. T. 800; 16 W. R. 38 ... 656

Y

Yates Finn, 13 Ch. D. 839; 28 W. R. 387; 49 L. J. Ch. 188 ... 27
Ydun, *In re*, (1899) B. 236 ... 267
Yogambal Boyee v. Naina Pillai, 33 M. 15; 3 Ind. Cas. 110; 6 M. L. T. 162; 19 M. L. J. 489 146

Z

Zahrun v. Gowri Sunkar, 15 C. 198 ... 125
Zamiran v. Fateh Ali, 32 C. 146 ... 659
Zamindar of Karvetnagar v. Trustee of Tirumalai Tirupati, 32 M. 429; 19 M. L. J. 491; 2 Ind. Cas. 18 9 81

INDIAN CASES.

1912.

VOLUME XIII.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 900 OF 1909.
July 30, 1911.
Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.
AKHJU SINGH—DEFENDANT No. 1—APPELLANT
versus
Rai Kumar JAGANNATH PRASAD SINGH—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), *s.* 120, *sub-s.* (2)—"*Any other evidence*"—Zerait *land—Admission by tenant in previous deposition—Assertions of witnesses that land is cultivated by landlord—Mere execution of* kabulyat.

The policy of the Legislature is that a *zemindar* should not be at liberty to add to his stock of private lands, that is, to absorb the *raiyati* lands of the estate and convert them into his private lands. Only those lands can be treated as private lands which were originally set up by the *zemindar* as such.

Under section 120, sub-section (2), of the Bengal Tenancy Act, an admission by a tenant defendant in his previous deposition is admissible as "any other evidence."

Nilmoney Chuckerbutti v. *Baikanta Nath Bera*, 17 C. 466, referred to.

Assertions of witnesses to the effect that the land was cultivated by the landlord as his *zerait* land for a number of years, are also admissible in evidence.

The mere execution of a *kabulyat* is no evidence that the land was *zerait*, although the fact may be taken into consideration along with other evidence.

Appeal from the decree of the District Judge of Gaya, dated February 20th, 1909, reversing that of the Munsif of Aurangabad, dated September 22, 1908.

Babus *Mohendra Nath Roy* and *Anilendra Nath Roy*, for the Appellant.

Babu *Ram Charan Mittra*, Senior Government Pleader, and Babu *Sarish Chandra Chowdhury*, Junior Government Pleader, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the first defendant in an action in ejectment. The plaintiff-respondent commenced this suit on the ground that the land in the occupation of the appellant was *zerait* and that the defendant had no right to continue in occupation thereof after the expiry of the term of a lease granted to him on the 13th May, 1902. The defendant resisted the claim on the ground that the land was not *zerait*, that it constituted an occupancy holding and that he was not liable to be evicted. The Court of first instance dismissed the suit. Upon appeal, the District Judge has decreed the claim. On behalf of the defendant, this decision has been assailed substantially on three grounds, namely, *first* that the conclusion that the land in *zerait* is based upon evidence which is not admissible in law; *secondly*, that the Judge has not considered whether the defendant was protected from ejectment under section 116 of the Bengal Tenancy Act, even if it was conceded that the case fell within section 120 of the Bengal Tenancy Act, and, *thirdly*, that the Judge ought not to have held that if the land was not *zerait*, the defendant was liable to be ejected under clause (*c*) of section 44 of the Bengal Tenancy Act.

In so far as the last ground is concerned, it is, in our opinion, clearly well founded. Section 44 provides in clause (*c*) that a non-occupancy *raiyat* shall be liable to ejectment where he has been admitted to occupation of the land under a registered lease, on the ground that the term of the lease has expired. If it is assumed for a moment that the land is not *zerait* and that the defendant was an occupancy *raiyat* who was let into occupation

on the 13th May 1902, it follows that under section 44, he would be liable to be ejected after the expiry of the lease on the 13th May 1905. But section 45 provides that a suit for ejectment on the ground of expiration of the term of a lease shall not be instituted against a non-occupancy *raiyat* unless notice to quit has been served on the *raiyat* not less than six months before the expiration of the term of the lease and shall not be instituted after six months from the expiration of the term. This section was repealed by section 2 of Act I of 1907 (B. C.); but it was in force when the term of the lease of the 13th May 1902 expired in 1905. The liability of the defendant to be ejected under clause (*c*) of section 44 accrued at that time. It is not suggested that the landlord has complied with the requirements of section 45, that is, that he has served notice on the *raiyat* not less than six months before the expiration of the term. Nor has he instituted a suit for ejectment within six months from the expiration of the term. The right of the landlord, therefore, to eject the defendant as a non-occupancy *raiyat* under clause (*c*) of section 44 read with section 45, has never become enforceable. The subsequent repeal of section 45 in 1907 cannot clearly revive the right of the landlord. We must take it, therefore, that if the land is not *zerait* and if the possession of the defendant is that of a non-occupancy *raiyat* under the lease of the 13th May 1902, he is not liable to be ejected.

It is now necessary to consider the first two grounds urged in support of the appeal. The learned District Judge has held that under sections 120 and 103 (B) of the Bengal Tenancy Act, there is a presumption in favour of the tenant that the land in suit is not *zerait*. But he has also held that the landlord has sufficiently rebutted that presumption by the oral testimony of witnesses who support the case by the certified copy of a former deposition of the defendant dated the 1st July 1904 in which he admitted that on his application he had obtained the *zerait* land from the Manager, and by the evidence of the *kabulyat* itself the execution of which was not denied by the defendant. With reference to this analysis of the evidence on the record, it has been argued by the learned Vakil for the appellant that the evidence which is made the foundation of the judgment of the District Judge is irrelevant. He has contended, *first*, that under section 120 of the Bengal Tenancy Act an admission by the defendant in his previous deposition recorded on the 1st July 1904 is not admissible under sub-section (2) of section 120; *secondly*, that the mere assertion of a witness that the land is *zerait* is not admissible; and *thirdly*, that the mere execution of a *kabulyat* in 1902 is no evidence that the land was *zerait*. In support of these propositions, the learned Vakil for the appellant has placed reliance upon the case of *Nilmoney Chuckerbutti* v. *Baikant Nath Bera* (1) and has suggested that the contrary view taken in the case of *Bhagtu Singh* v. *Raghu Nath Sahai* (2) does not give effect to the true intention of the Legislature. In order to determine the validity of this contention it is necessary to consider the terms of section 120 of the Bengal Tenancy Act.

Section 120, it will be observed, does not furnish any definition of what constitutes a proprietor's private land. But it is plain that the intention of the Legislature was that no new proprietor's private lands should be created after the Bengal Tenancy Act had come into force. In fact, the view cannot be successfully contested that what is proprietor's private land now must have been the proprietor's private land at the time of the creation of the *zemindari*, in other words, such lands only can be treated as private lands which were originally set up by the *zemindar* as his private land. The policy of the Legislature is that a *zemindar* should not be at liberty to add to the stock of his private lands, that is, to absorb the *raiyati* lands of the estate and convert them into his private lands. The policy of the Legislature has been to discourage the prevention of acquisition of special rights by tenants in lands originally treated by the *zemindar*, not as his private land but as part of the stock of the *raiyati* land of his estate. Starting with this principle in view, it is clear that the Legislature intended in section 120 to impose the conditions under which a particular land might be proved to be the proprietor's private land. Sub-section (1) lays down that the Revenue Officer shall record a parcel of land as a proprietor's private land when one of two elements is established. If it is proved that the land has been cultivated as *khamar*

(1) 17 C. 466.
(2) 13 C. W. N. 135; 9 C. L. J. 15; 1 Ind. Cas. 571.

AKHJU SINGH *v.* JAGANNATH PRASAD SINGH.

zerait niz jote or *kamat* by the proprietor himself with his own stock or by his own servants or by hired labour for twelve continuous years immediately before the passing of the Bengal Tenancy Act, the land must be recorded as the proprietor's private land. Similarly, if it is proved that the cultivated land is recognised by village usage as proprietor's *khamar zerait, niz jote* or *kamat*, it is to be recorded as proprietor's private land. In other words, if one of these two elements is established the inference irresistibly follows that the land is the proprietor's private land. The Legislature, however, does not stop here, and proceeds to provide in sub-section (2) for cases not comprised in clauses (*a*) and (*b*) of sub-section (1). But though sub-section (2) has a wider scope, the landlord, as will be presently seen, is in a position of considerable disadvantage, it starts with the presumption against him that the land is not his private land and the burden is cast upon him to establish to the satisfaction of the Revenue Officer or the Civil Court under sub-section (3) that the land is of the character which he attributes to it. Sub-section (2) provides that in determining whether any land ought to be recorded as a proprietor's private land, the Officer shall have regard to local custom and to the question whether the land was, before the second day of March 1883, specifically let as proprietor's private land and to any other evidence that may be produced, but shall presume that the land is not a proprietor's private land until the contrary is shown. With regard to this sub-section it has been argued by the learned Vakil for the appellant, upon the authority of the decision in *Nilmoney Chuckerbutti* v. *Baikant Nath Bera* (1), that the phrase "any other evidence that may be produced" ought to be interpreted in a narrow sense, namely, as any other evidence that may be produced to show the assertion of any title on the part of the proprietor and communicated to the tenant before the 2nd March 1883. In our opinion, the restricted interpretation suggested is not borne out by the language used by the Legislature; and if the case before us were precisely of the same description as the one considered by the learned Judges, it would have been necessary for us to refer the question to a Full Bench. The case before us, however, is distinguishable and stands on an entirely different footing, and must be decided in accordance with what appears to us to be the plain meaning of sub-section (2) of section 120. As we interpret that sub-section, the Legislature directs that the Revenue Officer shall have regard to local custom and to the question whether the land was, before the second day of March 1883, specifically let as proprietor's private land and to any other evidence that may be produced for the purpose of establishing that the land was proprietor's private land. It may be conceded that the use of the expression whether the land was, before the second day of March 1883, specifically let as proprietor's private land, by implication excludes evidence to show that the land had after that date been specifically let as proprietor's private land The Legislature, for obvious reasons, may have intended that the fact that the landlord had after that date specifically let the land as his private land, would not be allowed to weigh in his favour. But it does not follow that "any other evidence" to which reference is made must necessarily be evidence to show that the landlord had before the second day of March 1883 made an assertion of title and communicated it to the tenant. We have not been able to discover that the view taken in *Nilmoney Chuckerbutti* v. *Baikant Nath Bera* (1) has been adopted in any other case, and possibly the principle laid down in that case was intended by the learned Judges to be taken only as referring to the particular kind of evidence then sought to be adduced. In that case, it was attempted to be shown that in 1883 and 1886, the landlord had asserted, in certain proceedings under the Bengal Tenancy Act, that the land was *zerait* and in the litigation which subsequently ensued, the landlord sought to rely upon this assertion as evidence in his favour. With reference to this, the learned Judges observed that the expression "any other evidence" means "any other evidence produced to show the assertion of title on the part of the proprietor and communicated to the tenant before that date." If the learned Judges intended to lay down broadly that evidence of other descriptions would not, under any circumstance, be admissible, we are unable to accept such conclusion as justified by the plain language of the section. The case of *Sher Bahadur Sahu* v. *M. H. Mackenzie* (3) does not militate against the

(3) 7 C. W. N. 400.

view we take. The evidence excluded in that case was evidence to show that the land had *after* the 2nd March 1883 been specifically let out as proprietor's private land; as we have just indicated, it may be a reasonable view of sub-section (2) to hold that evidence of this description was intended to be excluded by the Legislature. On the other hand, the case of *Bhagtu Singh* v. *Raghunath Sahai* (2) supports the interpretation we have adopted, although we must add that we are not prepared to distinguish the earlier cases on the ground suggested by the learned Judges, namely, that they were cases decided by a Revenue Officer, whereas the case then before the Court was tried as a civil suit. Sub-section 3 makes it patent that the two classes of cases stand on the same footing. In the light of these principles, let us examine whether the evidence to which exception has been taken is really irrelevant. In so far as the certified copies of the former deposition of the defendant recorded in the 1st July 1904 is concerned, it is clear that the identity of the land must first be established. If the identity is so established we are of opinion that the evidence would be admissible, and would fall within the description of 'any other evidence', in sub-section (2) of section 120. In so far as the oral testimony of witnesses is concerned, the question arises whether a bare assertion by a witness that the land is *zerait* is relevant. It may be pointed out that whether the land is *zerait* within the meaning of section 120, is not a simple question of fact. It is, as the learned Vakil for the respondent has suggested, a mixed question of fact and law. It would, therefore, be ordinarily necessary for the witness to state the ground for his conclusion; in other words, unless he had special means of knowledge, one would expect him to state facts which would show that the case fell within either clause (*a*) or (*b*) of sub-section (1) or within sub-section (2) of section 120. As we understand the evidence, the substance of which has been stated to us, the statements by the witnesses are not bare assertions of this kind. They have generally stated that the land was cultivated by the landlord as his *zerait* land for a number of years. That, undoubtedly, would be admissible in evidence and, if believed, might justify a finding in favour of the landlord.

As regards the third class of evidence, namely, the *factum* of the execution of the *kabulyat*, we are unable to regard it as any evidence that the land is *zerait*. Possibly what the learned Judge intended was that it was unlikely that if the defendant had really the status of an occupancy *raiyat*, he should execute a fresh *kabulyat* in favour of the landlord. That, no doubt, is a circumstance which, along with the other evidence on the record, may be taken into consideration. But, as the District Judge himself has pointed out, the *kabulyat* does not contain any admission on the part of the tenant that the land leased was *zerait*. If it did contain any such admission, as the *kabulyat* was executed after the 2nd March 1883, it would be of no assistance to the landlord, because it would be evidence that the land had, after that date, been specifically let out as the proprietor's private land. It is impossible for us, however, upon the judgment as it stands to decide this case finally. We are not satisfied that the District Judge has examined the evidence as a whole with specific reference to the elements mentioned in the various clauses of section 120. It is, therefore, necessary in the interest of justice that the case should be re-considered from this point of view. If the District Judge, upon an examination of the whole evidence from the point of view suggested, comes to the conclusions that the land is *zerait* within the meaning of section 120, the next question will be, whether the defendant is liable to be evicted under section 116, which provides that nothing in Chapter V shall confer a right of occupancy in, and nothing in Chapter VI shall apply to, a proprietor's private land where any such land is held under a lease for a term of years or under a lease from year to year. Before, therefore, the landlord succeeds, he must prove the conditions under which the defendant was let into occupation. It is important to observe that the case for the defence was that, although the *kabulyat* was executed in 1902, the defendant has, as a matter of fact, been in occupation from an earlier period, and the judgment of the original Court indicates that the Munsif was prepared to accept this theory. But the District Judge does not appear to have considered this point in detail. It will, therefore, be necessary for him, if he finds in favour of the landlord under section 120, to consider whether a case for ejectment has

been made out under section 116.

The result is that this appeal is allowed, the decree of the District Judge set aside and the case remitted to him in order that the appeal may be re-heard. The costs of this appeal will abide the result.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1351 OF 1910.

November 7, 1911.

Present:—Mr. Richards, K. C., Chief Justice, and Mr. Justice Banerji.

NAND RAM—PLAINTIFF—APPELLANT

versus

BHUPAL SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Mortgage by father—Interest—High rate of interest—Necessity to borrow money at high rate—Burden of proof on plaintiff—Suit against son—Discretion to reduce interest.

Where a suit against descendants is brought to enforce a mortgage executed by their ancestor in which there is a stipulation for payment of a high rate of interest, it lies on the plaintiff to prove that there was necessity not only for borrowing the money but for borrowing it at the exorbitant rate mentioned in the deed.

The principle which governs the case of a mortgage by a Hindu widow or by the guardian of a minor should be applied to the case of a Hindu minor.

Chandra Deo Singh v. *Mata Prasad*, 1 Ind. Cas. 479; 6 A. L. J. 263; 31 A. 176; *Huro Nath Roy Chowdhuri* v. *Randhir Singh*, 18 C. 311; 18 I. A. 1; *Kameswar Prasad* v. *Ranbahadur Singh*, 6 C. 843; 8 C. L. R. 361; 8 I. A. 8, followed.

Where no necessity for borrowing at an exorbitant rate is proved, a Court would be justified in reducing the stipulated rate of interest to a reasonable rate as well as in refusing to allow compound interest especially where the plaintiff has made a long delay in instituting his suit.

Second appeal from the decision of the Assistant Sessions Judge of Moradabad, dated 20th November 1910.

Dr. *Tej Bahadur Sapru*, for the Appellant.

Mr. *Hamilton*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-appellant to enforce a mortgage, dated the 8th of February 1888, for Rs. 80 executed by Bahadur Singh, ancestor of the defendants Nos. 1—5. The rate of interest stipulated for in the mortgage-deed is Rs. 2-4 per cent. per mensem compound interest with half yearly rests. The plaintiff alleged that in accordance with the terms of the mortgage, the total amount due to him exceeded Rs. 17,000 but he claimed to recover Rs. 2,500 only.

The Court of first instance was of opinion that the mortgage was made for the payment of Government revenue, but that it had not been established that there was any necessity for borrowing money at the high rate provided for in the mortgage-deed. That Court made a decree for simple interest at the rate of Rs. 18 per cent. per annum and the total amount decreed by it was Rs. 432-1-0, that is, more than five times the principal amount borrowed.

The plaintiff appealed and the defendants filed objections under Order XLI, rule 22, of the Code of Civil Procedure. The lower Appellate Court, in a somewhat sketchy judgment, came to the conclusion that no undue influence had been exercised on the mortgagor and varied the decree of the Court of first instance and allowed simple interest at the rate of Rs. 2-4 per cent. per mensem, that is Rs. 27 per annum.

This was an inconsistent judgment because the Court should either have allowed compound interest at Rs. 27 per cent. per annum which was the contract rate of interest, or, if it considered that it was competent to interfere with the contract of the parties and reduce the rate, it ought to have set forth reasons for interfering with the decision of the Court below.

The plaintiff, however, was not satisfied with the decree of the lower Appellate Court and preferred this appeal claiming compound interest as stipulated in the mortgage-deed. The defendants have preferred the connected Appeal No. 1364 of 1910, in which they urge that the Court below ought not to have raised the rate of interest allowed by the Court of first instance. We are of opinion that the plaintiff's appeal must fail. It has been held by a Full Bench of this Court in *Chandradeo Singh* v. *Mata Prasad* (1) that where a plaintiff seeks to enforce a mortgage made by the father or manager of a joint Hindu family as against the joint family property, it lies on the plaintiff to show that the loan was contracted for the necessities of the family. We are bound to follow this Full Bench ruling and, therefore, it lay on the plaintiff to prove that there was necessity not only for borrowing the money but for borrowing it at

(1) 31 A. 176; 1 Ind. Cas. 479; 2 A. L. J. 263.

the exorbitant rate mentioned in the mortgage deed. In the case of *Hurro Nath Rai Chowdhuri* v. *Randhir Singh* (2) their Lordships of the Privy Council held in a case in which money had been advanced to a Hindu widow for the payment of Government revenue that the plaintiff ought to have proved that there was a necessity to borrow the money at the high rate of interest agreed upon in the mortgage-deed. This was, no doubt, the case of a widow acting as guardian of an infant but in the view of the Full Bench ruling of this Court to which we have referred and also of the decision of their Lordships of the Privy Council in *Kameswar Prasad* v. *Run Bahadur Singh* (3), the principle which governs the case of a guardian of a minor and of a Hindu widow should be applied to the case of the father of a Hindu family. In this case the Court of first instance found that the property mortgaged was of such value as to make the borrowing of money at such a high rate of interest unnecessary. It was also of opinion that it had not been established that there was any necessity for borrowing at such high rate of interest. This finding was never seriously attacked nor do we see how it could have been. We must, therefore, hold that although there was necessity for borrowing the money, there was no necessity for borrowing at the high rate contracted for in the mortgage-deed and we are of opinion that in view of the long delay which the plaintiff has made in instituting his suit, the Court of first instance was justified in reducing the rate of interest claimed, to simple interest at the rate of Rs. 18 per cent. per annum. The result is, that we must dismiss this appeal with costs, and we order accordingly. The costs will include in this Court fees on the higher scale.

Appeal dismissed.

(2) 18 C. 311; 18 I. A. 1.
(3) 6 C. 843; 8 C. L. R. 361; 8 I. A. 8.

PUNJAB CHIEF COURT.

CIVIL REVISION No. 2441 OF 1911.

November 11, 1911.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Rattigan.

O'BRIEN, M. W.—DEFENDANT—PETITIONER

versus

Haji ABDUL RAHMAN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 24 (3) —Transfer of case—Power of District Judge to transfer to Additional District Judge—Revision—Material irregularity—Failure to consider important evidence—Misunderstanding position of parties—False assumption—Punjab Courts Act (XVIII of 1884), s. 70 (1) (a) and (b).

A District Judge has the power under section 24 (3) of the Civil Procedure Code, 1908, to transfer a case pending before him to the Court of the Additional District Judge.

Where in dealing with a possessory suit under section 9 of the Specific Relief Act, the Court entirely misunderstood the position of the plaintiffs, ignored material and important evidence, misconstrued a material document and failed to apply its mind to the distinction between possession and use or occupation:

Held, that the Court acted with material irregularity within the terms of section 70 (1) of the Punjab Courts Act and that a re-trial of the suit was necessary.

Petition, under section 70 (*a*) and (*b*) of Act XVIII of 1884 as amended by Act XXV of 1899, for revision of the order of the District Judge, Delhi, dated the 18th October 1911, decreeing plaintiff's claim.

Mr. *Beechey*, for the Petitioner.

Mr. *Petman*, and Lala *Piare Lal*, for the Respondents.

JUDGMENT.—This is an application by the defendant under section 70 of the Courts Act for revision of decree in a possessory suit under section 9 of the Specific Relief Act. The premises in suit consist of a building in the compound of the Woodland Hotel, Delhi. This hotel was leased by the plaintiffs-respondents to the petitioner on the 28th March 1903. On the 2nd April 1909, the terms of this lease were modified by the addition of a clause binding the petitioner to pay Rs. 100 per mensem additional rent in the event of the premises now in suit being completed by the respondents according to specification. On the 8th January 1910, the respondents filed a suit of ejectment against the petitioner on the ground that he rendered himself liable to ejectment by failure to pay rent fixed by a lease of the

SINNACHAMI *v.* RAMASAMY CHETTIAR.

2nd April 1909 and for arrears of rent. The property in suit was described as being bounded on the east by the house of the heirs of Muhammad Ibrahim, on the west by a public road and shops newly built by the plaintiffs, on the south by a public road known as Church Road and on the north by the same road and by Court land, being the compound of the District Courts. The lease or modifications of the 2nd April 1909 provided that if the respondents desired to construct any building on the north-west part of the land leased, the petitioner would not prevent him provided that if any sheds or stables then standing were demolished, the respondents would re-build them at another spot at their own expense. It is admitted that nothing was done by the respondents towards the completion of the premises now in suit subsequently to the date of institution of the previous suit, and the Court below has recited that the parties were agreed before it that the premises in suit were not complete according to specification. That Court has decreed the suit on the ground that the respondents were in possession of the premises in suit and were ousted by the petitioner on the 23rd April 1911 within six months of suit.

The first plea urged for the petitioner for our disposal is that the Additional District Judge, who passed the decree, had no jurisdiction, the District Judge who recorded the evidence not being empowered to transfer the case to the Additional District Judge, the Court being of co-ordinate jurisdiction. In our opinion section 24 (3) of the Code of Civil Procedure disposes of this objection which must be overruled. The main ground urged by Counsel for the petitioner was that the Court below entirely misunderstood the position of the petitioner and omitted consideration of important points and evidence. The previous suit, above referred to, was for possession of the land within the boundaries referred to and the buildings standing thereon, including the premises now in suit. The suit was dismissed on the ground that there had been no breach of contract by the petitioner and that no rent in excess of what had been tendered was due at the date of suit. In deciding the present case the Additional District Judge appears to have entirely misunderstood the position of the respondents; to have ignored the Municipal record dealing with an application by the respondents to build certain chambers for legal practitioners on a part of the compound of the hotel bordering on the Court compound, although the record contains a note of the 29th August 1911 that Counsel on both sides having referred to this record. It should be summoned, and a note of the 12th September 1911 that the record had been received: to have consequently assumed that clause (*b*) of the lease or modification cited by him referred to the premises now in suit, to have failed to apply his mind to the distinction between possession and use or occupation to have acted with material irregularity in the disposal of the case, and to have failed to consider whether the premises in suit were built on land to which clause (*b*) above referred to could apply. These omissions and assumptions constitute, in our opinion, material irregularity within the terms of section 70 (1) of the Courts Act and, without expressing any opinion on the merits, we are satisfied that this suit was not properly tried and that a re-trial is necessary.

We allow the application, set aside the decree of the Additional District Judge, and under section 70 (1) of the Courts Act, remand this suit to the Court of the Divisional Judge of Delhi for re-trial. Inasmuch as it has not been alleged on either side that all available evidence was not tendered and recorded or brought on to the record, the re-trial will be on the record as it stands unless either party satisfies the Divisional Judge that further evidence is necessary.

Any proceedings in execution now pending go with the decree and are dismissed. Costs of this Court will be costs in the cause. Counsel's fee rupees one hundred.

Case remanded.

MADRAS HIGH COURT.

CIVIL APPEAL No. 170 OF 1906.

September 13, 1911.

Present:—Sir Arnold White, KT., Chief Justice, and Mr. Justice Phillips.

SINNACHAMI *alias* KUMARETTU SERVAIGAR, MINOR, THROUGH HIS GUARDIAN SIVAGANAM SERVAIGAR—APPELLANT

versus

U. A. R. RAMASAMY CHETTIAR AND OTHERS—RESPONDENTS.

Hindu Law—Impartible estate—Alienation—Custom

SINNACHAMI *v.* RAMASAMY CHETTIAR.

—Adoption—Date from which adopted son's rights begin—Alienation by full owner prior to adoption cannot be defeated—Necessity—Duty of lender—Recitals—Presumption—Adoption by widow—Consent of sapindas *—Adoption not to the last male holder, validity of.*

The holder for the time being of an impartible estate, although the line of succession is governed by same rules as if the property were joint family property, has unrestricted power to deal with the estate.

The rights of an adopted son do not relate back to a period earlier than the date of his adoption. Therefore, an adopted son cannot defeat an alienation made before his adoption by a *full* male owner of the estate.

Per *Phillips, J.*—When a lender is dealing with a borrower (member of a joint Hindu family) who is not absolute owner of the estate mortgaged as security for the loan, it is incumbent on the lender to satisfy himself by reasonable inquiry that the loan is for the benefit or necessity of the estate, for otherwise his charge on the estate in the hands of the next holder is liable to be defeated, but if he inquires fairly and honestly, the real existence of an alleged and reasonably credited necessity is not a condition precedent to the validity of the charge and he is not bound to see to the application of his money.

The recitals in the bond and representations of the borrower are in themselves *prima facie* evidence of necessity, and if a large portion of the loan is for the benefit of the family, it may be presumed that the balance also was borrowed for the same purpose.

The assent of the *sapindas* to an adoption by a widow validates it, from whatever motive the consent was given.

When an estate is divested by an adoption not made to the last male holder but to a prior male holder of the estate, the adoption is not valid and does not divest the existing holder of the estate.

Thayyammal v. *Venka Rama*, 10 M. 205 and *Padma Kumari Debi* v. *Court of Wards*, 8 C. 302; 8 I. A. 229, referred to.

Inalienability of a partible estate must be proved by custom.

Appeal against the decree of the Subordinate Judge's Court of Tuticorin, in Original Suit No. 32 of 1904.

Mr. *K. Srinivasa Iyengar*, for the Appellant.

The Hon'ble Mr. *P. S. Sivaswami Aiyar*, (Advocate-General), for the Respondents.

JUDGMENT.

WHITE, C. J.—This is an appeal by the 2nd defendant against a decree on a mortgage, dated the 11th October 1892, executed by the father of defendants Nos. 1 and 2 on his own behalf and on behalf of the defendants in favour of the plaintiffs' predecessor-in-title. For the purposes of the appeal the material dates are these. In January 1897 Kumarettu, No. 14 in the pedigree, died. In October 1892, the mortgage in question was executed by Sivathaiya, No. 18 in the pedigree. In 1896, No. 18 died and his estate devolved upon defendants Nos. 1 and 2. In December 1904, the present suit was instituted. In January 1905 the widows of No. 14 adopted the 1st defendant. It seems clear (in fact the appellant did not seriously contend otherwise) that the exercise of the power to adopt was the counter-move on the part of the widows and the 2nd defendant to the suit on the mortgage. For the purpose of the appeal, I assume that a valid power to adopt was given, and that this power was duly exercised by the widows of Kumarettu (No. 14 in the pedigree).

The questions for consideration are:

(1) In whom was the estate in the property comprised in the mortgage vested at the date of the adoption?

(2) What was the nature of this estate?

(3) Did the exercise of the power to adopt divest the estate?

(4) If it did, does the adopted son take the property subject to the mortgage which had been executed by the holder of the estate before the power to adopt was exercised?

As to (1), the appellant has contended that No. 18 took no estate at all (though he was entitled to possession during the life-time of the widows by an arrangement with them), and that at the date of the adoption a widow's estate was vested in the widows of No. 14.

Their case is that at the time of his death No. 14 held the property in question as his separate estate, and that a widow's estate therein devolved on his widows at his death.

Even in this view, the widows being still alive, on the authority of *Sreeramulu* v. *Kristamma* (1), the plaintiffs would be in the position of mortgagees of an interest which would be a subsisting interest during the life-time of the widows.

In *Sreeramulu* v. *Kristamma* (1), it was held that when a Hindu widow alienates part of the immoveable property belonging to her husband's estate and then adopts a son, the son cannot sue to recover possession of the property until the termination of her widowhood. It was urged that this decision was wrong. It is, no doubt, inconsistent with the view expressed by Mr. Mayne. See section 197 of his book (Edition No. 7). It does not seem to be reconcilable with the decision of the Privy Council in *Rai Banomali Roy Bahadur* v. *Jagat Chandra Bhowmick* (2) and

(1) 26 M. 143.

(2) 32 I. A. 80; 15 M. L. J. 267; 32 C. 669; 1 C. L. J. 319; 2 A. L. J. 794; 9 C. W. N. 673.

it was expressly dissented from in *Ramakrishna* v. *Tripurabai* (3). I do not propose to discuss the question whether the decision in *Sreeramulu* v. *Kristamma* (1) is good law. The Subordinate Judge finds against division between the branches represented by No. 14 and No. 18 and I am not prepared to differ from his conclusion. In the view that No. 14 did not hold the property as separate estate, the question considered in *Sreeramulu* v. *Kristamma* (1) does not arise for determination in this case.

I am of opinion that on the death of No. 14 subject to the widow's right to maintenance the estate vested in No. 18. It is clear that this was the view taken by the widows (See Exhibit X). The case sought to be made in the Court below that this document was procured by coercion was not pressed on appeal. On the death of No. 18, before the adoption, the estate vested in defendants Nos. 1 and 2 as sons of No. 18, and at the time of the adoption the estate vested in them.

As regards the second question, the Subordinate Judge found that the property was impartible and that on the death of No. 14 it devolved as an impartible estate on No. 18. See paragraphs 56 to 91 of his judgment. I agree with this finding. In certain litigation in 1864 (see Exhibits N and N1) this Court held that the property was impartible and the view that it is impartible is strongly supported by the terms of Exhibit X. I need not refer to the other evidence on the question.

It was urged that, as there was no specific allegation in the pleadings as to the impartibility of the estate, the Judge was wrong in allowing the plaintiffs to raise the question at the trial. The Judge deals with the point in paragraphs 93 to 95 of his judgment.

I am not prepared to say the Judge was wrong in allowing this question to be raised, or in declining to allow the defendant to recall two of his witnesses after his case had been closed, (see the Subordinate Judge's order of October 17th, 1905) or in admitting the documents referred to in the Subordinate Judge's order of November 21st, 1905.

If the property was impartible, although the line of succession is governed by the same rules as if the property were joint family property, No. 18 had unrestricted powers to deal with it. See *Sartaj Kuari* v. *Deoraj Kuari* (4) and *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *The Court of Wards* (5), *Rajah of Kalahasti* v. *Achigadu* (6) and *Zemindar of Karvetnagar* v. *Trustee of Tirumalai Tirupati &c., Devastanams* (7). His sons could not question an alienation made by him and, if the estate divested, it could only divest subject to any alienations which had been made by the holder of the estate for the time being. No question as to the purpose for which the alienations had been made would arise.

If the estate is partible, the estate which devolved upon No. 18 on the death of No. 14, was the ordinary estate by survivorship in a joint Hindu family.

As to the 3rd question, the question whether the adoption of the 2nd defendant had the effect of divesting the estate which was vested in No. 18 when the adoption took place, was elaborately argued. Here the adoption did not take place until after the death of No. 18, *i. e.*, after the interest which No. 18 took whether he took it by survivorship or as the successor to an impartible estate, had passed from him. It may be said to be now settled law that an adoption made to the last male holder of the interest claimed by the adopted son would divest an already vested interest whether the estate was partible [See *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo* (8)] or impartible. [See *Bachoo* v. *Mankorebai* (9) . But I think I am right in saying it has never been held that an adoption, [except where the property has reverted to the adopting mother herself, see *Villanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi* (10)] which was not made to the last male holder of the interest claimed by the adopted son, operates so as to divest an estate already vested when the adoption was made; or, in other words, it has never been held that where the interest claimed by the adopted son had, at the time of the adoption, passed from the person on

(3) 33 B. 88; 10 Bom. L. R. 1029.

(4) 10 A. 272; 15 I. A. 51.
(5) 22 M. 383; 26 I. A. 83; 3 C. W. N. 415.
(6) 30 M. 454; 17 M. L. J. 367.
(7) 32 M. 429; 2 Ind. Cas. 18; 19 M. L. J. 401.
(8) 1 M. 69; 25 W. R. 291; 3 I. A. 154.
(9) 29 B. 51.
(10) 1 M. 174; 4 I. A 1; 26 W. R. 21.

whom it had devolved from the original owner to some other person, that person would be ousted by the adoption. Here the adoption was made to No. 14 and at the time it was made, the last male holder of the interest claimed by the adopted son was No. 18. At the time of the adoption the interest claimed by the adopted son had passed from the person on whom it had devolved from the original owner.

It may be that the language of the judgment in *Musammat Bhoobun Moyee Debia* v. *Ram Kishore Acharje Chowdhry* (11) is not altogether appropriate to a case where the party whose estate is said to be divested has taken by survivorship as a member of an undivided family, but there is no authority to show that the principle of that decision does not apply in the case of a joint Hindu family. [In fact, the authorities would seem to be all the other way. See, for instance, *Chandra* v. *Gojarabai* (12)].

In that case their Lordships observe that an adopted son as such takes by inheritance and not by devise and they point out (page 311) that the rule of Hindu Law is that in the case of inheritance the person to succeed must be the heir of the last full owner. In the present case, at the time of the adoption, the last full owner was No. 18, but the 2nd defendant claims to succeed as 'the heir' of No. 14.

The tendency of recent decisions would seem to be in the direction of limiting rather than extending the conditions in which an adoption can be made which has the effect of divesting estate or interests already vested when the adoption is made. In *Manikya Mala Bose* v. *Nandakumar Bose* (13) the rule that, where the widow of an adopted son is alive, the widow of the original owner cannot make an adoption which would oust the adopted son's widow, was extended to a case where the widow of the adopted son had died when the adoption was made by the widow of the original owner and the estate had become vested in her. The same view was taken by this Court in *Adivi Suryaprakasa Rao* v. *Nidamurty Ganraju* (14).

As regards this question, the view which I should be disposed to take is that, in the case before us the adoption of the 2nd defendant did not operate so as to divest the estate which had vested in defendants Nos. 1 and 2 at the date of the adoption. It is not necessary, however, to decide this point because, assuming the estate was divested by the adoption, I think there can be no doubt that the adopted son would take the property subject to the mortgage. The rights of an adopted son do not relate back to a period earlier than the date of his adoption [*Ramundoss Mookerjee* v. *Musammat Tarinee* (15) and *Harek Chand Babu* v. *Bejoy Chand Mahtab* (16)]. As Mr. Mayne points out, (section 197, Hindu Law, 7th Edition) "till he was adopted it might happen that he never would be adopted; and when he was adopted, his fictitious birth into his new family could not be antedated." Mr. Mayne goes on to observe that an adopted son would not necessarily have to acquiesce in all the dealings with the estate between the death of his adoptive father and his own adoption. He points out that when the estate has been held by a female the estate is limited by the usual restrictions which fetter an estate so held, and that, if she has created any incumbrances or made any alienations which go beyond her legal powers, the adopted son can set them aside.

The question of the effect of an alienation by a man holding a full estate with reference to a subsequent divesting as the result of a subsequent adoption does not seem to have been considered in any reported case.

It is obvious that the restrictions which are incidental to the estate of a widow are not incidental to the full estate of a male. With reference to the estate of a full owner, Mr. Mayne observes (section 198, Hindu Law, 7th Edition) "until adoption has taken place he is lawfully in possession, holding an estate which gives him the ordinary powers of alienation of a Hindu proprietor. No doubt, he is liable to be superseded but, on the other hand, he never may be superseded. It would be intolerable that he should be prevented from dealing with his own on account of a contingency which may never happen. When the contingency has happened, it would be most inequitable that the purchaser should be deprived of rights which he obtained from one who, at the time, was per-

(11) 10 M. I. A. 279; 3 W. R. (P. C.) 15.
(12) 14 B. 463.
(13) 33 C. 1306; 4 C. L. J. 357; 11 C. W. N. 12.
(14) 33 M. 228; 4 Ind. Cas. 386; 7 M. L. T. 236.
(15) 7 M. I. A. 169.
(16) 9 C. W. N. 795; 2 C. L. J. 87.

fectly competent to grant them." The decision in the *Berhampore case, Sri Varada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo* (8), that the brother who was ousted by the adoption to the last holder is not accountable for mesne profits between the date when he took possession and the date of the suit, supports the view that in the case of a male owner he is not, as Mr. Mayne put it, "prevented from dealing with his own on account of a contingency which may never happen." The decision of the Full Bench of this Court in *Ramachandram Pillai* v. *Kalimuthu Chetti* (17) that the *quantum* of the interest taken by the alienee of an undivided co-parcener is to be determined with reference to the number of co-parceners at the date of the alienation, may also be referred to.

If the *quantum* of the interest is not affected by the birth of a natural son, it would not be affected by a fictitious birth by adoption, and, if the interest of the alienee is not affected as regards the *quantum*, it is difficult to see on what principle it can be contended that he is liable to be deprived of the property altogether.

I am, therefore, of opinion that, in the present case, the adopted son takes subject to the mortgage. Assume I am wrong in the view I have indicated, and that it is necessary for the plaintiffs to show that the mortgage-debt was contracted for purposes which were binding on the estate, I agree with the conclusion at which my learned brother has arrived, for the reasons stated by him in the judgment which he is about to deliver, that the evidence establishes that the debt was binding on the estate.

I am also of opinion, for the reasons stated by my learned brother, that, as between the 2nd defendant and his natural father, the 2nd defendant has failed to show that the money was borrowed for immoral or illegal purposes.

As regards the question of penalty, I agree with the Court below that the provisions as to interest were not of a penal character. I think that this appeal should be dismissed with costs.

PHILLIPS, J.—This is an appeal by the 2nd defendant against a mortgage decree passed by the Tuticorin Subordinate Judge in favour of the plaintiffs (respondents Nos. 1 to 7) on a mortgage bond, dated the 11th October 1892, executed by the father of defendants Nos. 1 and 2 in favour of the plaintiff's predecessors-in-interest.

2. A very large number of questions both of fact and of law have been raised in the lower Court and in appeal, and, as the law points depend very largely upon the facts, it will be as well to begin by recording findings upon the facts, as such findings may do away with the necessity for dealing with some of the points of law raised in the case.

3. The plaint bond (Exhibit A) was executed by the father of defendants Nos. 1 and 2, one Sivathiya, in favour of two Chettis who traded under the designations of R. M. A. R. A. R. and U. A. R., respectively, for Rs. 12,000 and the consideration is made up of 7 items, (1) Rs. 4,250 to discharge a prior bond in favour of Vakil Subbusami Aiyar, (2) Rs. 2,930-6-4 for payment of *cist* due to the Ettiyapuram *zemindari*, (3) Rs. 1,000 due on a pro-note executed to R. M. A. R. A. R. alone, (4) Rs. 65 for stamp and registration expenses, (5) Rs. 2,000 for a *hundi* for house-hold expenses and (7) Rs. 254-9-8 paid in cash before the Sub-Registrar. The appellant contends, that with the exception of item (1), the consideration was borrowed by Sivathaiya for immoral purposes and has adduced evidence in support of his contention.

4. As regards item (2), there is no evidence as to its application for immoral purposes, but it is contended that the plaintiffs have not proved that the sum of Rs. 2,930-6-4 was actually paid for *cist*. We have, however, Exhibit J, an *irasulnama* or *chellan*, which shows that Rs. 2,930-6-4 was paid to one Subramania Aiyar. This *chellan* bears an endorsement "credited," which is signed by some illegible initials, but this endorsement has not been proved. No doubt Subramania Aiyar was an employee of the mortgagees' firm, but in Exhibit J he is described as the "Kattalankulam Kattuguthagaidar's man" *i. e.*, the mortgagor's man and the 1st plaintiff as the plaintiffs' witness No. 8 proves his signature. The accounts, Exhibits E and K, also show the payment of this sum. Although there is no direct evidence that the money was actually paid into the Zemin treasury, it is proved

(17) 21 M. L. J. 246; 2 M. W. N. 238; 9 M. L. T. 389; 9 Ind. Cas. 596.

that the money was paid to the mortgagor's man and that formal *chellan* for payment into the treasury was filled up. The mortgagees have, therefore, every right to conclude that the money was paid for the purposes for which it was borrowed.

5. Item (3) is Rs. 1,000 borrowed by Sivathaiya on a pro-note executed to R. M. A. R. A. R. on the 8th October 1892 (Exhibit B).

The pro-note recites no purpose, but the defendants' witnesses Nos. 14, 15, and 16 say that the money was borrowed in Madura and that it was paid over by Sivathaiya to one Subbammal in the presence of the lender, Adappa Chetti. This Subbammal is admittedly a dancing woman who was kept by Sivathaiya. The evidence of these witnesses is not satisfactory, for they are interested in defendants Nos. 1 and 2 and the defendants' witnesses Nos. 14 and 15 cannot explain why they accompanied Sivathaiya to Madura. The plaintiffs' witnesses Nos. 5 and 7 say that the money was paid in the Chettis' shop, whereas the defendants' witnesses say it was paid in Saptur bungalow, where Sivathaiya and Subbammal were staying. Item (5) is a *hundi* for Rs. 2,000 for the expenses of a suit. The defendants' witnesses Nos. 7, 14, 15, 18 and 19 all say that this *hundi* was handed over to Subbammal, but there are many discrepancies in their evidence. Exhibit A shows that the *hundi* was drawn upon one Vairavan Chetti of the firm of R. M. M. of Tinnevelley, and that he was to pay the expenses of the contemplated suit. His accounts, Exhibits E and E1, show clearly that payments were made by him to Vakils and for the expenses of Original Suit No. 50 of 1894 on behalf of the Kattalangulam Kattuguthagaidar, *i. e.*, the mortgagor. These payments, together with an excess payment of Rs. 382 due to Vakil Subbusami Aiyar make up the Rs. 2,000 due on the *hundi*. These accounts, together with the oral evidence of the plaintiffs' witnesses Nos. 3, 4 and 6, completely falsify the evidence of the defendants' witnesses as to the payment to Subbammal, for they are unable to show, that Vairavan Chetti had any other funds belonging to Sivathaiya from which the payments in the accounts could have been made. Sivathaya's accounts have not been produced by the defendants, although it might be expected that they would give useful information. As regards item (6), we also have oral evidence that the money was paid to Subbammal. These same witnesses have given false evidence about item (5), and there is no reason why they should be believed as regards items (3) and (6). No doubt, the money was borrowed in October, 1892, and Original Suit No. 50 of 1894 was not filed until July 1894 but the delay has been satisfactorily explained. The Subordinate Judge has given additional reasons for disbelieving the defence evidence in regard to these items and there is no reason to differ from his opinion. The letters Exhibits XVI and XVII series, which tend to show that Sivathaiya wanted to give Rs. 4,500 to Subbammal, cannot have much weight in this case, for they were produced in a former suit Original Suit No. 68 of 1897 to show that the money lent by another Chetti in March 1893 was borrowed by Sivathaiya to give to Subbammal, and in that suit the plea was upheld (Exhibits XLI and XLI*a*). If, therefore, the Rs. 4,500 referred to in Exhibit XVII (*j*) was obtained from the lender in the former suit it cannot have been borrowed under Exhibit A. Further, Exhibit XVII (*j*) is undated, and the recital in it is consistent with the circumstances attending the execution of Exhibit A. Exhibits XXVI and XXVII are not shown to be in any way connected with the plaint transaction. As regards the last item (7), there is no evidence except that of the defendants' witnesses that it was paid into Subbammal's hands. The Subordinate Judge's finding that the defendants have failed to prove that the money borrowed under Exhibit A was for immoral purposes, must be upheld.

6. Under Exhibit A, seven villages are mortgaged and these are "Kattuguthagai" villages held in perpetuity at a low rent, and it will now be necessary to determine, (1) the nature of Sivathaiya's estate in these villages, and (2) whether they are partible or impartible property. Up to 1873, the villages were held by one Kumaretu, and he died leaving two widows (defendants Nos. 6 and 7) and no sons. He is No. 14 in the pedigree (Exhibit XXXI). He was succeeded by the mortgagor Sivathaiya (No. 18) who was his paternal uncle's son, their respective fathers being Nos. 7 and 8 in the pedigree. The appellant sets up a division between the ancestor of Nos. 7 and 8 (*i.e.*, No. 2) and his

brother No. 3, and a subsequent division between Nos. 7 and 8. No document is available to prove either partition, and the appellant relies on documents (Exhibits II, V, XII, XIII, XIV and XLII) which show that the junior members of the family dealt with certain lands as their ancestral property and an attempt has been made to show by oral evidence that the lands dealt with by the respective branches are equal in value. It is suggested that in the division between Nos. 7 and 8, the former took the Kattuguthagai villages, and the latter, an equivalent extent of other ancestral property. The finding of the Subordinate Judge, that the Kattuguthagai villages are impartible, is not seriously controverted in appeal, and it is supported by ample documentary evidence dating back to 1857 (*vide* paragraphs 58 to 66). It is, however, urged that the defendants were not allowed an opportunity of meeting the plaintiffs' evidence as to the impartible nature of the state. The B diary and Civil Miscellaneous Petition No. 399 show that the question was raised before the defence closed, and although no specific issue was framed on the point it is clear that the question was present to the minds of the parties. As the Kattuguthagai villages are impartible and held by only one member of the family at a time (this latter fact is not disputed), it is most improbable that one branch would take only the impartible property and leave all the partible property to the other branch. The oral evidence by which it is sought to prove that property in possession of the members of No. 8's branch is equal in value to the impartible property belonging to No. 7's branch must be rejected, for the valuation given by the witnesses is very materially opposed to the valuation given in several documents (Exhibits II, XIIa and XLII). The separate possession of the junior members is easily explained when we consider that the family held a valuable impartible estate, the holder of which would have to make allotments for maintenance. The non-execution of a partition-deed in the case of a family holding such large properties partible and impartible is so improbable that very good extraneous evidence would be required to prove partition, and such evidence is not available. The presumption, therefore, that Nos. 14 and 18 were undivided must prevail, and this is also supported by the admission of No. 14's widows (defendants Nos. 6 and 7) in Exhibit X that No. 18 was the rightful heir of No. 14. The lower Court's findings that the estate was impartible and that Nos. 14 and 18 were undivided must, therefore, be upheld.

7. After this suit was filed, and after issue but not service of notice on the defendants, the 2nd defendant was adopted by the 6th defendant with the consent of the *sapindas* as expressed is Exhibit I, and it is in virtue of this adoption that the 2nd defendant, the appellant, seeks to evade the plaintiff's claim. The adoption is said to have been made not only with the consent of the *sapindas* but also with the authority of the deceased Kumarettu (No. 14) to whom the adoption was made. The point is not of great importance in this case, but the authority of Kumarettu is not proved. There is only oral evidence to prove the authority, which must have been given 25 years before the trial of this suit. No such authority was set up before the date of this suit, and the recital in Exhibit I goes to show that the *sapindas* who authorised the adoption did not believe that any authority had been given by the husband. It must, therefore, be held that the adoption was made with the consent of the *sapindas*. The question of whether this adoption is or is not valid has been the one most hotly contested in appeal but before proceeding to decide that question it will be advisable to see whether the appellant can succeed, even if the validity of his adoption be accepted. If his adoption be valid and effective, he would be entitled to succeed to his father's estate, but inasmuch as his adoption only took place in January 1905 the estate of his father did not vest in him until that date, and he would be bound by any legitimate alienations made by the intermediate holders of the estate, and he would be bound by the plaint alienation, if Sivathaiya had authority to make it. Taking the lowest view of the case, Sivathaiya would be entitled to make the plaint alienation in order to satisfy valid antecedent debts "for family necessity." Items (1) and (3) are antecedent debts; although the latter was only incurred 3 days before the execution of Exhibit A, it cannot be considered part of one and the same transaction, for

in the prior loan, the lender was only one of the lenders concerned in the plaint transaction. Item (2) was applied to the payment of *cist* due to Ettiyapuram. No doubt a careful man ought to have been able to pay the *cist* out of his current revenue, but Sivathaiya was not a careful man and incurred many debts, and a lender need be guided not by what ought to be the necessity of a borrower if he were a prudent Manager, but what were his necessities at the time of the loan. The recital in Exhibit A and the appropriation of the money towards the *cist* are, therefore, sufficient to discharge the burden on the lender of proving the necessity. The Rs. 65 for stamp and registration, item (4), were also for the family necessity as well as item (5), the *hundi* for Rs. 2,000. The fact that the suit for which the Rs. 2,000 was required was dismissed, cannot affect the case. Even if the suit was based on a false claim, the creditors were not in a position to know the fact. That the claim was not patently false is shown by the fact that defendants Nos. 1 and 2 continued the litigation after their father's death. The only other items are Nos. (6) and (7), and of the application of these there is no evidence adduced by the plaintiffs. As regards the item of Rs. 1,500 (6), the bond Exhibit A recites that it was borrowed for "household expenses;" but as to item (7), Rs. 254-9-8 paid in cash, there is no recital at all. When a lender is dealing with a borrower who is not absolute owner of the estate mortgaged as security for the loan, it is, no doubt, incumbent on the lender to satisfy himself by reasonable inquiry that the loan is for the benefit or the necessity of the estate, for, otherwise, his charge on the estate in the hands of the next holder is liable to be defeated, but it has been remarked by their Lordships of the Privy Council in *Hanooman-persaud Panday* v. *Musammat Babooee Munraj Koonwaree* (18): "Their Lordships think that the question on whom does the *onus* of proof lie in such suits as the present is one not capable of a general and inflexible answer," and later on, "the representations by the Manager accompanying a loan as part of the *res gesæt* and as the contemporaneous declarations of an agent have been held to be evidence against the heir and as their Lordships are informed that such *prima facie* proof has been generally required..... .....they think it reasonable and right that it should be required..... .....It is obvious, however, that it might be unreasonable to require such proof from one not an original party after a lapse of time and enjoyment and apparent acquiescence." Later on, in the same judgment, their Lordships lay down the principles which should govern the case, and remark that the lender is bound to inquire into the necessities for the loan..... .....but they [*i. e.*, their Lordships] think that, if he does so inquire and acts honestly, the real existence of an alleged and reasonably credited necessity is not a condition precedent to the validity of his charge..... .....and he is not bound to see to the application of his money. The case under consideration by their Lordships was one of a charge created by a mere Manager or *de facto* owner of an estate, and their remarks would apply, with even greater force, to the present case where the borrower was full owner of the estate charged and only liable to be divested of his estate by an adoption. It is clear that the representations of the borrower are evidence of the necessity for the loan and may in certain cases be treated as *prima facie* proof as between the lender and the heir. The question was recently considered by Abdur Rahim and Krishnaswami Aiyar, JJ., in *Maharaja of Bobbili* v. *Raja Kaminayami Bangaru* (19) and they remarked that the representations of the borrower "may in particular circumstances be sufficient to shift the *onus* from the lender to the person impeaching the alienation." This view certainly appears to be warranted by the dictum of the Privy Council in *Hanooman Persaud's* case (18). In the present case, the plaintiffs are not the actual lenders but merely their heirs, and some 12 years have elapsed between the execution of the bond and this suit. The recitals in the bond are, in themselves, evidence as to the necessity for the loan, and the plaintiffs have been able to show that a large portion of the loan was borrowed for the family necessity and, therefore, so far as the remainder is concerned, I think it may fairly be held in this case that the proved or admitted facts throw the *onus* of proof on the defendants. A large proportion of the loan was

(18) 6 M. I. A. 393; 18 W. R. 81.

(19) 21 M. L. J. 593; 9 M. L. T. 155; 2 M. W. N. 101.

borrowed for purposes binding on the family, and it would, therefore, be only reasonable to presume that the balance was also borrowed for the same purpose on the strength of the recitals in the mortgage-deed and the absence of satisfactory evidence to the contrary. Even if I am wrong in this view, I agree with the conclusion of the learned Chief Justice that an adopted son cannot defeat an alienation made before his adoption by a full male owner of the estate. The further plea taken for the plaintiffs that, as Sivathaiya was the holder of an impartible estate, his alienations cannot be questioned by the 2nd defendant, must also be upheld in view of the decision of the Privy Council in *Sartaj Kuari* v. *Deoraj Kuari* (4), which was affirmed in the *Pittapur case* (5), in both of which cases it was held that inalienability of a partible estate must be proved by custom. No such custom has been proved in the present case and not much weight can be attached to the appellant's Vakil's objection that this point was not taken in the lower Court. The question of impartibility was raised in the lower Court, and consequently all legal incidents attaching to the tenure set up must be held to have been in issue. The appellant must be presumed to have been aware of the law laid down in regard to impartible estates, and cannot now plead his ignorance on the point.

The validity of the 2nd defendant's adoption is impeached (*a*) because the consent of the *sapindas* as given in Exhibit I was not a valid consent as the motive for the adoption was corrupt, and (*b*) because the adoption was not to the last male holder.

The first objection cannot be supported, as it has repeatedly been laid down that so long as the assent of the kinsmen is valid, the adoption is valid. *The Collector of Madura* v. *Mutu Ramalinga Sathupathy* (20), and *Sri Varada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo* (8) and *Vellanki Venkata Krishna* v. *Venkato Rama Lakshmi* (10), respectively. In this case it is not contended that the assent was given from corrupt motives.

The second objection is the more important one. It was held by the Privy Council in *Bhoobun Moyee's* case (11) that the adoption by a widow after her husband's estate had vested successively in his son and in his son's widow, was invalid.

(20) 12 M.I.A. 397; 10 W.R.(P.C.) 17.

As explained in the subsequent cases, *Thayammal* v. *Venkatarama* (21), and *Padmakumari Debia Chowdhrani* v. *Court of Wards* (22), not only is such an adoption invalid but the widow's power to adopt is determined on the happening of certain events. The rule to be deduced from these cases appears to be that, when an estate is divested by an adoption not made to the last male holder but to a prior male holder of the estate, the adoption is not valid and does not divest the existing holder of the estate. This rule has been applied by the Privy Council in cases where the parties were governed by *Dayabhaga* Law and in cases under the *Mitakshara* Law where the property was separate property and not joint undivided property, but it has not been laid down that it is inapplicable to joint family property under *Mitakshara* Law and the Advocate-General contends that it should also be applied in such a case. It was so applied by this Court in *Rathna Mudaliar* v. *Raghunadha Bhattar* (23) and in *Adivi Suryaprakasa Rao* v. *Nidamurty Gangaraju* (14), but in the latter case the property had vested at the date of the adoption in the widow of the last male member of the family and was no longer joint family property. In this case, however, the finding that the estate was impartible somewhat alters the case. The succession to an impartible estate is not by survivorship; for it has been held that a coparcener in an undivided family has no interest is an impartible estate until the holder's death. Although the successor must be sought amongst the survivors of the undivided family, the succession is not by survivorship but by inheritance. I think, therefore, that the rule in *Bhoobun Moyee's* case (11) would clearly be applicable here, for the effect of the adoption to No. 14, if it were effective, would be to divest the present holder (1st defendant) who has succeeded by inheritance to No. 18, Sivathaiya, who himself succeeded No. 14. In this view I am inclined to hold that the adoption would be invalid, but I agree with the learned Chief Justice that the question need not be decided in this case.

In view of my finding that the family of Nos. 14 and 18 was undivided, it is unnecessary to consider what would result, if the estate had vested in defendants Nos. 6 and 7

(21) 10 M. 205.
(22) 8 C. 302; 8 I. A. 229.
(23) 8 M. L. J. 173.

on No. 14's death and had been transferred by them to No. 18.

The only remaining point for consideration is the question of interest. The plaint bond stipulates for an enhancement of the rate of interest from 12 to 15 per cent. from date of default and also for compound interest with yearly rests. In *Abbake Heggadthi* v. *Kinhiamma Shetty* (24), a very similar stipulation was held not to be by way of penalty, and the Privy Council ruling in *Sunder Koer* v. *Rai Sham Krishen* (25), lays down no rule to the contrary. The Subordinate Judge has found as a fact that the stipulation here was not by way of penalty, and I see no reason to differ from his finding. I, therefore, agree that the appeal should be dismissed with costs.

Appeal dismissed.

(24) 29 M. 491.

(25) 34 C. 150; 4 A. L. J. 109; 11 C. W. N. 249; 5 C. L. J. 106; 17 M. L. J. 43; 9 Bom. L. R. 304; 2 M. L. T. 75.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 32 OF 1911.

October 20, 1911.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

T. N. MUTHUVEERAPPA CHETTI *alias* T. N. BATCHA CHETTI AND ANOTHER —APPELLANTS

versus

T. R. PONNUSWAMI CHETTY—RESPONDENT.

Guardians and Wards Act (VIII of 1890*), ss.* 7, 17 *—Guardianship of minor—Right to minor's custody—Welfare of the minor to be considered—Legal rights.*

In an application for appointment as guardian of the person of a minor, the welfare of the child is the paramount consideration, although regard must also be had to the recognised rights of guardianship under the law.

Re Gulbai and Lilbai, 32 B. 50; 9 Bom. L. R. 923; *Bindo* v. *Sham Lal*, 29 A. 210; A. W. N. (1907) 24; 4 A. L. J. 22; *Tota Ram* v. *Ram Charan*, 33 A. 222; 7 A. L. J. 1149; 8 Ind. Cas. 785; *Krishnaswamy Chethi* v. *Cottah Mangammal*, (1911) 2 M. W. N. 365; 10 Ind. Cas. 283; *Muthusammy Sastri* v. *Narayana Sastri*, 21 M. L. J. 195; 8 Ind. Cas. 393; 8 M. L. T. 300; (1911) 2 M. W. N. 36; *Sami Row* v. *Elianatha Row*, 16 M. L. J. 357, followed.

The question whether there is any misconduct on the part of an applicant disqualifying him from being the guardian of a minor is only subsidiary to the question whether it is in the best interests of the minor that he should be appointed guardian.

The claims of persons recognized as having preferential rights of guardianship should be discarded where the Court comes to the conclusion that the best interest of the child will not be secured by their being declared or appointed guardians.

In this case, the High Court refused to appoint as guardian a person who resided outside the limits of its ordinary Original Civil Jurisdiction.

Appeal from the order of the Hon. Mr. Justice Bakewell, dated the 27th September 1911, in the ordinary Original Civil Jurisdiction of the High Court.

Mr. *T. Ethiraja Mudaliar*, for the Appellants.

Mr. *M. N. Doraiswami Aiyengar*, for the Respondent.

JUDGMENT.—This is an appeal against the order of Bakewell, J., in an application by the respondent to be declared the guardian of his minor girl aged about five years. The petitioner is living in the Civil and Military Station, Bangalore, and the child at the time of the application was and now is in custody of her deceased mother's mother and father living in Madras. The learned Judge bases his order on the only ground that nothing was shown "disqualifying the respondent either in his conduct or in his opinion from having the custody of his child."

It would appear that the learned Judge treated the application as one to enforce the petitioner's legal right to the custody of his child and as similar to an action to recover the child from the appellants. The appellants, the child's maternal grandfather and maternal grandmother, alleged in their affidavits that the petitioner and his wife (now deceased) had not been getting on well for sometime before her death, that she had been living with her husband, the respondent at Bangalore till May 1906, that she then came over to Madras apparently for her confinement, and while she was here the respondent instituted a suit against her for restitution of conjugal rights and another against her parents for the recovery of his wife. There were also criminal proceedings in which he charged his wife and her parents with theft. The child was born in September 1906. After the death of the wife the petitioner demanded the restoration of the child by a lawyer's notice; but the appellants sent no reply to it. This was in December 1907. The present application for being

declared guardian of the minor was in May 1911. The respondent stated in his affidavit that he made one or two attempts to see his wife and child but the appellants would not allow him to see them.

We may at once say that we agree with the learned Judge that no serious misconduct is proved against the respondent. But the question we have to decide is whether it is for the welfare of the minor that the respondent should be declared or appointed her guardian. Recent decisions of the High Court have established the principle, that in an application of the kind in question, the welfare of the child is the paramount consideration although 'regard must also be had to the recognised rights of guardianship under the law.' As a matter of fact, the texts of the Hindu Law do not recognize any absolute rights of guardianship in any one, the Sovereign being entrusted with the guardianship of all minors and entitled to appoint the person as guardian in their interest. *Re Gulbai and Lilbai* (1); *Bindo* v. *Sham Lal* (2) and *Tota Ram* v. *Ram Charan* (3) all recognised the principle that the welfare of the minor is the first consideration to be borne in mind. It has also been affirmed in the decisions of this Court in *Krishnaswamy Chetty* v. *Cottah Mangammah* (4); *Muthusawmi Sastry* v. *Narayana Sastry* (5) and *Sami Row* v. *Eliavatha Rao* (6). The case in *Bindo* v. *Sham Lal* (2) is very similar in its facts to the present case. Mr. Justice Bakewell distinguishes these cases on the ground that it was possible in some of them to consult the wishes of the minor and that the Court acted in accordance with the minor's wishes, but that it is not possible to do so in this case as the minor is only five years old. But we do not think that this would enhance the rights of the respondent. It would make it the duty of the Court to come to its own conclusion as to what would best promote the minor's interests. It does not appear that, excepting the respondent's wife, there is any female relation living with him competent to take proper care of the child. It would be hardly safe to presume that his wife, the child's step-mother, would be willing to do so. On the other hand, the grandmother, with whom the child has been living till now, might be trusted to take good care of her. The maternal grandfather's father has made a gift of a house in favour of the child's mother to which the child has now succeeded. There is good reason for believing that the maternal relations have strong affection for the child. We cannot also ignore the fact that the respondent who, as a fact, has never seen the child, was not during the last years of his wife's life on the best terms with her. It was also urged for the appellants that the respondent would be the next heir to the child's property but we should not attach much importance to this fact in the case of a father applying to be declared the guardian of his child. It also appears that the respondent is not a person possessed of ample means, though we do not suggest that he would not be able to bring up the child properly.

The claims of persons recognized as having preferential rights of guardianship have not been recognised in several of the cases referred to above where the Court came to the conclusion that the best interests of the child did not lie in their being declared or appointed guardians. The petitioner himself is residing beyond the limits of the jurisdiction of this Court and it would not be very easy for the Court to control his conduct as guardian. The application is one which the Court is not bound to grant, unless it is satisfied that it is for the welfare of the child that an order should be made.

In all the circumstances of the case, we are of opinion that the application of the respondent should not have been granted. We, therefore, reverse the order of the learned Judge and dismiss the application with costs both here and before the learned Judge.

Application dismissed.

(1) 32 B. 50; 9 Bom. L. R. 923.
(2) 29 A. 210; A. W. N. (1907) 24; 4 A. L. J. 22.
(3) 8 Ind. Cas. 785; 33 A. 222; 7 A. L. J. 1149.
(4) 10 Ind. Cas. 283; (1911) M. W. N. 365.
(5) 8 Ind. Cas. 393; 21 M. L. J. 195; 8 M. L. T. 300; (1911) 2 M. W. N. 36.
(6) 16 M. L. J. 357.

NURA *v.* NASIR DIN.

FINANCIAL COMMISSIONER'S COURT, PUNJAB.

CIVIL APPEAL No. 101 OF 1910-11.

March 13, 1911.

Present:—Mr. Meredith, F. C.

NURA—APPELLANT

versus

NASIR DIN *alias* NASIRA—RESPONDENT.

Custom—Succession—Lambardar, *office of—Adopted son a collateral—Muhammadan Chauhan Rajputs of Madh, District Hissar.*

Among Muhammadan Chauhan Rajputs of *Mauza* Madh, in the Hissar District, the adopted son of a deceased *Lambardar*, who is also a distant agnatic relation of the deceased, is entitled to succeed his adoptive father as *Lambardar* in the presence of a first cousin of the deceased.

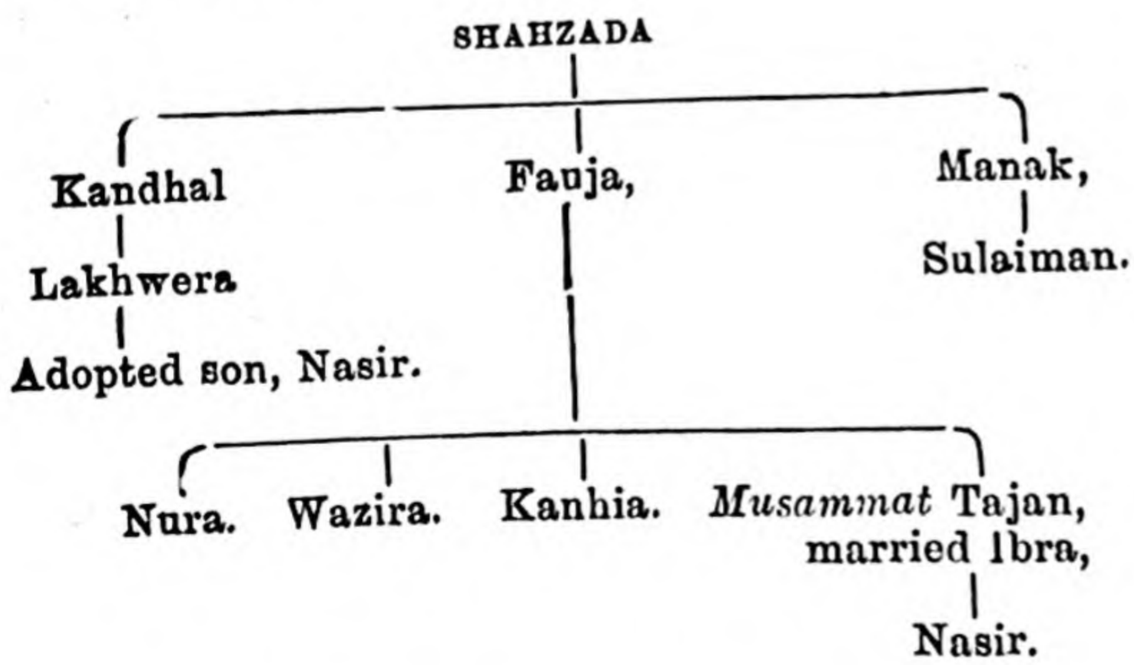
Hira Singh v. *Jiwan Singh*, 14 P. R. 1880, Rev.; *Nihal Singh* v. *Bhana*, 2 P. R. 1883 Rev.; *Maula Dad* v. *Hayat*, 14 P. R. 1886 Rev.; *Shah Muhammad* v. *Diwan Bakhsh*, 12 P. R. 1892, Rev.; *Ramjas* v. *Nihala*, 13 P. R. 1892, Rev., relied upon.

Barkat Ali v. *Illahi Bakhsh*, 2 P. R. 1899 Rev.; *Hira* v. *Wazira*, 9 P. R. 1892, Rev.; *Sher Singh* v. *Subha*, 10 P. R. 1892, Rev.; *Suchet Singh* v. *Basant Singh*, 11 P. R. 1892, Rev., distinguished.

Appeal against the order of the Commissioner, Delhi Division, dated 13th May 1911, reversing that of the Settlement Collector, Hissar, dated 18th October 1910.

ORDER.—Lakhwera, *Lambardar* of Madh, in the Fatehabad Tahsil of the Hissar District, has died childless. There are two claimants for the vacant post; Nura, his uncle's son, and Nasir, his uncle's daughter's son, who was adopted by him in 1903. Nasir is sister's son of Nura, and is also a distant collateral of the 10th or 12th degree.

The following pedigree-table shows the relationship:—



The Collector appointed Nura who has acted as *sarbarah* of the *Lambardar* for the last six years. The Commissioner reversed this order on appeal, on the ground that an adopted son ordinarily has all the rights and privileges of a real son. Neither Court referred to the previous decisions on this point of the succession of an adopted son to the post of *Lambardar*, which were summed up in Sir Louis Tupper's judgment in the case of *Barkat Ali* v. *Ilahi Bakhsh* (1). It was taken as settled that an adopted son, being also a daughter's son, is not entitled to succeed to the office of *Lambardar* in the presence of near collaterals, if he is not of the same *got* as the deceased, *Hira* v. *Wazira* (2), and *Sher Singh* v. *Subha* (3) and *Suchet Singh* v. *Basant Singh* (4). In the present case the parties are Muhammadan Rajputs of the Chauhan *got*. It was also held to be decided that an adopted son, being a near agnate of the deceased *Lambardar* and of the same *got* with him, is entitled to succeed if his succession is not opposed to custom or to the general feeling in the village on the matter, *Hira Singh* v. *Jiwan Singh* (5), *Nihal Singh* v. *Bhana* (6), *Moula Dad* v. *Hayat* (7) and *Shah Muhammad* v. *Diwan Bakhsh* (8) and *Ramjas* v. *Nihal* (9). There is no reference in the *wajib-ul-arz* to any such custom, nor is such alleged to exist. There is no feeling in the village about the matter at all. In the case whether an adopted son who is a distant agnatic kinsman of the deceased is entitled to exclude a collateral as near as a brother's son. Sir Louis Tupper was of opinion that it was not advisable to lay down any hard and fast rule as to the degree of relationship which would support or bar the claim and that the whole circumstances of each particular case must be considered. In the present case, Nasir is a distant agnatic relation of the deceased, he was adopted by him in 1903, since when he has been managing half his land. A registered agreement was executed on 19th March 1903 to this effect, Nura himself being a witness. He is the sister's son of Nura and I agree with the Commissioner that he is entitled to succeed

(1) 2 P. R. 1899, Rev.
(2) 9 P. R. 1892, Rev.
(3) 10 P. R. 1892, Rev.
(4) 11 P. R 1892, Rev.
(5) 14 P. R. 1880, Rev.
(6) 2 P. R. 1883, Rev.
(7) 14 P. R. 1886, Rev.
(8) 12 P. R. 1892, Rev.
(9) 13 P. R. 1892, Rev.

Lakhwera, his adoptive father, as *Lambardar* in the presence of Nura, who is only the first cousin of the deceased.

Appeal rejected with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 363 OF 1911.
November 10, 1911.
Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.
SHANKAR LAL AND ANOTHER—DEFENDANTS—APPELLANTS
versus
SARUPLAL AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 22—Cross-objections by respondent—Appeal not maintainable, whether cross-objections sustainable.

A respondent is entitled to file cross-objections even where the appeal filed by appellant is not maintainable at all.

Second appeal from the decision of the Additional Judge, Saharanpur, dated the 21st of March 1911.

Mr. *Nihal Chand*, for the Appellants.

The Hon'ble Dr. *Sundar Lal* (with him Mr. *Durga Charan Banerjee*), for the Respondents.

JUDGMENT.—Roshan Lal, the owner of certain property in the Saharanpur District, died of plague in May 1907. After his death his step-mother applied for a succession certificate, and thereupon the defendants to this suit produced a Will in their favour which they alleged had been executed by Roshan Lal. The plaintiff in this suit and his brother, who is the father of one of the defendants, appear to be the heirs of Roshan Lal. Mansa Debi, the step-mother, is admittedly not an heir. But she is in possession of the property. The plaintiff asks for a decree declaring that the Will is a forgery and void against him and that it should be delivered up and cancelled. The first Court found that the Will was not proved to have been executed by Roshan Lal. But it dismissed the suit on the ground that it was governed by section 42 of the Specific Relief Act, and that the claim for a declaration was not maintainable as the plaintiff was entitled to claim possession of the property. In the decree of the first Court dismissing the suit the finding that it was not proved that Roshan Lal had executed the Will is distinctly set out. The defendants fearing, apparently, that this finding would prejudice them hereafter filed an appeal. The plaintiff filed an objection under Order XLI, rule 22, to the effect that the suit was not one for a declaration of title under section 42 of the Specific Relief Act, but was a suit under section 39 of the same Act. The Additional Judge dismissed the defendants' appeal, and on the plaintiffs' objections held that the suit was one under section 42 of the Specific Relief Act, and that the plaintiff was not under the necessity of claiming any relief other than the cancellation of the Will. He, therefore, allowed the cross-objections and decreed the plaintiffs' claim. This is a second appeal by the defendants. The first question for consideration is, whether the lower Appellate Court had power to set aside the decree of the first Court on the cross-objections filed by the plaintiff. According to the decisions of this Court, the defendants were not entitled to file an appeal against the decree of the first Court for that decree was entirely in their favour. A question was raised as to whether a respondent is entitled to file cross-objections where the appellants' appeal is not maintainable at all. We are of opinion that a respondent is entitled to do so in such a case as this. The respondent in the lower Appellate Court had a right to appeal, and we think that he did not lose his right to file cross-objections merely because his opponents filed an appeal which was found to be not maintainable. On the question on which the Courts below have differed, namely, whether the suit is governed by section 39 or section 42 of the Specific Relief Act, we think there can be no doubt that the suit is governed by section 39. The plaintiff nowhere seeks a declaration of his title. He asks only that the Will may be declared void and delivered up to be cancelled. The language used in the prayer for relief leaves no doubt that the plaintiff intended to rest his claim upon section 39. That section provides that any person against whom a written instrument is void..... may sue to have it adjudged void..... and the Court may in its discretion so adjudge it and order it to be delivered up and cancelled. It seems to us that, ordinarily, where a plaintiff is out of possession and he is in a position to claim a decree for pos-

75382

session, he should not be permitted to obtain merely a decree for the cancellation of an instrument according to which, if genuine, he has no title to the land, ordinarily a Court would, we think, exercise its discretion wisely if it declined to adjudge such an instrument void, and will do well to leave the plaintiff to a suit for possession. The result of allowing a suit to be maintained under section 39 and another suit for possession to be brought immediately afterwards is, that the defendant is put to unnecessary expense. In the present case though the Additional Judge does not say very much about it, we think we must hold that he has exercised his discretion, and inasmuch as he has decided that the document is void, and both the lower Courts agree that the Will has not been proved, we do not feel called upon to set aside his decree. The appeal is dismissed with costs which, in this Court, will include fees on the higher scale.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 137 OF 1911.

November 11, 1911.

Present:—Mr. Justice Chevis.

MOHAMMAD—PLAINTIFF—APPELLANT

versus

SUKHA SINGH—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), *s.* 13—Res judicata—*Alienation by grandfather—Vendee suing minor grandson for possession—Guardian* ad litem *confessing judgment—Subsequent suit for possession by minor not barred—Inquiry into consideration and necessity—Negligence of guardian.*

Negligence on the part of a guardian *ad litem*, even apart from fraud or collusion, is sufficient to prevent the *quondam* minor from being bound by the decree passed in the suit.

Daulat Singh v. *Raghubir Singh*, A. W. N. (1894) 141, dissented from.

Ahmad Ali v. *Amir Shah*, 35 P. R. 1898, followed.

A.'s grandfather alienated certain ancestral property. The vendee obtained possession of the property by a suit in which *A.*, then a minor, was a defendant and was represented by his mother as his guardian. In that suit, the mother confessed judgment. Subsequently, *A.* brought the present suit for possession of the property on the ground that the alienation was not for consideration and necessity. The lower Courts held the suit barred as *res judicata*:

Held, that the former suit did not bar the present suit and that, in the interests of justice, *A.* was entitled to claim an inquiry into the present suit. If on inquiry it should be found that the alienation was for consideration and necessity, then the suit would fail on the merits. If, however, it was not for necessity and consideration, the mother was negligent in not defending the suit and the decree in the previous suit was not binding on *A.*

Second appeal from the order of the Divisional Judge, Jhelum Division, dated 15th July 1909, confirming the order of the Munsif, 1st class, Gujrat, dated 29th January 1909, dismissing plaintiff's suit.

Mr. *B. C. Chatterjee*, for the Appellant.

Lala *Amar Nath Chopra*, for the Respondent.

JUDGMENT.—Plaintiff sues for possession of certain land. The defence is that the land was sold by plaintiff's grandfather Aladitta and by Hyat Bibi, daughter of a first cousin of Aladitta; that as regards Hyat Bibi's land plaintiff cannot sue in the presence of her son Khushi Muhammad, and that as regards Aladitta's land the sale was for consideration and necessity. The suit is time-barred and is also barred by the law of *res judicata*, the vendee having obtained possession by a suit in which the present plaintiff, then a minor, was represented by his mother.

The first Court dismissed the suit. The learned Divisional Judge on appeal held that the suit was barred as *res judicata* as regards Aladitta's land and that as regards Hyat Bibi's land plaintiff could not sue in the presence of her son. So the appeal was dismissed.

Plaintiff appeals to this Court. As regards Hyat Bibi's land Counsel states that plaintiff now prefers no claim, so it is only the land alienated by Aladitta which is now in question.

As regards this land, the Divisional Judge has disposed of the case simply on the question of *res judicata*. For plaintiff it is urged that his mother having confessed judgment and not having properly defended the case, the former decision is no bar to the present suit, neither fraud nor collusion is alleged, only neglect. For defendant it is urged that mere negligence, however, gross on the part of guardian *ad litem*, will not prevent the decree in the former case being a bar to the present suit.

I cannot agree with the contention advanced for the defendant. It is true that in *Daulat Singh* v. *Raghubir Singh* (1) it is laid down that mere negligence on the part of a

(1) A. W. N. (1894) 141.

guardian *ad litem*, will not prevent a decree being binding on the minor, but I prefer to follow the rulings of the Chief Court of this Province. In *Ahmad Ali* v. *Amir Shah* (2) it was held that omission to appeal, notwithstanding that there were excellent grounds both on law and on facts for an appeal, amounted to gross negligence on the part of the guardian, and that the *quondam* plaintiff was not, in such circumstances, bound by the decree. I hold, therefore, that negligence on the part of a guardian *ad litem*, even apart from fraud or collusion, is sufficient to prevent the *quondam* minor from being bound by the decree passed in the former suit.

Now, if the alienation in question was really for necessity and consideration then the mother was right in confessing judgment; if, however, it was not for necessity and consideration, the mother was negligent in not defending the suit. It follows, therefore, that if the mother's action was not negligent but well advised, the present suit must fail on the merits. So that it may be assumed, without doing any injustice to the defendant, that the mother was negligent and that the former suit is no bar. If on inquiry it should be found that the alienation was for necessity and consideration, then the decision as to the mother having been negligent may be incorrect but the suit will fail on the merits. In the interests of justice, plaintiff is entitled to claim an inquiry into the present suit.

Counsel for defendant has also raised questions of limitation and estoppel, but these have not been decided by the Divisional Judge.

I accept this appeal and set aside the decision of the learned Divisional Judge, and send the case back for re-decision in accordance with the above remarks.

Stamp on appeal to be refunded. Other costs of this appeal to follow the event.

Case remanded.

(2) 35 P. R. 1898.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 1 OF 1911.

November 14, 1911.

Present:—Mr. Justice Tudball.

JANKI PRASHAD—DECREE-HOLDER—APPLLICANT

versus

THAKUR DAS MUKHERJEE AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2 (3)—Uncertified payment—Court cannot allow it to be proved in execution—Revision—Error of law—Substantial justice not done.

In execution of a decree, the Court should not allow the judgment-debtor to prove those payments which had not been certified under Order XXI, rule 2 of the Code of Civil Procedure, 1908, within the prescribed period.

The High Court will interfere in revision where the lower Court has been guilty of an error of law and substantial justice has not been done in the case.

Revision against the decree of the Small Cause Court Judge of Agra, dated the 13th of April 1910.

Mr. *A. P. Dube*, for the Appellant.

Mr. *J. N. Choudhri*, for the Opposite Party.

JUDGMENT.—This is an application for revision under section 25 of the Provincial Small Cause Courts Act. It rises out of the following circumstances:—In 1902, the applicant advanced a sum of Rs. 50 to the opposite parties on a promissory-note at the rate of Rs. 37½ per cent. interest per annum. In February 1903, he sued to recover his money *plus* interest. His claim was for Rs. 54 odd, a payment of Rs. 5 having been already made. He obtained a decree and put it into execution several times without success. Finally, in January 1909, when one of the judgment-debtors, who is a Railway servant, had been transferred to Allahabad, he put his decree into execution. He allowed certain payments as having been made. One of the judgment-debtors came to Court and filed an objection to the effect that he paid off the whole amount of the decree. He produced some nine receipts, six of these covered sums which the decree-holder had allowed in his application as having been paid. In the case of one receipt, the decree-holder admitted having received a sum of Rs. 5 and urged that the figure 1 had been inserted and the receipt altered. In the case of the other two receipts, the decree-holder totally denied that he either received the money or granted the receipt.

JANKI PRASHAD *v.* THAKUR DAS.

The Court called on the judgment-debtors to prove the three disputed receipts, overlooking the terms of clause (3) of Order XXI, rule 2, of the Code of Civil Procedure. The receipts related to payments which had not been certified and recorded according to the terms of Order XXI, rule 2. The Court ought to have refused to go into the question of these payments, leaving it to the judgment-debtor to recover the money, if paid, from the decree-holder by a separate suit. The Court, however, called on the judgment-debtor to prove the payments covered by these three receipts. On the 3rd of March 1910, it ordered the judgment-debtor to secure an expert for examination of the receipts. This apparently was not done. On the 2nd of April 1910, an order was passed postponing the case to the 9th of April for the purpose of examining the judgment-debtor himself in proof of the receipts. On the 8th of April, the decree-holder, who personally conducted his case without the assistance of a legal adviser, wrote to the presiding officer of the Court stating that he was ill and that he would be unable to attend the Court on the 9th and asking for one week's postponement. On the 13th of April 1910, the judgment-debtor was examined in the absence of the decree-holder. He made a brief bald statement supporting the receipts. On the 9th of April, the Court had ordered an account to be prepared and the case to be put up on Monday the 13th April, on which date it held, accepting the evidence of the judgment-debtor, that the decree had been satisfied and dismissed the decree-holder's application for execution with costs. On the 11th of May, the decree-holder applied for restoration and rehearing of the application. This was rejected on the 15th of August 1910, on the ground that the decree-holder had not deposited the amount of costs decreed against him. He made a second application on the 2nd of September 1910 with a deposit. This was rejected on the 26th of September as being barred by limitation. He has now come on revision to this Court. It is quite clear that the lower Court has committed an error in making inquiry as to the payment or non-payment of the amount disputed. The terms of Order XXI, rule 2, clause (3), are very plain and unmistakeable. At the same time, the lower Court did make some sort of inquiry, and if I could say with certainty that substantial justice had been done, I should have refused to entertain the revision. The receipts produced by the judgment-debtors are on the record and I have compared the disputed ones with the admitted ones. There is a distinct difference in the hand-writing, although not such as to enable a non-expert to say with any degree of certainty that the disputed receipts are forgeries. There are certain other features, too, which go to create a certain amount of suspicion in the matter. These disputed receipts are supported by a very meagre bare *ex parte* statement of the judgment-debtor himself and by no other evidence. He was not even cross-examined as the decree-holder was absent. Without describing these disputed receipts as forgeries, still, I think, the circumstances of the case are such that the lower Court was not justified in holding that the receipts were proved, and it would be certainly advisable that these receipts, the burden of proving which was on the judgment-debtor, should be established, if the latter deems fit to do so, by a regular suit rather be accepted in the present proceedings after a very meagre inquiry. I am far from satisfied that material justice has been done in the case. The lower Court has been guilty of an error of law and I think I can do justice to both parties by allowing the decree to be executed, leaving it to the judgment-debtors to establish by a regular suit the genuineness of their receipts and thereby recovering their money. I, therefore, admit this application, and set aside the order of the lower Court dated the 13th of April 1910. The application for execution will be granted and the lower Court will proceed to execute the decree according to law. The decree-holder applicant will have his costs in the lower Court. So far as costs in this Court are concerned, each party will bear his own costs.

Appeal allowed.

P. N. Dar
Advocate High Court
Jammu & Kashmir
Srinagar.

GOKUL KRISHNA DAS *v.* SHASHI MUKHI DASI.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1645 OF 1910.

August 26, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Teunon.

GOKUL KRISHNA DAS AND OTHERS—DEFENDANTS—APPELLANTS

versus

SHASHI MUKHI DASI—PLAINTIFF—RESPONDENT.

Partnership—Death of one partner—Dissolution—Continuation of partnership—Contract Act (IX of 1872) s. 253, cl. 10—Account stated or settled—Long acquiescence—Limitation—Account to be taken from commencement unless account settled subsequently—Ordinary items not to be challenged in absence of fraud—Salary of partner when may be charged—Sums over-drawn by partner—Liability to pay interest.

A partnership was commenced in 1883 between the husband of the plaintiff, and the defendants. The husband of the plaintiff died in 1887. Since his death, the business was conducted on the assumption that the plaintiff was a partner:

Held, that the original partnership must be held to have been continued by common consent, with this difference that the plaintiff re-placed her husband, and this condition of things could be explained only on the hypothesis that the contract between the founders of the partnership was that it was not to be dissolved by the death of any of the partners.

The mere balancing of an account in a book of accounts does not of itself constitute an account-stated, much less does it constitute an account-settled such as the parties would not be entitled to re-open except on special grounds.

But where an account has been rendered and has long been acquiesced in, unless fraud be proved, a Court will not re-open it, although the account may be shown to be erroneous and although no final settlement was ever made.

Clancarty v. *Latouche*, (1810) 1 Ball and B. 420 and *Scott* v. *Milne*, 5 Beav. 215, on Appeal 7 Jur. 709, referred to.

So long as a partnership continues, the statute of limitation does not apply between the partners as to a claim for account; and the time from which the account is to begin, in a general account of partnership dealings and transactions, is the commencement of the partnership, unless some account has since that time been settled by the partners, in which case the last settled account will be the point of departure.

Foster v. *Hodgson*, 19 Ves. 183 and *Cook* v. *Collingridge*, Jacob 607; 23 R. R. 155, 767; 1 L. J. Ch. (o. s.) 74, referred to.

Unless fraud is establishd, the ordinary items relating to purchases and sales in respect of the business are not to be challenged.

In the absence of any agreement to that effect, one partner cannot charge his co-partners with any sums in the shape of salary, commission or otherwise. But where a *pardanashin* lady is a partner and the responsibility for the conduct of the partnership business is thrown upon the other partners, it is just and equitable that some allowance should be made in favour of the other partners.

Where some of the partners have over-drawn sums of money from the partnership-business and applied them to establish other firms from which they have earned large profits, they must, when the partnership accounts are taken, not only account for the money but also pay interest on the same.

Appeal from the decree of the District Judge of 24-Perganahs, dated March 18th, 1910, modifying that of the Sub-Judge of 24-Perganahs, dated July 19th, 1909.

Babus *Bipin Bihari Ghosh* (Junior) and *Mohini Mohan Chatterjee*, for the Appellants.

Babus *Tarakishore Chowdhury*, *Brojo Lal Chakravarti* and *Satish Chundra Mukherjee*, for the Respondent.

JUDGMENT.—This appeal is directed against the preliminary decree in a suit for dissolution of a partnership-business, for adjustment of accounts, and for incidental reliefs. The claim of the plaintiff related to four firms, in respect of which she alleged that her husband, and after his death, she herself was partner with the defendants. In the original Court, the suit was dismissed on the ground that all the partners had not been joined as defendants. The District Judge, on appeal, reversed that decision, and gave the plaintiff an opportunity for the proper constitution of the suit. Upon remand, the Subordinate Judge held that the plaintiff was entitled to a decree for dissolution and gave directions as to the mode in which the business was to be dissolved and account taken. Upon appeal, the learned District Judge has affirmed this decision with two important variations, namely, *first*, that the plaintiff was entitled to a decree for dissolution in respect of one of the firms only from the income of which the other firms appear to have been established by the defendants, and *secondly*, that the plaintiff was not entitled to interest on sums over-drawn by the defendants. The defendants have appealed to this Court, and on their behalf, the decree of the District Judge has been assailed, substantially on two grounds, namely, *first*, that the direction as to the mode in which the accounts are to be taken are unjust and erroneous, and *secondly*, that the defendants are entitled to remuneration on account of their services in the management of the firm. The plaintiff has contested the validity of these arguments, and has further urged that she is entitled to claim interest on amounts over-drawn by the defendants. We may add that when the appeal was first

GOKUL KRISHNA DAS *v.* SHASHI MUKHI DASI.

called on for hearing, it was argued on behalf of the defendants-appellants, that the suit was not properly constituted as parties interested in the partnership had not been served with notice, either in the primary Court or in the Court of Appeal below. We thereupon directed notices to be issued upon such persons. But they have not entered appearance in response to the notice; in other words, in spite of the best efforts of the plaintiff, no one has come forward to claim an interest in the partnership transactions. We are satisfied that there is no substance whatever in the contention that the suit as framed, is open to the objection on the ground of defect of parties. We shall, therefore, proceed to consider the objections urged against the decree of the District Judge.

The first point taken on behalf of the defendants is, that the District Judge has not given proper directions as to the manner in which the accounts are to be taken. It has been suggested that the plaintiff is not entitled to claim any account at all by reason of her laches. The partnership was commenced on the 19th November 1883, between the husband of the plaintiff and the defendants. The husband of the plaintiff died in 1887. It has been found that, since his death, the business has been conducted on the assumption that the plaintiff was a partner. Consequently, no question arises, whether the partnership was or was not dissolved in 1887, under clause (10) of section 253 of the Indian Contract Act. That section provides that, in the absence of a contract to the contrary, the relations of partners are determined by the death of any partner. There is no direct evidence to show what was the contract between the parties in this respect at the inception of the partnership: but the Subordinate Judge has held, and his view does not appear to have been contested before the District Judge, that the conduct of the parties since 1887 shows that there must have been a contract between the original parties, that the partnership would not be dissolved by the death of any partner. There is no room for the theory that, after the death of the husband of the plaintiff, a new partnership was constituted between herself and the surviving partners. The true view is that the original partnership was continued by common consent with this difference that the plaintiff re-placed her husband, and this condition of things can be explained only on the hypothesis that the contract between the founders of the partnership was that it was not to be dissolved by the death of any of the partners. The position since 1887 has, consequently, been that the defendants have managed the business and kept the accounts; the plaintiff, as a *parda-nashin* Hindu lady, could hardly be expected to take an active interest in the actual management of the trading concern. She might, no doubt, have employed an agent to examine the accounts from time to time. Indeed, the case for the defendants is that the accounts were settled from year to year. This, however, has been negatived by the Courts below, and in, our opinion, very properly. It is well settled that the mere balancing of an account in a book of accounts does not of itself constitute an account-stated, much less does it constitute an account settled such as the parties would not be entitled to re-open except on special grounds. *Olancarty* v. *Latouche* (1). The contention of the defendants that there has been a settled account cannot, therefore, be sustained nor can the position be maintained that there has been such acquiescence on the part of the plaintiff as to disentitle her to claim an account. No doubt, where an account has been rendered and has long been acquiesced in, unless fraud be proved, a Court will not re-open it, although the account may be shown to be erroneous, and although no final settlement was ever made: *Scott* v. *Milne* (2). The same principle is acted on in taking accounts, for charges long improperly made and acquiesced in or long omitted to be made and known so to be, are regarded, in the absence of fraud, as having been made or omitted by agreement: *Thornton* v. *Proctor* (3). This principle has obviously no application to the present case. The defendants were fully aware that, as they were in charge of the business and kept the accounts, they were liable to render accounts to the plaintiff who, as a *pardanashin* Hindu lady, could not herself take part in the management, or control the accounts. As already explained, their case is that such accounts have been rendered. This defence has failed. They cannot now very well turn round and contend that they were

(1) (1810) 1 Ball and B. 420.
(2) 5 Beav. 215, on Appeal 7 Jur. 709.
(3) 1 Austr. 94; 3 R. R. 558.

under the impression that the accounts, as entered by them in the books of the firm, were accepted by the plaintiff. But, although the plaintiff is not disentitled to claim an account, the question may very well arise as to the extent to which the accounts are to be taken. No question of limitation obviously arises. As the partnership had not been dissolved before suit, Article 106 of the Limitation Act, 1877, would have no application, *Harrison* v. *Delhi and London Bank* (4), in other words, as put in *Foster* v. *Hodgson* (5), so long as a partnership continues, the statute of limitation does not apply at all between the partners. Article 120 would, consequently, govern the present suit. If, therefore, no question of limitation arises, the point requires consideration, what is the period for which the accounts have to be taken. There can be no question that the time from which the account is to begin, in a general account of partnership dealings and transactions, is the commencement of the partnership, unless some account has since that time been settled by the partners, in which case the last settled account will be the point of departure: [*Cook* v. *Collingridge* (6).] In the present case, there has been no such settled account; consequently, the accounts must be taken from the inception of the partnership. It is clear also, that the accounts must be taken of all dealings and transactions up to the date of the dissolution: [*Beak* v. *Heak* (7), *Jones* v. *Noy* (8).] It has been contended, however, with considerable force by the learned Vakil for the defendants-appellants, that as the plaintiff was entitled to exercise her right of examining the books and accounts of the firm by an agent appointed by her for that purpose [*Bevan* v. *Webb* (9)] and as she has never chosen to exercise such a right, it would be a great hardship upon the defendants if they were called upon now to justify the purchases and sales on account of the firm at this distance of time, many years after the transactions have taken place. The learned Vakil for the plaintiff-respondent has appreciated the force of this contention and has stated that the plaintiff is not anxious to require the defendants to justify the ordinary items. Her grievance is that sums have been paid out in an obviously unauthorised manner, and that the defendants ought to be called upon to account for such sums. The payments so made have been classified under four heads, namely, *first*, sums paid by way of remuneration to the defendants; *secondly*, sums paid to Mohesh Chandra Dey, the nephew of the husband of the plaintiff, or to creditors of Mohesh; *thirdly*, sums paid to Bindubashini, the widow of Mohesh Chandra, and *fourthly* sums paid to the defendants which they have invested in very profitable business. In so far as payments of the first of these four classes are concerned, we shall deal with the matter when we consider the second ground urged by the appellants. In so far as the second and third classes of payments are concerned, the defendants are obviously liable to render an account. Their case throughout has been that Mohesh Chandra Dey was one of the partners of the firm and that after his death, his widow also continued to be a partner. This defence has completely failed. The payments made to Mohesh or his creditors or to his widow cannot, therefore, be justified on the ground that they were payments made to a partner. But it has been suggested on behalf of the defendants that Mohesh had rendered services to the firm, for which he was entitled to remuneration. That is a question which remains to be investigated; if it is established that Mohesh was entitled to remuneration for services rendered, a reasonable amount of remuneration may be set off against the sums paid out to him, his creditor or his widow. The remainder must be deemed as unauthorized payments for which the defendants are bound to render an account. In so far as payments of the fourth class are concerned, it is clear that the defendants are liable to render an account. If it is established that they have withdrawn sums from the partnership business and supplied them for purposes unconnected therewith, they are bound to render an account for the sums so withdrawn. It follows, consequently, that the defendants are liable to render an account from the commencement of the partnership business, that unless fraud is established, the ordinary items relating to purchases and sales in

(4) 4. A. 437.
(5) 19 Ves. 183.
(6) Jacob 607; 23 R. R. 155, 767; 1 L. J. Ch. (o s.) 74.
(7) Finch 190.
(8) 2 Myl. and K. 125; 39 R. R. 160; 3 L. J. Ch. 14.
(9) (1901) 2 Ch. 59; 84 L. T. 609; 70 L. J. Ch. 536; 6 W. R. 548.

respect of the business are not to be challenged, but that the defendants must render an account with regard to the four classes of payments just mentioned.

The second point taken on behalf of the defendants is, that they were entitled to remuneration on account of their services in the management of the firm. We are of opinion that this contention is well-founded. It may be conceded, as put by Lord Wynford in *Thompson* v. *Williamson* (10), under ordinary circumstances the contract of partnership excludes any implied contract for payment of services rendered for the firm by any of its members; consequently, in the absence of any agreement to that effect, one partner cannot charge his co-partners with any sums for compensation, whether in the shape of salary, commission or otherwise, on account of his own trouble in conducting the partnership business, and in this respect a managing partner is in no different position from any other partner. [*Hutchson* v. *Smith* (11)]. This doctrine has been applied even where the amount of the services rendered by the partners is exceedingly unequal. In such a case, a remuneration to be paid to either partner for personal labour exceeding that contributed by the other is considered as left to the honour of the other, and it has been said that where that principle is wanting a Court of Justice cannot supply it. [*Webster* v. *Bray* (12)] where an allowance for trouble was made to the defendant, because it was offered by the plaintiff, [*Robinson* v. *Anderson* (13)] where no allowance was offered and none was given by the Court: where, however, it is the duty of each partner to attend to the partnership business and one partner in breach of his duty wilfully leaves the other to carry on the partnership business unaided, the Court may, upon dissolution of partnership, decree an allowance in favour of the partner who had carried on the business alone [*Airey* v. *Borham* (14)]. In the case before us, the circumstances are peculiar; the plaintiff is a *pardanashin* lady and is unable, by reason of her station in life, to take an active interest in the management of the partnership business, the responsibility for the conduct of which has naturally been thrown upon the defendants. In view of these facts we expressed our opinion that it was just and equitable that some allowance should be made in favour of the defendants. The plaintiff thereupon offered remuneration at the rate of Rs. 150 a year. In our opinion, this is reasonable and we direct accordingly, that when the accounts are taken, the defendants be credited with remuneration at the rate of Rs. 150 a year from the time of the death of the husband of the plaintiff. If the defendants have credited themselves with any sum in excess of Rs. 150 a year by way of remuneration, they must account for the difference.

The point urged on behalf of the plaintiff against the decree of the District Judge raises the question whether the defendants are liable to pay interest on sums withdrawn by them from the partnership business. The learned District Judge has disallowed the claim for interest, and the learned Vakil for the defendants has sought to justify this view by reference to the case of *Meymott* v. *Meymott* (15). He has argued that, except where there has been fraudulent retention, as in *Hutchson* v. *Smith* (11), or an improper application, as in *Evans* v. *Coventry* (16), a partner ought not to be charged with interest on money of the firm in his hands, *Webster* v. *Bray* (12); *Stevens* v. *Cook* (17). It may be conceded that this is a sound rule; but, in our opinion, it is of no assistance to the defendants. The case for the plaintiff is—and her allegation has been accepted by the Courts below—that the defendants have, from time to time, withdrawn large sums of money from the partnership business, and applied them to establish other firms from which they have earned large profits. Under these circumstances, it is difficult to appreciate how the defendants can resist the claim for interest. If the money had been retained and laid out judiciously or applied for the legitimate expansion of the business of the firm, the plaintiff would have been entitled to the additional profit. This is clearly a case where some of the partners have, with-

(10) 7 Bligh (N. s.) 432.
(11) 5 Ir. Eq. 117.
(12) 7 Hare 159.
(13) 20 Beav. 98; 7 De G. M. and G. 239.
(14) 29 Beav. 620; 4 L. T. 391.
(15) 31 Beav. 445; 32 L. J. Ch. 218; 9 Jur. (N. s.) 426.
(16) 8 DeG. and M. and G. 835; 26 L. J. Ch. 400; 3 Jur. (N. s.) 1225; 5 W. R. 436.
(17) 5 Jur. (N. s.) 1415.

out the assent of the other partners, wrongfully used in trade funds which were not their exclusive property. They are clearly liable to restore the property and to make the owner proper compensation. In our opinion, the plaintiff, under these circumstances, would be entitled at her option, either to take interest on the profits made by the use of the funds. Although she claimed the latter alternative in the original Court, she has not put forward any such claim before us; she has contented herself in this Court with a claim for interest. This is clearly unanswerable [*Yates* v. *Finn* (18), *Booth* v. *Parke* (19), *Docker* v. *Somes* (20)]. When the accounts, therefore, come to be taken, not only must the defendants account for all sums over-drawn by them and applied for purposes unconnected with the firm, but also pay interest thereon at 12 per cent. per annum. from the date when the sums were over-drawn to the date of the final decree of the lower Court.

The result is that the appeal and the cross-objections must both be allowed in part; the decree of the District Judge will be varied and the accounts will be taken in the manner explained in this judgment. Subject to the variations indicated, his decree will be affirmed. There will be no order as to the costs in this Court.

Appeal and cross-objections allowed in part.

(18) 13 Ch. D. 839; 28 W. R. 387; 49 L. J. Ch. 187.
(19) Beaty 444.
(20) 2 Myl. and K. 655; 3 L. J. Ch. 200.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 920 OF 1910.
November 11, 1911.
Present:—Mr. Justice Robertson.

MUHAMMAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat BAKKO AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Succession—Collaterals—Degree of relationship—Method of calculation—General rule—Mianwali Tahsil—Presumption.

The general rule in the Punjab for calculating the degree of relationship of collaterals is that the calculation must be made from the *deceased* to the common ancestor of the claimant, the deceased and the ancestor being each counted as one.

Ladhu v. *Daulti*, 126 P. R. 1890; *Nur Muhammad* v. *Gulam Habib*, 106 P. R. 1892; *Karim Bakhsh* v. *Jehandad Khan*, 74 P. R. 1906; 137 P. L. R. 1906, followed.

Mianwali Tahsil must be presumed to be governed by the general Punjab rule. The rule prevailing in the Bannu Tahsil, *viz.*, that the calculation must be made from the *collaterals claiming* to the common ancestor, each counting as one, cannot be applied to the Mianwali Tahsil.

Second appeal from the order of the Divisional Judge, Attock Division, dated 16th June 1910, reversing that of the Munsif, 1st class, Mianwali, dated 12th January 1910, decreeing the plaintiff's claim.

Mr. *Nand Lal*, for the Appellants.

Mr. *Nanak Chand*, for the Respondents.

JUDGMENT.—The plaintiffs in this case sue as reversioners of one Dauran Khan for possession of his estate to which defendant, daughter of Dauran Khan, was also a claimant. It appears that Dauran Khan was not, as a matter of fact, the last male owner, but his son, Khan Beg, actually came into possession before his death. The lower Court has dismissed the claim on the ground that in Tahsil Mianwali daughters and sisters can only be excluded from inheritance of their fathers or brothers by collaterals not more remote than the sixth degree, and that the plaintiffs are not in fact related to the last male owner, Khan Beg, within the 6th degree.

This contention is practically accepted by both sides and I see no reason to doubt its correctness.

The sole question which is left for my decision is, how is the relationship of the collaterals of the deceased Khan Beg to be calculated? There can be no doubt that the general rule throughout the Punjab for such calculation must be held to be that laid down in various judgments of this Court, *inter alia* *Ladhu* v. *Daulti* (1), *Nur Muhammad* v. *Ghulam Habib* (2), *Karim Bakhsh* v. *Jehandad Khan* (3). No doubt, it is possible that this rule is not quite universal as has been supposed, but that it is general there can be little doubt, and the presumption in every case must be in favour of it. If that rule be applied, which is that the calculation must be made from the deceased to the common ancestor of the claimants, the deceased and the ancestor, being each counted as one, then the plaintiffs' suit must fail; as this would show the colla-

(1) 126 P. R. 1890.
(2) 106 P. R. 1892.
(3) 74 P. R. 1906; 137 P. L. R. 1906.

terals as only related in the seventh degree. The collaterals, however, claim that the proper method of calculation in the Mianwali Tahsil is the same as that laid down in the *Riwaj-i-am* of the Bannu Tahsil, *i. e.*, the calculation must be made from the collaterals claiming to the common ancestor, each counting as one, and not from the deceased to the common ancestor. If that were so, the plaintiffs' suit will succeed, as they will then be shown within the sixth degree. Plaintiffs rely mainly upon a Division Bench judgment of this Court, reported as *Girdhari Ram* v. *Faizullah Khan* (4). That, undoubtedly, lays down that, under the provisions of the *Riwaj-i-am* of the Bannu Tahsil, which they considered might be also applied to the Isa Khel Tahsil, the method of calculation put forward by the plaintiffs is correct. But this judgment deals with a special part of the country and lays down a rule on the strength of a special entry in the *Riwaj-i-am* of that tract. The question, therefore, is, are we to apply to Mianwali the general rule obtaining throughout the Punjab or the rule found to obtain in Isa Khel and Bannu? The actual evidence that the rule is as laid down by the plaintiffs is not of any particular value and may be neglected. After full consideration, I consider that Mianwali, being a Cis-Indus Tahsil, separated by the river Indus from the Tahsils of Isa Khel and Bannu and differing very materially from those Tahsils in character and population, must be presumed to be governed by the general rule of the Punjab. This presumption has not, to my mind, been rebutted and there is nothing in the *Riwaj-i-am* of the Mianwali Tahsil to support the contention of the plaintiffs. I am, therefore, unable to see any sufficient reason for accepting the appeal. It is accordingly rejected with costs.

Appeal dismissed.

(4) 48 P. R. 1908; 98 P. W. R. 1908; 166 P. L. R. 1908.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 92 OF 1911.

November 7, 1911.

Present:—Mr. Justice Chevis.

AMAR SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

HUSAINA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Punjab Pre-emption Act (II of 1905), *ss.* 2 (2), 12—*Occupancy rights under section* 6 *of the Tenancy Act —Sale to landlord by joint tenant—Right of other tenant to pre-empt—Landlord's right to defeat pre-emption —Remedy of landlord in case of such sale to third person—Punjab Tenancy Act (XVI of* 1887*)*, *ss.* 5, 6, 53, 56, 60.

Where one of two joint occupancy tenants under section 6 of the Punjab Tenancy Act has sold his occupancy rights to the landlord, the other tenant is entitled to pre-empt.

There is nothing in the Punjab Tenancy Act or in the Pre-emption Act which gives a landlord any right of pre-emption, or right to defeat a claim to pre-empt in the case of a sale of a right of occupancy under any section other than section 5.

Ghauhra v. *Harbhaj*, 16 P. R. 1905; 41 P. L. R. 1905, explained and distinguished.

In the case of such a sale to the landlord himself, he is estopped, by reason of being a party to the sale, from suing to avoid the sale under section 60 of the Tenancy Act. If the sale is to a third person and the landlord has not given his previous consent in writing, he can sue to avoid the sale.

Second appeal from the order of the Additional Divisional Judge, Amritsar, at Jullundur, dated the 18th August 1910, confirming that of the Munsif, 1st class, Amritsar, dated the 31st January 1910, decreeing plaintiff's claim.

Pandit *Rambhaj Datta*, for the Appellants.

Chowdhuri *Nabi Bakhsh*, for the Respondents.

JUDGMENT.—This is a pre-emption case in which one of two joint occupancy tenants has sold his occupancy rights to the landlord and the other tenant sues to pre-empt. The occupancy rights in question are rights under section 6 of the Tenancy Act. The first Court gave the plaintiff a decree, which the Divisional Judge upheld on appeal. The only question is whether such a sale is subject to pre-emption.

For the landlord appellant it is urged that a landlord is given the first right of pre-emption even in cases of a sale of occupancy rights held under section 5, and that the landlord's position should be even stronger in a case, where the occupancy tenure is held under section 6.

LALJI PANDEY v. BERHAMDEO PANDEY.

In section 2 (2) of the Pre-emption Act, it is laid down that nothing in the Act shall affect the provisions of section 53 of the Tenancy Act. Section 53 lays down that a tenant having a right of occupancy under section 5 must, if he wishes to alienate his occupancy rights, give notice to his landlord through the Revenue Officer, and that the landlord may then within one month buy the rights at a price to be fixed by that officer. This is, of course, a kind of pre-emption. In *Ghauhra* v. *Harbhai* (1), it is laid down, when dealing with the case of a sale by a *mukarraridar* to the landlords, that the proprietors "have a statutory right of purchase under Chapter V of the Tenancy Act," and so it is held that the co-sharer in the tenancy cannot pre-empt from the landlord. But the *mukarraridar* is a person whose status is higher than that of an occupancy tenant; so apparently it was considered that in such a case the landlord was entitled to the full benefits of section 53. And the ruling was one under the old law, *i.e.*, the Punjab Laws Act. But we have in the present case nothing to do with section 53 of the Tenancy Act, as the occupancy rights in question are not rights held under section 5. It is sections 56 and 60, if any, which can benefit the landlord in the present case. Section 56 lays down that a right of occupancy under any section other than section 5 shall not be transferred by private contract without the previous consent in writing of the landlord. (I omit the other words of the section, as there is no question here of attachment or sale in execution of a decree or order of Court; what has occurred has been a transfer by private contract.) Section 60 lays down that any transfer in contravention of the foregoing provisions shall be voidable at the instance of the landlord. But this is not a case of a landlord seeking to avoid the transfer; on the contrary, the landlord seeks to maintain the transfer, which is in his favour, and to defend it against a pre-emptor. So I fail to see how sections 56 and 60 can help the landlord in this case. The plaintiff is clearly entitled to pre-empt, according to the provisions of section 12 of the Pre-emption Act, and, granting, for the purposes of argument, that section 2 (2) of the Pre-emption Act, combined with section 53 of the Tenancy Act, debars any one from pre-empting from a landlord in the case of a sale by a tenant holding under section 5 of the Tenancy Act in favour of the landlord, still I am quite unable to find any thing, either in the Tenancy Act or in the Pre-emption Act, which gives a landlord any right of pre-emption or right to defeat a claim to pre-empt in the case of a sale of a right of occupancy under any section other than section 5. What the landlord can do is, to withhold his consent to the transfer in the first place, but if the transfer once takes place, then the landlord's position seems to me to be as follows. If the sale is in favour of a third person and the landlord has not consented, he can sue to avoid the sale under the provisions of section 60. But if the landlord has given his previous consent in writing, or if he is estopped by reason of being himself a party to the sale, then he cannot avail himself of the provisions of section 60, and the sale remains an accomplished fact, not liable to attack by the landlord under the provisions of section 60 of the Tenancy Act but subject to the peremptory claim of any body who can prove his claim to pre-empt under the provisions of the Pre-emption Act.

I uphold the decision of the lower Courts, and dismiss this appeal with costs.

Appeal dismissed.

(1) 16 P. R. 1905; 41 P. L. R. 1905.

CALCUTTA HIGH COURT.

CIVIL REFERENCE No. 2 OF 1911.

June 26, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

LALJI PANDEY—PLAINTIFF—PETITIONER

versus

BERHAMDEO PANDEY—DEFENDANT—OPPOSITE PARTY.

Landlord and tenant—Damages—Rent—True test—Wilful omission by defendant to cultivate land according to agreement—Suit for compensation whether suit for rent—Money value of crops—Small Cause Court—Jurisdiction.

Whether a suit is one for damages or for rent must depend upon the nature of the claim put forward. If what the plaintiffs claim is the money value of the crops to be delivered by the tenants to the landlords on account of use and occupation of the land held by them, its true nature is rent.

Panchu Chakar v. *Nagendra Nath Pal Chowdhury*, 8 Ind. Cas. 96; 12 C. L. J. 480, relied upon.

Where the allegations in the plaint are that the defendants agreed to cultivate the land, but they wilfully omitted to raise any crops and that conse-

LALJI PANDEY v. BERHAMDEO PANDEY.

quently the plaintiffs were deprived of their share of the crops:

Held, that the share of the crops which the defendants are alleged to have undertaken to deliver to the plaintiff was rent, and the suit was not triable by a Small Cause Court.

Reference by the District Judge of Mozafferpore, dated May 1st, 1911, in Suit No. 13 of the Court of the first Munsif of that place.

Babu *Hira Lal Chakravarti*, for the Petitioner.

Mr. M. M. Mustafa Khan, as *Amicus Curiæ*.

JUDGMENT.—This is a reference under rule 7 of Order XLVI of the Code of 1908 by the District Judge of Mozafferpore and raises questions of considerable nicety and importance. It appears that on the 30th January 1911, Lalji Pandey and others, as plaintiffs, instituted a suit in the Court of the Small Cause Court Judge of Mozafferpore against the defendants, Burhamdeo Pandey and others, for recovery of what was described as damages for use and occupation of certain land. The substance of the case for the plaintiffs was that they were the superior landlords of the disputed land; that the defendants were in occupation and were bound to cultivate the lands; that they had omitted wilfully to raise any crops, and that consequently during the years 1315 to 1318, the plaintiffs were deprived of their share of the crops. The plaintiffs, therefore, sought to recover Rs. 29-10-3 as the money value of what would have been their share of the produce which might have been grown in the land. The defendants entered appearance and on their objection on the 22nd March 1911, the Small Cause Court Judge held that the suit was not triable as a Small Cause Court suit: he, therefore, returned the plaint to the plaintiffs for presentation to the proper Court. The plaintiffs thereupon applied to the District Judge for revision of this order on the ground that the nature of the suit had been misunderstood by the Small Cause Court Judge and that it was, as a matter of law, cognizable by that Court. The learned Judge has made a reference to this Court, and has expressed an opinion that upon the decision in *Kunjo Behari Singh* v. *Madhab Chundra Ghose* (1) and *Kali Krishna Tagore* v. *Izzatunnissa Khatun* (2), the view taken by the Small Cause Court Judge would not be supported.

At the hearing of the reference the authorities on the subject have been clearly analysed and placed before us with great care by the learned Vakil for the plaintiff, while the case for the defendants (who have not entered appearance) has been presented by Moulvi Muhammad Mustafa Khan, who at the request of the Court undertook to argue the case as *amicus curiæ*, and we are indebted to him for the very full and able argument that he has addressed to us.

The question for decision is, whether the suit is excluded from the cognizance of the Small Cause Court by reason of Article 8 of the Second Schedule of the Provincial Small Cause Courts Act of 1887. That Article provides that a Small Cause Court shall not take cognizance of a suit for recovery of rent other than house rent. On behalf of the plaintiff it has been contended that the suit is for the recovery of damages and is consequently cognisable in a Court of Small Causes; on behalf of the defendants, the contrary view has been presented that if the plaintiffs are entitled to recover any sum, that sum is in the nature of rent, and a claim in respect thereof must be enforced in the ordinary Civil Court.

In a case of this description the essential point to be ascertained is the status of the defendants. If the defendants are servants or labourers employed by the plaintiffs, the suit must be treated as one for damages. On the other hand, if the defendants are tenants; it is conceivable that the claim may be one for rent. This fundamental distinction was pointed out by this Court in *Sreenath Dutt* v. *Dwary Dhallie* (3). (Sutherland References from the Mofussil Small Cause Courts, p. 113.) In that case, it was ruled that where the cultivator is a mere servant of the landlord, a suit for damages will lie against him in a Small Cause Court; but if the cultivator is a tenant to whom the landlord has sub-let the land, a suit for non-fulfilment of the contract by the tenant will lie under the Rent Act. This principle appears to have been recognised in the case of *Kade Mandal* v. *Ahadali Molla* (4), and if the distinction is borne in mind it is not difficult to reconcile the cases mentioned in *Shoma Metha* v. *Rajani Biswas* (5). In this case it was pointed out that a suit for produce rent or its money value is a suit for rent under the Bengal Tenancy Act and not a suit for damages for breach of contract and is, there-

(1) 23 C. 884.
(2) 24 C. 557.
(3) 2 W. R. S. C. C. Ref. 2.
(4) 6 Ind. Cas. 594; 14 C. W. N. 629.
(5) 1 C. W. N. 55.

fore, not cognizable by a Small Cause Court. The learned Judges observed that this view was in accord with that taken by a Full Bench of the Allahabad High Court in the case of *Tajuddin Khan* v. *Ram Parshad Bhagat*(6) and that the previous decisions of this Court in the cases of *Lachman Prosad* v. *Halas Mahtoon*(7); *Mullick Amanutali* v. *Ukloo Pasee* (8); *Mohunt Jumna Doss* v. *Gowsee Meah* (9) did not militate against this view. We, therefore, start with the position that the status of the defendants has first to be determined, because if they are not tenants, the claim against them cannot possibly be for rent, although it does not follow that if they are tenants, the claim must necessarily be for rent.

In the case before us the plaint, taken as a whole, indicates, we think, that the plaintiffs have treated the defendants as tenants. No doubt, they stated that they called upon the defendants to quit the land when they found that they omitted to cultivate it in due course and that the defendants neither quitted the land nor brought it under cultivation. But it is to be observed that the claim has been laid in respect of the crops for four years and it has further been restricted to the one-half share of the whole produce which is explicitly described as the *malik's* share. These circumstances indicate that the plaintiffs have treated the defendants as tenants. If their case was that the tenancy had been terminated, the suit ought to have been brought for recovery of the value of the entire crop on the footing that the defendants were trespassers in occupation, and in that event the claim for any period in excess of three years would at once have been met by the plea of limitation. If, then, the defendants are tenants, the question arises whether the suit is one for rent.

It has been suggested by the learned Vakil for the plaintiffs that the suit is one for damages for use and occupation. In our opinion, that view cannot be supported. A suit for damages for use and occupation can be maintained against a tenant who has occupied the premises by the permission or sufferance of the landlord, though the terms of the tenancy have not been settled with precision. [*Rochester* v. *Pierce* (10); *Konai Lall* v. *Nitai Chand* (11)]. In these circumstances, the law implies a contract or promise by the tenant to pay to the landlord a reasonable sum for such use and occupation. [*Hellier* v. *Sillcox* (12) and *Churchward* v. *Ford* (13)]. In the case before us, if the allegations of the plaintiffs are accepted the terms of the tenancy have been settled with perfect accuracy. Their allegations are that the tenants agreed to cultivate the land and to pay them a half share of the produce that might be raised by due diligence. Consequently, although in the event of the failure of the tenant to deliver one-half share of the produce, the Court may be called upon to investigate the quantity and the money value of the crops, there is no uncertainty as to the terms of the contract between the parties. It follows, therefore, that the suit cannot be treated as one for damages for use and occupation. This clears the way for determination of the question, whether the suit is one for rent. Now, the definition of 'rent' as given in section 3 clause (5) of the Bengal Tenancy Act is, whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use and occupation of the land held by the tenant. It is clear, therefore, that the share of the crops which the defendants are alleged to have undertaken to deliver to the plaintiff was rent. They have failed to deliver the crops, and the plaintiffs seek to recover the money value thereof. Is the nature of the relief which the plaintiffs seek altered by the failure of the defendants to perform their part of the contract? In our opinion, the answer ought to be in the negative. The learned Vakil for the plaintiffs did not dispute that if the defendants had grown the crops in due course and had appropriated them for their own purposes, a suit by the landlords to recover the value of their share of the crops could be treated only as a suit for rent. But he urges that the matter is different when the defendants fail to raise the crops. We are unable to accept the suggested distinction as well founded on principle. The position of the landlord is precisely the same whether the failure of the tenants to deliver the crops is

(6) 1 A. 217.
(7) 11 W. R. 151; 2 B. L. R. 27 App.
(8) 25 W. R. 140.
(9) 21 W. R. 124.
(10) (1803) 1 Campbell 466.
(11) 7 Ind. Cas. 492; 12 C. L. J. 612.
(12) 19 L. J. Q. B. 295; 14 Jur. 573.
(13) 2 H. and N. 446; 115 R. R. 631; 26 L. J. Ex. 354; 5 W. R. 831.

due to the fact that they have misappropriated the crops themselves or have failed by reason of want of diligence to raise them at all. In either event, the landlords are entitled to be indemnified and the money which they recover from the tenants represents the compensation paid by the tenants to them on account of the use and occupation of the land held; that is, it is rent. It is not necessary for us to hold that whenever the tenant fails to raise the crops contrary to the terms of his contract, the sole remedy of the landlord is to recover the value of the crops. The landlord may, sometimes, have an additional remedy. For instance, if by reason of the failure of the tenant to cultivate the land, the land itself is deteriorated in value, or if it relapses into jungle, the landlord may well be entitled to claim damages and such damages may, in the contingency mentioned, very well represent the cost of reclamation. The answer to the question, therefore, whether the suit is one for damages or for rent must depend upon the nature of the claim put forward. If what the plaintiffs claim, is the money value of the crops to be delivered by the tenants to the landlords on account of use and occupation of the land held by them, its true nature, in our opinion, is rent. This view is in accord with that taken by this Court in the case of *Panchu Chakar* v. *Nogendra Nath Pal* (14), in which it was ruled that the money value of services not performed by the tenant is in the nature of rent and a claim in respect thereof can be enforced only in the ordinary Civil Courts. The learned Vakil for the plaintiffs has placed much reliance upon the case of *Vira Pillai* v. *Rangasami Pillai* (15). That case, however, is of no assistance to him. There the defendant had ceased to be a tenant and the suit brought against him was for damages for use and occupation of the land held by him as a trespasser. A suit of that description is obviously cognizable in a Court of Small Causes and a similar principle appears to have been accepted in *Bhoobun Mohun* v. *Chander Nath* (16). In the case before us, as we have already explained, the tenancy has not yet been terminated. The defendants are still tenants in occupation and consequently the sum claimed by the plaintiffs, if recoverable at all, is recoverable only as rent and not as damages for use and occupation.

The answer, therefore, which we give to the reference is that the view taken by the Small Cause Court Judge is correct and the plaint has been rightly returned for presentation to the proper Court.

Order accordingly.

(14) 8 Ind. Cas. 96; 12 C. L. J. 480.
(15) 22 M. 149.
(16) 17 W. R. 69.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 229 OF 1910.
June 28, 1911.

Present:—Mr. Justice Rattigan and Mr. Justice Chevis.

MUHAMMAD BADAR KHAN AND OTHERS —PLAINTIFFS—APPELLANTS

versus

CHIRAGH SHAH—DEFENDANT—RESPONDENT.

Landlord and tenant—Sanjidar, *position of—Denial of owner's right by* sanjidar—*Repudiation—Acquiescence by landlord—Suit by landlord for ejectment as trespasser*—Sanjidar *resiling from repudiation—Liability to eviction—Grant of* muafi *rights by Government—Effect on landlord's suit.*

A *sanjidar* is a person who performs certain services in connection with *takyas* and in consideration thereof is given certain land to hold as a tenant under the owners.

Although a tenant cannot, by any unilateral act on his part, determine a tenancy that subsists, between him and his landlord, yet if the landlord acquiesces in the tenant's repudiation of that relationship, the landlord is entitled to evict the former tenant as a mere trespasser and to apply to the Civil Court for his eviction as such.

Sutyabhama Dassee v. *Krishna Chunder*, 6 C. 55; 6 C. L. R. 375; *Ishun Chunder* v. *Shamachurn Dutt*, 10 C. 41; 12 C. L. R. 414; *Khushal Singh* v. *Arjan Singh*, 41 P. R. 1894; *Tulsi Ram* v. *Jhandu*, 186 P. R. 1888, relied upon.

It is not open to the Court to hold that a contractual relationship which is disowned by both parties, still subsists as between them, at all events, so far as those parties concerned.

A *sanjidar* under the plaintiffs was granted certain *muafi* rights by Government. In a suit in 1907, the *sanjidar* filed a written statement, in which he repudiated the relationship of landlord and tenant which plaintiffs alleged to subsist between them and him, and asserted that he himself was the full proprietor of the property held by him. The plaintiffs accepted this repudiation of the relationship and sued to evict the *sanjidar* as a trespasser. The *sanjidar* gave up the position adopted by him in the former suit and in the present suit admitted plaintiff's proprietary rights, claiming to be a *sanjidar* not liable to ejectment:

Held, (1) that the plaintiffs were entitled to eject defendant. The cause of action accrued to the plaintiff upon the denial by defendant of their title as owners and his belated repentance could

MUHAMMAD BADAR KHAN *v.* CHIRAGH SHAH.

not put an end to the right which accrued to the plaintiffs on that cause of action.

(2) That the fact that the defendant was granted *muafi* rights by Government did not debar the plaintiffs from suing for his eviction, because they were in no way concerned with what occurred between Government and the defendant.

Second appeal from the order of the Divisional Judge, Jullundur Division, dated the 9th August 1909, confirming that of the Sub-Judge, 2nd class, Jullundur, dated the 16th March 1909, dismissing plaintiffs' claim.

The Hon'ble Mr. *Muhammad Shafi*, for the Appellant.

Mr. *Lakhshmi Narain*, for the Respondent.

JUDGMENT.—The facts of the case are stated succinctly in the judgment of the learned Divisional Judge and more fully in that of the Sub-Judge. Plaintiffs are admittedly the owners of the property in suit, which comprises 2 *takyas* and a certain area of land of which part is culturable and part used for purposes of a grave-yard. The defendant, Chiragh Shah, is the son of one Chanan Shah and it is admitted that the latter was a *sanjidar* and held the property as such under the plaintiffs. Chanan Shah died in 1906 and there is some dispute as to whether Chiragh Shah succeeded his father as *sanjidar*. Mr. Shafi was not prepared to admit that Chiragh Shah was ever recognised as *sanjidar* by plaintiffs, but in view of the statements made by the latter in the plaint, which they filed in their suit against Bava Ram Das and others (including defendant) in 1907, we have no hesitation in holding that plaintiffs recognised Chiragh Shah as *sanjidar* on the death of his father and that they regarded him as such up to the date of their said suit in 1907. It has not been clearly explained to us what the position of *sanjidar* exactly is, but from what we can gather from the materials on the record and the statements of Counsel before us, he is a person who performs certain services in connection with the *takyas* and in consideration therefor is given certain land to hold as a tenant under the owners. It is clear that up to the date of the suit in 1907 the defendant was regarded by the plaintiffs as their tenant and as holding the land in suit upon the terms of rendering service as a *sanjidar*. But in that suit defendant filed a written statement in which he repudiated the relationship of landlord and tenant which plaintiffs alleged to subsist between them and him, and asserted that he himself was the full proprietor of the said property. Plaintiffs were naturally incensed at the attitude thus taken up by defendant and decided to accept the latter's repudiation of the relationship theretofore subsisting between him and them and to treat him as a mere trespasser. They have accordingly brought this suit upon that basis and they now ask the Court to evict defendant on the ground that he is a trespasser. Defendant has thought fit in this case to give up the position which he adopted in the former suit, and he now admits plaintiffs' proprietary rights and claims to be a *sanjidar* only, though not liable to ejectment, as he has acquired occupancy rights in the land.

Mr. Shafi contends that the defendant's denial in 1907 of plaintiffs' rights as owners gave the latter the right to determine the relationship of landlord and tenant and that when once the plaintiffs had accepted defendant's repudiation of that relationship, the parties no longer occupied the position of landlord and tenant, plaintiffs thereafter being at liberty to treat the defendant as a mere trespasser, and to sue for his eviction in the Civil Courts. The learned Counsel further argued that the mere fact that in this suit defendant had thought it advisable to repent of the position which he defiantly adopted in the former suit could not affect plaintiffs' rights to claim his eviction as a trespasser. After careful consideration of the arguments of Mr. Shafi for the plaintiffs and of Mr. Lakhshmi Narain for the defendant, we are of opinion that there is force in the former's contention. It is true that a tenant cannot, by any unilateral act on his part, determine a tenancy that subsists between him and his landlord, but if the landlord acquiesces in the tenants' repudiation of that relationship he is, we think, entitled to treat the former tenant as a mere trespasser and to apply to the Civil Court for his eviction as such. *Sutyabhama Dassee* v. *Kreshna Chandra* (1); *Ishan Chander* v. *Shamacharan Dutt* (2); *Khushal Singh* v. *Arjan Singh* (3); *Tulsi Ram* v. *Jhandu* (4). In such a case both parties

(1) 6 C. 55; 6 C. L. R. 375.
(2) 10 C. 41; 12 C. L. R. 414.
(3) 41 P. R. 1894.
(4) 186 P. R. 1888.

are at one in treating the former relationship as no longer in existence and it cannot be open to the Court to hold that a contractual relationship which is disowned by both parties, still subsists between them, at all events, so far as those parties themselves were concerned. Upon this view of the case, it is clear that plaintiffs, who were the admitted owners of the property must succeed in the present suit as defendant is a mere trespasser with no rights. We cannot agree with the Divisional Judge that because the defendant, as a *sanjidar* was granted certain *muafi* rights by Government, plaintiffs are thereby debarred from suing for his eviction. Plaintiffs are in no way concerned with what has occurred between Government and defendant, and so far as affects them, the fact that defendant may hereafter be unable to perform duties in respect of which Government recognised him as a *muafidar*, is entirely irrelevant.

Nor, again, can the fact that defendant has now seen the error of his ways and is anxious to resile from the position taken up by him in 1907 deprive plaintiffs of their rights to ask for his eviction. Their cause of action accrued upon the denial by defendant of their title as owner and his subsequent belated repentance cannot determine the right which accrued to them upon that cause of action. The case might, perhaps, have been different if defendant had by a *bona fide* mistake been inadvertently led to dispute plaintiff's title. But in 1907 when he boldly asserted himself to be the owner of the property, he was fully aware of the falsity of his assertion, and he had no possible justification for taking up the position he did. We accordingly hold that plaintiffs are entitled to treat defendant as a mere trespasser and to pray for his eviction as such. We, therefore, accept the appeal and grant plaintiffs the decree prayed for with costs throughout.

Appeal accepted.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 58 OF 1910.

November 8, 1911.

Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.

Lala GANPAT RAI—DEFENDANT—APPELLANT

versus

MUNNI LAL AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Joint family business—Manager's power to contract debt—Presumption as to the debt being for benefit of family—Burden of proof—Family necessity.

There is no presumption that a debt contracted by the Manager of a firm or family is contracted for the benefit of the firm or family, and a plaintiff who seeks to bind the other members of the joint family will have to prove that it was a debt contracted for their benefit, or with their consent, or that there was an urgent family necessity therefor.

Soiru Padmonabh Rangappa v. *Narain Rao* bin *Vithal Rao*, 18 B. 520; *Sunkar Pershad* v. *Goury Pershad*, 5 C. 321; *Nagendra Chandra Dey* v. *Amar Chandra Kundu*, 7 C. W. N. 725; *Krishna Ramaya Naik* v. *Vasudev Venkatesh Pai*, 21 B. 808 at p. 815, followed.

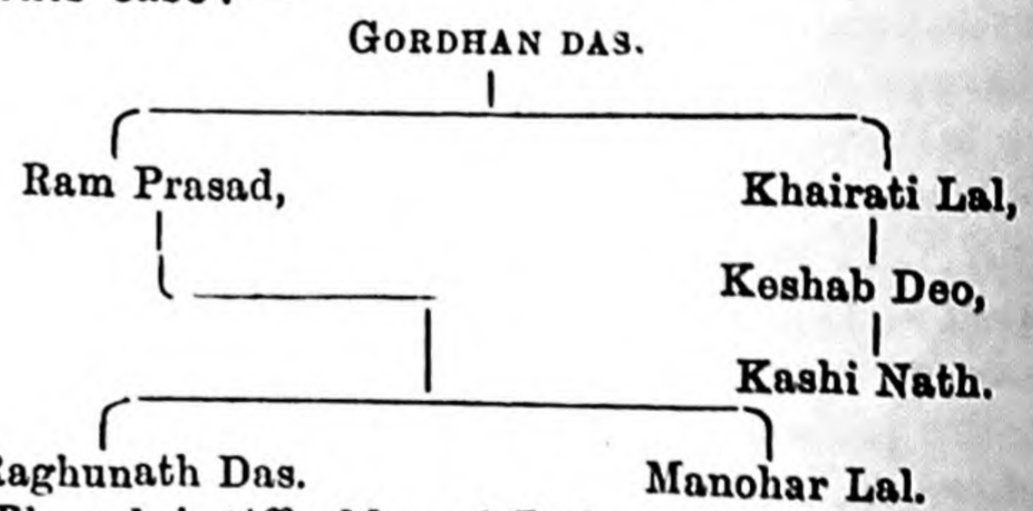
Sheo Prashad v. *Sahib Lal*, 20 C. 453, distinguished.

First appeal from the decision of the Additional Judge of Agra, dated 24th November 1909.

The Hon'ble Mr. *Moti Lal Nehru*, Messrs. *Mohan Lal Sandal* and *S. K. Dar*, for the Appellant.

The Hon'ble Mr. *Sunder Lal*, and Dr. *Satish Chandra Banerji*, for the Respondents.

JUDGMENT.—The following pedigree will show the relation of some of the parties to this case:—



The plaintiffs Munni Lal and Chhedi Lal instituted this suit against Ram Prasad, Raghunath Das, Manohar Lal, Keshab Deo, Kashi Nath, Ganpat Rai and Puran Chand on the following allegations: Ram Prasad, defendant No. 1, was the proprietor and Manager of firm styled Gordhan Das-Ram Prasad at Agra. In order to carry on the business of the said firm he borrowed from the plaintiffs Rs. 16,000 by hypothecating the family property known as the Putaria

GANPAT RAI *v.* MUNNI LAL.

Mahal in the city of Agra under a registered bond dated the 25th of January 1903. Out of the amount of principal and interest due on the mortgage, Rs. 13,170 were paid by Babu Puran Chand defendant No. 6, on the 4th of September 1906. The balance amounting to Rs. 6,585 has not been paid by the defendants. Keshab Deo, after the execution of the mortgage-bond dated the 25th of January 1903, in order to defraud the plaintiff and other creditors, sold a portion of the hypothecated property to Ganpat Rai by a deed dated the 14th of July 1905 alleging himself to be the adopted son of Khairati Lal. Keshab Deo and his representative-in-interest Ganpat Rai are bound to pay the balance due on the mortgage-bond inasmuch as the property of the family was mortgaged for the payment of debts contracted in the ordinary course of the business of the firm and for the benefit of Keshab Deo and his representative Ganpat Rai. The plaintiffs on the above allegations prayed for the recovery of the balance by sale of the property hypothecated. The pleas put forward by Ganpat Rai were to the effect that Keshab Deo was the adopted son of Khairati Lal; that the mortgage-deed dated the 25th of January 1903 was a fraudulent transaction; that no consideration passed for it; that the debts for the payment of which the mortgage-deed was executed were not contracted for any legal necessity nor were they of such a nature as to be binding on Keshab Deo or his representative, that Ram Prasad at the time of the execution of the mortgage-deed was not the Manager of the firm, and that he had no authority to transfer the joint family property nor did he in that capacity execute the mortgage-deed in question. The Court below framed the following issues:—(1) whether Ram Prasad was the Manager and working agent of the firm Gordhan Das-Ram Parsad and whether he in the same capacity executed the mortgage-deed, dated the 25th of January 1903, and whether the said deed was executed for consideration; (2) whether Keshab Deo is an adopted son of Khairati Lal and how far he and his representative Ganpat Rai are bound by the mortgage-deed in suit; (3) whether the plaintiffs are entitled to the interest claimed. Is there any mistake in the calculation of the amount? (4) whether two-thirds of the house purchased by defendant No. 6 are not liable for the plaintiffs' claim; (5) to what reliefs are the plaintiffs entitled. The Court found as a fact that Ram Prasad was the Manager and working agent of the firm Gordhan Das-Ram Prasad; that he executed the mortgage-deed in his capacity of a managing member of the firm; that the deed was executed for consideration; that Keshab Deo was the adopted son of Khairati Lal; that there was no sufficient evidence of the fact that the debts for the payment of which the mortgage deed was executed were gambling debts, and that Ganpat Rai, the representative of Keshab Deo, was bound by the mortgage in suit. On these findings the Court below decreed the plaintiffs' suit. Lala Ganpat Rai, the vendee under the deed of 14th July 1905, has appealed and the plaintiffs have filed objections. The substance of the pleas taken in the memorandum of appeal is that the mortgage-deed was executed without consideration; that it was a fraudulent transaction; that Ram Prasad was not competent to borrow the money; that he was not the Manager of the firm at the time of the execution of the mortgage-deed; that the mortgage-deed was not executed for the benefit of the firm or for legal necessity or for the benefit of Keshab Deo or with his consent, and that the share of Keshab Deo now in the possession of the appellant as a *bona fide* purchaser was not liable for the payment of the debt contracted by Ram Prasad. The substance of the objections taken by the plaintiffs is that the adoption of Keshab Deo is not proved nor is it proved that Khairati Lal authorized his wife to adopt a son. For the reasons stated by the learned Additional Judge in his judgment, we agree with him that Ram Prasad was the Manager of the firm styled Gordhan Das-Ram Prasad; that the mortgage-deed dated the 25th of January 1903 is not a fraudulent transaction, and that it was executed for consideration. The only points which remain for determination are the following: Is Keshab Deo the adopted son of Khairati Lal? Are the debts for the payment of which the family property in question was mortgaged gambling debts? Is the share of Keshab Deo which was purchased by the appellant Ganpat Rai liable for the payment of the mortgage-debt? The finding of the Court below on the question of adoption is that Keshab Deo is the adopted son of Khairati Lal. The most important

GANPAT RAI *v.* MUNNI LAL.

piece of documentary evidence on that point is a copy of the arbitration agreement dated the 10th of July 1903 paper No. 46 (*c*) which is to be found in the paper book of First Appeal No. 302 of 1905. The opening words of that agreement are as follows:—" We, Ram Prasad, son of Gordhan Das, the first party and Keshab Deo, adopted son of Khairati Lal, the second party, caste Bania Agarwal, residents of Belangunj, Agra, declare as follows:—'A reference to this agreement is to be found in the judgment of the High Court dated the 18th of February 1908 in First Appeal No. 35 of 1906.' The learned Judge of this Court in that judgment says 'The suit was instituted on the 2nd of May 1904. Before its institution differences appear to have arisen between the members of the family as regards their interests in the ancestral property of Gordhan Das for we find that on the 10th of July 1903 Ram Prasad the head of the family and Keshab Deo, who claims here to be the adopted son of Khairati Lal, agreed to refer to arbitration all matters in difference relating to the moveable and immoveable property of the family. In that document Keshab Deo is described as the adopted son of Khairati Lal and in it is a recital that the parties to the agreement dealt in merchandise and *hundis*, in a shop called Lalji Mal-Gordhan Das at Kumer in the Bharatpur State, and another shop at Bharatpur Khas and another at Belangunj in Agra, and that they were equal partners in these shops." Keshab Deo in his statement dated the 26th of February 1909 in respect of the arbitration agreement already referred to says as follows:—"I had a dispute with Ram Prasad. Then we executed an agreement for arbitration. I do not know where that agreement is. The witness looked at the copy of agreement filed with the record of the said case paper No. 46 (*c*) and stated:—An agreement was executed but I do not remember now the terms thereof. Shankar Lal, Chhote Lal and Khub Chand were the arbitrators. Two agreements for arbitration were executed but only one was registered. The agreement which was registered was executed before the suit was instituted. The other was filed in the suit. This statement of Keshab Deo is, in our opinion, sufficient to prove the agreement and the recital in the agreement that he was the adopted son of Khairati Lal at a time when there was no collusion between the parties is, in our opinion, a very strong piece of evidence in favour of the adoption of Keshab Deo by Khairati Lal. The mere fact that the mortgage-deed which is the basis of the suit, is of a prior date is, in our opinion, no sufficient reason for disregarding the recital in the above-mentioned document. In addition to that piece of evidence we have the entries in the accounts for Sambat 1947 to be found on pages 16 and 23 R. of the paper book in F. A. No. 35 of 1906. The entry on page 16 is as follows:—Debited to the account relating to *Tika* (marking of forehead) ceremony of Chiranjin Keshab Deo. The entry on page 23 is in the following terms: A detail of the expenses relating to *Tika* (ceremony) and adoption is given at page 102 of the cash book under date Magsar Badi 5th. The statement of Badri Prasad, a witness for Ganpat Rai, dated 23rd March 1909, proves, that the accounts from which the above entries have been extracted belong to the shop at Kamehar. He says: "My father who is dead was a *Munieb* of Gordhan Das. He worked at the Kamehar shop. He used to make entries in the account books. I can recognize his handwriting." The witness having seen the writing in *Hindi* on page 102 of the cash book marked red for Sambat 1946 to 1948 relating to the shop at Kamehar stated:—"This is in my father's handwriting. My father was a *Munieb* for 12 years." That being the documentary evidence of the adoption of Keshab Deo the oral evidence of Chhote Lal and Kanhaiya Lal which has been believed by the learned Additional Judge is, in our opinion, reliable regarding the adoption of Keshab Deo as the son of Khairati Lal. Taking into consideration the facts that Ganpat Rai is an outsider to the family that the adoption took place about the year 1889 and that for a party in the position of Ganpat Rai it is difficult to produce any direct evidence relating to the adoption of Keshab Deo by Khairati Lal especially when we find that Keshab Deo in the case before us is siding with Ram Prasad we find that Keshab Deo's adoption is proved. Besides, the treatment by the member of the family of Gordhan Das extending over 20 years raises a strong presumption in favour of the adoption of Keshab Deo as the son of Khairati Lal. For the above reasons, we agree with the

learned Judge of the Court below that Keshab Deo is the adopted son of Khairati Lal.

The next question is as to the nature of the debt for the payment of which the family property in dispute was hypothecated. After a careful consideration of the evidence on the record we have come to the conclusion that the bulk of the debts for which the mortgage was made were gambling debts. The transactions were similar to what is called "betting on difference in England, *i. e.*, betting on the price of a certain commodity or stock on a given date. The entries on pages 13 and 23 of the respondents' book leave no doubt in our mind that they relate to *badni* or gambling transactions. The entry on page 13 has been translated as follows:—Magh Badi 13th on account of loss in buying and selling Bengal cotton Rs. 7,824-11-0, Chait Badi 12th on account of loss in buying and selling ginned Bharaunch cotton Rs. 4,651-3-0. An expert who was produced on behalf of the respondents read the original of the 2nd entry as follows: Chait Badi *baras rui jin Bharaunch ke differes ki*. The last word *differs* is undoubtedly a corruption of the word difference: In substance, it means that on account of the difference in the price of the ginned Bharaunch cotton (so much will be paid), Jeth Sudi 6th on account of loss in the transactions of purchase and sale relating to the month of April. The original of this has been deciphered by the abovementioned expert as follows:—Jeth Badi *Chhathrui Jehun April mahina ke differs ki*, that on account of the difference in the price of cotton and wheat in the month of April. The entry on page 23 is to the same effect except that the words *leni bechni* are to be found in the entries of Magh Badi 13th and Chait Badi 12th. The entries on pages 13 and 23 relate to the same transactions. The learned Additional Judge is, however, of opinion that there is no sufficient evidence that the debt was a gambling debt. He remarks as follows: "The next objection is that these debts were gambling debts similar to those which I believe are called differences in England, that is, gambling or betting on the price of a certain commodity or stock on a given day. To my mind, there is no sufficient evidence of this. It is said that the testimony of Goddar Mal and the condition of the firm's books and also of the books of the Bombay firm Khatri Das-Lachhman Narain to whom the debts are alleged to have been due show this. I may remark, however, that if this point was intended to be seriously pressed it seems curious that no question was addressed in cross-examination to Manni Ram the firm's *Munieb* who was examined on commission about the matter." A reference to the record very clearly shows that interrogatories dealing with the nature of the debts were sent to Bombay at rather a later date and the case was taken up by the Court below for argument before the answers to those interrogatories came back. The learned Vakil for the defendant finding that it was for the plaintiffs to prove that the nature of the debt was such that it was binding upon Keshab Deo and his representatives and also finding that the evidence adduced on behalf of the plaintiffs fell short of proving that thought it was unnecessary to apply for an adjournment in order to get answers to those interrogatories. We find also that when one of the plaintiffs Munni Lal was examined several questions were asked in cross-examination by the Pleader for Ganpat Rai in respect of the so called *badni* transactions. Manni Lal in his cross-examination says: "I lent the money to Ram Prasad alone and had the house hypothecated by him. During the life-time of Gordhan Das this firm dealt as commission agents for the sale of cotton grain *hundis* and *parchas* and made time bargains. I do not know when Gordhan Das died." Further on he states: "There is an agreement as regards silver: The rate is Rs. 63. Profits and losses are taken into account on the due date. Ram Prasad used not to enter into *badni* contracts. His *Gumashta* used to do so. I do not know if these losses were sustained on account of *badni* (time bargains)". This statement very distinctly shows that the Pleader for Ganpat Rai did ask questions relating to *badni* transactions. We, therefore, disagreeing with the learned Judge of the Court below hold that the debts for the payment of which the mortgage-deed of 25th January 1903, was executed by Ram Prasad were gambling debts. That being so, they cannot be regarded as the debts contracted by Ram Prasad in his capacity of a Manager of the firm in the course of the ordinary business of the firm, and if the statement of Munni Lal that he lent the money to Ram Prasad

alone be taken into account it becomes evident that Ram Prasad was not raising funds for the ordinary business of the firm. There is no evidence to show that there was any urgent necessity for raising that money by the mortgage of the family property, nor is there any evidence that Keshab Deo was in any way benefited by that loan or that it was raised with his consent. In these circumstances, it is necessary to see what is the law applicable to the facts of the case. In *Soiru Padmanabh Rangappa* v. *Narayan Rao* bin *Vithal Rao* (1) it is laid down that there is no presumption that a loan contracted by a Manager of a joint Hindu family has been contracted for the family purpose. In *Sunkur Pershad* v. *Goury Pershad* (2) it is laid down: "The condition of a Hindu family is *prima facie* joint and, therefore, property held by the managing member of a Hindu family is *prima facie* joint; but as there is nothing to prevent an individual managing member from contracting debts on his own account there is no presumption that a debt contracted by him is joint." In *Nagendra Chandra Dey* v. *Amar Chandra Kundu* (3) it was held that in order to make the brother of the Manager liable it was necessary to find (1) whether the trading business was a joint family business, (2) whether the note given was for the purposes of the trading business of the family and (3) whether the amount covered by the note was appropriated to the purposes of such trading business. In *Krishna Ramaya Naik* v. *Vasudev Venkatesh Pai* (4) it is laid down that there is no presumption that money borrowed by a Manager was borrowed for family purposes. The above cases are authority for the proposition that there is no presumption that a debt contracted by the Manager of the firm or family is contracted for the benefit of the firm or family and the plaintiff who seeks to bind the other members of the joint family will have to prove that it was a debt contracted for their benefit or with their consent or that there was an urgent family necessity therefor. During the course of his argument the learned Advocate for the respondents relied on *Sheo Pershad Singh* v. *Sahib Lal* (5). But that case does not touch the points which we have to determine. In that case the debt was incurred in the ordinary course of business and a decree was passed in execution of which the family property in dispute in that case was sold and the plaintiffs as members of a joint Hindu family sued for a declaration that their shares were not liable. The Calcutta High Court, with reference to the facts of the case, came to the conclusion that the plaintiffs were not entitled to the declaration they sought. As, in the case before us, the plaintiffs have failed to prove that there was any real necessity for the loan or that the loan in question was taken with the consent of Keshab Deo or that he in any way was benefited thereby and as there is evidence that the debts for the payment of which the family property was mortgaged were gambling debts we are of opinion that the share of Keshab Deo which was sold to Ganpat Rai is not liable for the payment of those debts.

The result is that we allow the appeal and set aside the decree of the Court below in respect of the property which was sold by Keshab Deo to Ganpat Rai. The objections taken by the respondents are also dismissed with costs. The appellant will have his costs including in this Court fees on the higher scale.

Appeal allowed.

(1) 18 B. 520.
(2) 5 C. 321.
(3) 7 C. W. N. 725.
(4) 21 B. 808 at p. 815.
(5) 20 C. 453.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 246 OF 1911.
November 10, 1911.
Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.

BALA PROSHAD—PLAINTIFF—APPELLANT,
versus
PARTAB SINGH—DEFENDANT—RESPONDENT.

Limitation—Mortgage suit—Sons of mortgagor not impleaded within limitation—Dismissal of suit even against the mortgagor.

In a suit upon a mortgage the sons of the mortgagor were not made parties to the suit within limitation:

Held, that the suit could not be dismissed against the mortgagor because his sons had not been impleaded in time.

SENGODA GOUNDEN *v.* VARADAPPAN.

Second appeal from the decision of the Additional Judge of Aligarh, dated the 23rd day of December 1910.

Mr. *Gulzari Lal*, for the Appellant.

JUDGMENT.—This was a suit for sale upon a mortgage bond. The Court of first instance found that the defendant's sons should have been impleaded, and that as they were not impleaded within time, the suit must be dismissed. There was an appeal to the lower Appellate Court which agreed with the first Court in dismissing the suit. The plaintiff comes here in second appeal. In our opinion the Courts below were wrong in the view they took. The sons of the defendant should have been made parties at the instance of the Court and then the suit should have been tried against them as well as against their father. Even if the Courts below had come to the conclusion that the suit against the sons was barred by time, they could probably have given some sort of decree against the mortgagor alone if the claim against him was not barred by time. We, therefore, set aside the decrees of the Courts below and remand the case to the Court of first instance through the lower Appellate Court for re-admission and disposal according to law in the light of the observations we have made. Costs will abide the event.

Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 726 OF 1910.

November 7, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

SENGODA GOUNDEN—APPELLANT

versus

VARADAPPAN *alias* RASA GOUNDAN AND OTHERS—RESPONDENTS.

Patta *for trees given to one person and that for land to another person—Cancellation of* patta *for trees, effect of—Right of land* pattadar *to trees.*

Plaintiff held the *patta* for trees standing on suit land for over 20 years and defendants had the *patta* for the land. Government having cancelled the trees *patta* two years before date of suit, defendants interfered with the enjoyment of the trees by the plaintiff. In a suit by plaintiff for recovery of the trees:

Held, (1) that in the absence of evidence as to resumption by Government and grant of trees to defendants, the effect of cancellation of the trees *patta* was not to vest the ownership of the trees in the defendants.

(2) That plaintiff was entitled to rely on his possession for a preferential claim as against the defendants.

Narayana Row v. *Dharma Char*, 26 M. 514 and *Subaraya Chetti* v. *Aiyaswami Aiyar*, 32 M. 86; 5 M. L. T. 80; 1 Ind. Cas. 749, referred to.

A *pattadar* for trees has an interest, during the continuance of the *patta*, in the trees itself and in all that is necessary for the growth of the trees, including the soil in which they grow.

Reference under section 39 *of the Madras Forest Act*, 12 M. 203 and *Thievu Pandithan* v. *Secretary of State for India*, 21 M. 433, referred to.

Second appeal against the decree of the District Court of Salem, in A. S. No. 188 of 1909, presented against the decree of the District Munsif of Namakal, in Original Suit No. 1192 of 1908.

Mr. *T. R. Vencatarama Sastri*, for the Appellant.

Mr. *V. Visavanatha Sastri*, for the Respondents.

JUDGMENT.—In this case the plaintiff (appellant) held a *patta* for certain trees on land in certain survey fields and the defendants (respondents) held the *patta* for the land. The plaintiff had possession of the trees for more than 20 years prior to 1903. In that year the Revenue authorities cancelled the *patta* which they had given to the plaintiff. The defendants then interfered with the plaintiff's enjoyment of trees and deprived him of their possession. The plaintiff, therefore, brought this suit to recover possession of the trees and for mesne profits.

The District Munsif gave him a decree but the District Judge reversed it on appeal and dismissed the suit. We think the decree of the District Munsif is right.

The successive standing orders of the Board of Revenue, Madras, in regard to tree *pattas* are found at pages 5, 6 and 7 of Maclean's Edition of 1878, and at pages 36 and 40 of the Government Editions of 1900 and 1907, respectively.

The respective rights of parties in the position of the plaintiff and defendants who, for the sake of brevity, are called tree *pattadar* and land *pattadars* respectively are discussed in the cases reported in *Reference under section* 39 *of Madras Forest Act*(1) and *Thievu Pandithan* v. *Secretary of State for India* (2). It was

(1) 12 M. 203.
(2) 21 M. 433.

NANJI KOER v. UMATUL BATUL.

there held that the tree *pattadar* "has an interest during the continuance of his *patta* in the tree itself and in all that is necessary for the growth of the tree including the soil in which it grows."

The District Judge held that the plaintiff's interest in the tree ceased to exist as soon as the *patta* was cancelled, and that he could not rely on his possession, because it was not really adverse to the defendants but was rather that of a licensee, and when the tree *patta* was cancelled the effect was to "complete the land *pattadar's* natural and usual proprietary rights in his land by cancelling the limitation which the existence of the tree *patta* imposed on him."

We do not think that this view is correct. So far as appears in this case, the only effect of the cancellation of this tree *patta* was that Government no longer made any demand on the *pattadars* for revenue in respect of the tree. It is not shown, or even contended, that Government resumed possession of the trees, or made any grant of them to the defendants. The District Judge, no doubt, states that when both *pattas* were in existence the land *pattadar* was credited with whatever revenue was collected from the tree *pattadar* and that on the cancellation of the tree *patta* the whole revenue was payable by the land *pattadar*. But this cannot be taken to evidence a grant of the trees to the land *pattadar*, and the District Munsif points out that no revised *patta* was issued to the latter enhancing the revenue payable by him. The Government is no party to the suit, and it is unnecessary to consider so far, if at all, the position of the tree *pattadar quoad* the Government is affected by the cancellation of the tree *patta*. For all that appears, the rights of the tree *pattadar* may have been and probably were in existence before the land *patta* was granted. Even if it is assumed that Government by cancelling the tree *patta* could and did resume complete ownership of the trees, there was no grant of them to the defendants and there is no foundation for regarding the defendants as the owners of the trees. The plaintiff was in possession of the trees until dispossessed by the defendant some two years prior to the suit. The defendants having no title as owners were mere trespassers, and the plaintiff was entitled to rely on his possession in a suit to eject them: *Narayano Row* v. *Dharama Char* (3) and *Subbaraya Chetti* v. *Aiyaswami Aiyer* (4).

On this ground we must set aside the decree of the District Judge and restore that of the District Munsif with costs in this and the lower Appellate Court.

Appeal allowed.

(3) 26 M. 514.
(4) 32 M. 86; 5 M. L. T. 80; 1 Ind. Cas. 749.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1528 OF 1909.
June 26, 1911.
Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

NANJI KOER—DEFENDANT 1ST PARTY—APPELLANT
versus
UMATUL BATUL—PLAINTIFF—RESPONDENT.

Interpleader suit—Suit by tenant to determine who is landlord—Whether suit maintainable—Civil Procedure Code (Act V of 1908)), s. 88—Specific Relief Act (I of 1877), s. 42—Previous rent decree—Subsequent suit by tenant for declaration that previous plaintiff is not tenant's landlord—Res judicata.

The present defendant No. 1 sued the present plaintiff for recovery of rent of the disputed property. The plaintiff resisted the claim on the ground that she held the land as tenant not under the then plaintiff but under the present defendant No. 2. The Court found that the present plaintiff held the land under the present defendant No. 1 and a decree was made in favour of the latter. The plaintiff has now brought this suit for a declaration that she was the tenant under defendant No. 2 and not under the defendant No. 1:

Held, that, as the suit was in the nature of an interpleader suit, it was not maintainable.

Koylash Chandra v. *Goluk Chunder*, 2 C. W. N. 61 and *K. S. Bonnerjee* v. *Raj Chundra Dutt*, 5 Ind. Cas. 577; 37 C. 552; 14 C. W. N. 784: 11 C. L. J. 577, followed.

Held, further, that the suit was not maintainable under section 42 of the Specific Relief Act, as the defendant No. 1 was not interested to deny that the plaintiff was a tenant in respect of the disputed land, and as the plaintiff did not ask for an injunction to restrain defendant No. 1 from executing the decree she obtained.

Held, also, that the present suit was barred by the rule of *res judicata* by the decree in the previous suit, as it was not open to the present plaintiff to seek for a declaration that she is not the tenant of defendant No. 1.

Appeal from the decree of the Sub-Judge of Mozaffarpur, dated June 1st, 1909, reversing that of the Munsif of that place, dated December 14th, 1908.

Kashmir Univer... Library.
Accession No. 75362

NANJI KOER *v.* UMATUL BATUL.

Babu *Joy Gopal Ghosha*, for the Appellant.

Moulvi *Shamsul Huda* and Babu *Tarakeshwar Pal Chowdhury*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the first defendant in an action commenced by the plaintiff-respondent for declaration that she was the tenant of the disputed land, not under the appellant, but under the second defendant. It appears that in 1906 the first defendant sued the plaintiff for recovery of rent of the disputed property. The plaintiff resisted the claim on the ground that she held the land as tenant not under the plaintiff but under the second defendant in the present litigation. That defence failed on the merits, and the Court found that the relationship of landlord and tenant was proved to have existed between the parties to that suit. The result was that a decree for rent was made in favour of the present first defendant. On the 5th October 1907, the plaintiff commenced this action and she joined as parties defendants, the first defendant, the successful plaintiff in the previous litigation, and the second defendant who was alleged by her to be her landlord. There was also a third defendant added to the suit, namely, the transferor of the first defendant. But we are not concerned with the third defendant at all because, so far as we can judge, no relief has been claimed as against him. The appellant defended the suit on the ground that it was not maintainable and that the question raised *res judicata*. The Court of first instance gave effect to this contention and dismissed the suit upon appeal; the learned Subordinate Judge has reversed that decision.

The first defendant has now appealed to this Court and on her behalf, the decision of the Subordinate Judge has been assailed substantially on two grounds, namely, *first* that the suit is in its essence an inter-pleader suit and is not maintainable, and *secondly*, that even if it be conceded that the suit as framed is maintainable the substantial question in controversy between the parties is *res judicata* and cannot be re-investigated in the present litigation. In our opinion, these contentions are well founded and must prevail.

In support of the first contention, it has been argued that the plain object of the plaintiff is to have it established that not the first defendant but the second defendant is her landlord in respect of the disputed land. In other words, the plaintiff has instituted this suit to have the controversy between these two defendants finally determined. The suit, therefore, is clearly in the nature of an interpleader suit and consequently not maintainable, in view of the decision of this Court in the cases of *Koylash Chondra Dutt* v. *Golak Chunder Poddar* (1) and *K. S. Bonnerjee* v. *Rajchandra Dutt* (2) See also Maclean on Interpleader, page 24. The learned Pleader for the respondent, however, has contended that the real object of the suit is to obtain a declaration that the first defendant is not the landlord of the plaintiff, and that consequently the suit is one for declaration within the meaning of section 42 of the Specific Relief Act. We are not prepared to accept this contention as well founded. But, even if the suit be taken to have been instituted under section 42, it is fairly clear that it is open to two fatal objections. In the first place, we are not satisfied that a suit of this character is maintainable under section 42 of the Specific Relief Act. That section provides that any person entitled to any legal character or to any right as to any property, may institute a suit against any person denying or interested to deny, his title to such character or right, and the Court may, in its discretion, make therein a declaration that he is so entitled and the plaintiff need not in such suit ask for any further relief. Now, the legal character which the plaintiff claims in the present litigation is that of a tenant in respect of the disputed land. The first defendant is not interested to deny that she is such a tenant. In fact, the case of the defendant is that she is a tenant and has been rightly made liable for rent. Consequently, if the suit be treated as one under section 42 it is clearly one not within the scope of the provisions of the law. In the second place, the suit, even if framed as one for a declaratory decree, is barred under the proviso to section 42 which lays down that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. If the contention of the plaintiff is well founded she would be entitled to an injunction to restrain the first defendant from

(1) 2 C. W. N. 61.

(2) 5 Ind. Cas. 577; 14 C. W. N. 784; 37 C. 552; 11 C. L. J. 577.

NANJI KOER *v.* UMATUL BATUL.

executing the decree she has obtained. Consequently, a suit for a declaratory decree, pure and simple, would not be maintainable. The learned Vakil for the plaintiff-respondent, however, has further contended that the suit cannot be treated as an interpleader suit, because his client does not profess to espouse the cause of the first defendant. She espouses the cause of the second defendant and is confident that the first defendant has improperly obtained a decree for rent against her. On this ground he urges that the plaint ought not to be treated as a plaint in an interpleader suit because the essence of a suit of that description is that the plaintiff professes to be in the position of a stakeholder and merely invites the Court to determine the controversy between the contesting defendants. We are of opinion that there is no substance in this contention. In order to determine the nature of the suit, we must examine its true scope and there can be no room for controversy that the real object of the plaintiff, which is manifest on the face of the plaint, is to have it determined as between the first and the second defendants that the one is not but the other is her landlord. We are of opinion that the suit as framed is not maintainable.

The second objection taken by the learned Vakil for the appellant is that, even if the suit be treated as maintainable, the question in controversy is clearly barred by the doctrine of *res judicata*. In support of this objection reliance has been placed upon the cases of *Ekabbar* v. *Hara Bewah* (3); *Hara Chandra Bairagi* v. *Bipin Behary Das* (4) and *Panchu Mandal* v. *Chandra Kant Saha* (5). It has been contended, on the other hand, that the question is not *res judicata*, because the previous suit was one for rent while the present litigation has been instituted for the determination of the question of title, and, therefore, in view of the decision of this Court in the cases of *Nityanunda Barkar* v. *Ram Narain Das* (6): *Sahadeb Dhali* v. *Ram Rudra Haldar* (7) and *Dwarka Nath Roy* v. *Ram Chand Aich* (8), there is no room for the application of the doctrine of *res judicata*. In our opinion, this argument is obviously fallacious. In the suit for rent, the present plaintiff as defendant contended that the relationship of landlord and tenant had not existed between the parties. She further alleged that she held the land as tenant of the present second defendant. This defence was investigated and overruled on the merits. Upon the evidence, the Court came to the conclusion that the then defendant was the tenant of the disputed land and held under the then plaintiff. That was a decision upon a question directly and substantially in issue between the parties. In fact, that was the only question which required determination in that case. The adjudication was by a Court of competent jurisdiction [*Bidhumukhi* v. *Jitendra* (9)]. Under these circumstances, it is difficult to appreciate how upon principle it can be seriously contended that this particular decision is not *res judicata* between the parties [*Kasiswar* v. *Mohendra* (10)]. In the present suit, the plaintiff does not allege that the relationship of landlord and tenant which was found to exist between the parties to that litigation has terminated since judgment was given in that case; consequently, it must be assumed that the relationship continues. It is clearly not open to the plaintiff to seek for a declaration that she is not the tenant of the first defendant. If she obtains such a declaration, its effect would be practically to nullify the decision given in the previous litigation. It may be conceded that there are expressions in the judgment of this Court in the case of *Nityanunda Sarkar* v. *Ram Narain Das* (6) which may lend some apparent support to the contention of the respondent. But, as was fully explained by this Court in the case of *Panchu Mandal* v. *Chandra Kant Saha* (5), the case of *Nityanund Sarkar* v. *Ram Narain Das* (6) must be taken to have been decided upon its special facts and the learned Judges could not have laid down any general proposition of law inconsistent with the principle recognised by their Lordships of the Judicial Committee in the case of *Radha Madhub Holdar* v. *Monohur Mookerji* (11). The case of *Sahadeb Dhali* v. *Ram Rudra Haldar* (7) was of an entirely different character, and there is nothing in the judgment of this Court in that case

(3) 8 Ind. Cas. 660; 13 C. L. J. 1; 15 C. W. N. 335.
(4) 6 Ind. Cas. 860; 13 C. L. J. 38.
(5) 12 Ind. Cas. 9; 14 C. L. J. 220.
(6) 6 C. W. N. 66.
(7) 10 C. W. N. 820.
(8) 26 C. 428; 3 C. W. N. 266.
(9) 10 C. L. J. 527; 4 Ind. Cas. 442.
(10) 25 C. 136.
(11) 15 C. 756; 15 I. A. 97.

which lends any support to the contention of the respondent. Much reliance, however, was placed upon the decision of the Full Bench in the case of *Dwarka Nath Roy* v. *Ram Chand Aich* (8); there is, in our opinion, nothing in any of the judgments delivered by the learned Judges in that case which tends to support in the slightest degree the contention of the respondent. In that case, the plaintiff had brought a suit for rent against the defendant upon the allegation that he was his tenant. The defendant denied the tenancy and contended that he held the land under another person. This defence was successful and the suit for rent was dismissed. The plaintiff then sued for establishment of his title against the third party (the alleged landlord of the defendant in the suit for rent). He also joined the tenant as defendant and prayed in the alternative that a decree for ejectment might be made against the tenant or a decree for damages for use and occupation under section 157 of the Bengal Tenancy Act. The Court held that the decision in the suit for rent did not operate as *res judicata* as between the plaintiff and the third party set up by the defendant. As between the plaintiff and the tenant who had been sued for rent unsuccessfully, the matter was treated as *res judicata*. But that was on the ground that as the tenant had successfully proved that he did not hold under the plaintiff he was liable either to be ejected or to pay damages for use and occupation. It is further worthy of note that one of the learned Judges pointed out that, according to the decision of this Court in the case of *Gopal Das* v. *Gopi Nath* (12), the matter would be *res judicata* as between the parties to the suit for rent. It is thus clear upon an examination of the judgments in the case of *Dwarka Nath Roy* v. *Ram Chand Aich* (8) that the contention of the present respondent cannot possibly prevail. On the other hand, the cases of *Ekabbar Sheikh* v. *Hara Bewah* (3) and *Hara Chandra Bairagi* v. *Bipin Behary* (4) conclusively establish that a decision in a suit for rent may operate as *res judicata*. In fact, if the contrary view were maintained and we found ourselves obliged to accede to the contention of the respondent, every suit for rent in which the defence of the tenant defendant has been overruled, would be followed by an action of the present description, namely, for a declaration that the tenant did not hold under the successful plaintiff but under a stranger to the litigation.

(12) 12 C. L. R. 38.

The result, therefore, is that both the contentions of the appellant must prevail. The decree of the Sub-Judge is discharged and the suit dismissed with costs in all the Courts.

Appeal allowed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 1944 OF 1910.

June 27, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

KAMINI MONI DEBI—PLAINTIFF—PETITIONER

versus

KHETTRA MOHUN GANGULI—DEFENDANT—OPPOSITE PARTY.

Legal Practitioners Act (XVIII of 1879), *ss.* 27, 28 *Pleader and Client—Fee payable by party to his own Pleader—Agreement to pay fee, how to be made—Agreement in contravention of s.* 27, *if of avail to Pleader either as plaintiff or as defendant.*

Section 27 of the Legal Practitioners Act has no reference to the fees payable by a party to his own Advocate, Pleader or Vakil. That payment is regulated by the agreement between the parties concerned. Section 28 deals with those agreements and lays down that they must be in writing signed by the client and filed within a specified period in a proper Court. That section is not restricted in its application to cases where the agreement is for payment of fees in excess of the fees prescribed by section 27.

Rama v. *Kunji*, 9 M. 375; *Krishnasami* v. *Kesava*, 14 M. 63; *Anantayya* v. *Padmayya*, 16 M. 278; *Sundararja Ayyangar* v. *Pattanathusami*, 17 M. 306; *Subba Pillai* v. *Ramasami Ayyar*, 27 M. 512; *Razi-ud-din* v. *Karim Baksh*, 12 A. 169; *Raghunath* v. *Sriram*, 28 A. 764; (1906) A. W. N. 235; 3 A. L. J. 579; 1 M. L. T. 242 and *Channulal* v. *Asharfi Lal*, 4 A. L. J. 535, dissented from.

If an agreement set up by a Pleader is in contravention of section 28 of the Legal Practitioners Act, it is of no avail whether the Pleader seeks to enforce the agreement as plaintiff or relies upon it as defendant in answer to a claim by the client.

Sarat Chandra Roy Chowdhury v. *Chandi Charan Mitra*, 7 C. W. N. 300, explained and distinguished.

Rule against the decision of the Small Cause Court Judge of Hooghly, dated February 2nd, 1910.

This Rule was heard *ex parte* on December 6th, 1910, by Mr. Justice Mookerjee and Mr. Justice Coxe (See 15 C. W. N. 681, 11 Ind. Cas. 382) and was made absolute. It was

KAMINI MONI DEBI *v.* KHETTRA MOHAN.

heard again, because the opposite party had not been represented at the original hearing for no fault of his learned Vakil.

Babu *Probodh Chandra Rai*, for the Petitioner.

Babu *Shiba Prosanna Bhattacharyya*, for the Opposite Party.

JUDGMENT.—This Rule was heard *ex parte* on the 6th December last and was made absolute. The opposite party, who was the first defendant in the suit, subsequently applied to us to allow him an opportunity to make his submissions on the matter, and we acceded to his request as it transpired that, through no fault of his learned Vakil, he had not been represented at the original hearing. We have now heard the parties at considerable length and examined all the arguments addressed to us.

The petitioner sued to recover from the first defendant a sum of money which the latter had withdrawn from Court where it had been deposited by the plaintiff. He resisted the claim on the ground that he was entitled to retain the sum withdrawn as he had a lien upon the money to the extent of Rs. 100, for fees due under an agreement for professional services rendered. The Court below came to the conclusion that the plaintiff was not entitled to succeed because fees were due from her to the first defendant and the latter was consequently entitled to appropriate the sum withdrawn from the Court in satisfaction of his dues.

This decision has been assailed on behalf of the plaintiff on the ground that the agreement set up by the defendant is in contravention of section 28 of the Legal Practitioners Act, 1879, and is consequently of no avail whether the Pleader seeks to enforce the agreement as plaintiff or relies upon it in answer to the claim by the client. In support of this view, reliance has been placed upon the case of *Sarat Chunder Roy Chowdhry* v. *Chundra Kant Roy* (1).

On behalf of the first defendant, it has been argued that section 28 is restricted in it application to cases where the agreement is for payment of fees in excess of the fees prescribed by section 27. It has been pointed out that the first defendant as the Pleader for the plaintiff in a proceeding under the Probate and Administration Act was entitled to receive at least Rs. 170 as fees, and that consequently an agreement to pay Rs. 100 is not within the scope of section 23 of the Legal Practitioners Act, 1879. In support of this position reliance has been placed upon certain observations in the case of *Sarat Chandra Chowdhry* v. *Chandra Kant Roy* (1) as also upon the decisions of the Madras High Court in the cases of *Rama* v. *Kunji* (2); *Krishnasami* v. *Kesava* (3); *Anantoyya* v. *Padmayya* (4); *Sundararaja Ayyangar* v. *Pattanathusamy* (5) and *Subba Pillai* v. *Rama Sawmi Ayyar* (6) and of the Allahabad High Court in the cases of *Razi-ud-din* v. *Karim Baksh* (7); *Raghunath* v. *Sriram* (8) and *Channu Lal* v. *Ashrafi Lal* (9). It may be conceded at once that the observations contained in the decisions of the Madras and Allahabad High Courts upon which reliance has been placed do tend to support the restricted interpretation of section 28 suggested on behalf of the first defendant. We are not bound, however, to accept those decisions as authorities binding upon us, specially in view of the fact that in the most recent decision on the subject [*Channu Lal* v. *Asharfi Lail* (9)] the learned Judge who followed the cases of *Razi-ud-din* v. *Karim Baksh* (7); *Raghunath* v. *Sriram* (8); adopted the view previously taken with considerable reluctance and stated that if the matter were *res integra* he would have been prepared to take the opposite view. It is, therefore, necessary that we should examine and construe the provisions of the Legal Practitioners Act on the subject.

Chapter VI of the Legal Practitioners Act consists of five sections which deals with the question of remuneration of Pleaders, *Mukhtiars* and Revenue Agents. The first of these, section 27, authorises the High Court and the Chief Controlling Revenue Authority in any place to fix the fees in Civil and Revenue Proceedings. These are fees payable by any party to his opponent in respect of the fees of the Advocate, Pleader, Vakil, *Mukhtiar*, Attorney employed by his adversary. It cannot be disputed that section 27 has no reference to the fees payable by a

(1) 25 C. 805.

(2) 9 M. 375.
(3) 14 M. 63.
(4) 16 M. 278.
(5) 17 M. 306.
(6) 27 M. 512.
(7) 12 A. 169.
(8) 28 A. 764; A. W. N. (1906) 235; 3 A. L. J. 579 (F. B.) 1 M. L. T. 242.
(9) 4 A. L. J. 535.

party to his own Advocate, Pleader or Vakil. That payment is necessarily regulated by the agreement between the parties concerned. Section 28 deals with cases of this description, namely, agreements by Pleaders with clients for payment for services rendered. That section provides that no agreement entered into by any Pleader, *Mukhtiar* or Revenue Agent with any person retaining or employing him, respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursement in respect of business done or to be done by such Pleader, *Mukhtiar* or Revenue Agent shall be valid, unless, it is made in writing, signed by such person, and is within 15 days from the day on which it is executed, filed in the District Court or in some Court in which some portion of the business in respect of which it has been executed, has been or is to be done. It is obvious, therefore, that an agreement between a Pleader and his client respecting the amount and manner of payment for the whole or any part of services fees in respect of business done or to be done must be embodied in an instrument in writing signed by the client and filed within a specified period in a proper Court. Section 29 then authorises the Court to modify or cancel such an agreement; that is, an agreement between a Pleader and his client as mentioned in section 28. Section 30 provides that an agreement of this description excludes further claims. Section 31 deals with cases of negligence on the part of the Pleaders and need not be considered for our present purposes. Now, it cannot be disputed that section 28 is, by the very generality of its language, comprehensive enough to include every agreement between a Pleader and his client for the payment of fees for professional services. It has been argued, however, that the scope of the section ought to be narrowed and that it ought to be applied only to cases in which the agreement is for the payment of fees in excess of those prescribed under the rules framed under section 27. Two objections, each of them insuperable, may obviously be taken to such a restricted interpretation. In the first place, there is no good reason why we should construe the words "no agreement" in section 28 as equivalent to the expression "no agreement for payment of fees in excess of those prescribed by the rules framed under section 27". If we were to accede to the contention of the first defendant, we would have to insert in the statute words not to be found there. In the second place, whereas section 28 refers not merely to the payment of fees but also to the payment of charges or disbursements in respect of business done, section 27 deals only with the fees payable by a party to his adversary on account of fees due to Pleaders, Advocates or Vakils. Consequently, if section 28 is restricted to the case of fees in the light of the provisions contained in section 27, the same restrictions would have to be placed in the case of payments, charges or disbursements, although section 27 does not deal with those matters at all. In our opinion, section 28 embodies an extremely salutary rule and it would not be right for us to restrict its scope and operation in the manner suggested by the learned Vakil for the first defendant. There is no question of hardship when the terms of the statute are perfectly plain. But we are not satisfied at all that even the most liberal interpretation and stringent application of section 28 would really cause any hardship to an honest professional man. A Pleader can always protect himself by a faithful adherence to the provisions of the law on the subject, which cannot cause him any inconvenience. We may add that section 27 deals only with the question of fees payable by a party to his adversary. Those fees have no relation to the fees actually paid by the adversary to his own Pleader, Vakil or Attorney. It is well known that the fees allowed in conformity with the rules framed under section 27 of the Legal Practitioners Act do not by any means represent the fees which litigants have to pay to their own Pleaders, Vakils or Advocates. They are as a rule very much in excess of what has been described before us as "legal fees" but sometimes they may be less. Unless the Pleader agrees with his client that he would accept whatever may be allowed by the Court as against the adversary, the fee is a matter of agreement between the Pleader and the client and irrespective of the fees allowed by the Court, the Pleader is entitled to claim the fees settled, provided he carries out the terms of section 28 of the Legal Practitioners Act. Under these circumstances, in spite of the contrary view accepted by the learned Judges of the Madras and Allahabad High Courts, we are unable to adopt the restricted interpretation suggested

by the learned Vakil for the first defendant.

It has been finally suggested by the learned Vakil for the first defendant that some allowance might possibly be made to his client in the shape of reasonable fees for the services rendered. As was pointed out on a previous occasion, no such claim was put forward in the Court below, possibly on the assumption that a claim in respect of an unascertained sum could not have been urged by way of defence to a suit for recovery of a specified amount. It is, therefore, not necessary for us to consider whether if such a claim had been put forward, the defendant would have been entitled to succeed. The cases of *Raghunath* v. *Sriram* (8), *Razi-ud-din* v. *Karim Bakhsh* (7), and the decisions of the learned Judges of the Madras High Court to which we have already referred, seem to support the view that, under such circumstances, a Pleader may be entitled to a reasonable remuneration for the services rendered. But it is worthy of note that the contrary view has been maintained by the learned Judges of the Punjab Chief Court. [*Hazari Lal* v. *Tilok Chand* (10)].

It is worthy of note that the decision of this Court in the case of *Sarat Chandra Roy Chowdury* v. *Chandi Charan Mitra* (11), is not contrary to the view we adopt. In that case, the learned Judges came to the conclusion that there was no agreement for payment of any fees by the client to his Pleader and that, consequently, the only amount which the Pleader could legitimately claim was the amount paid by the adversary of his client in conformity with the rules framed under section 27 of the Legal Practitioners Act; and we may observe that this amount was directed by the Court to be divided equally amongst the four Pleaders who had been employed by the successful litigant. In the case before us, the defence can succeed only upon proof of the alleged agreement for the payment of Rs. 100 as fees by the plaintiff to the first defendant. That agreement is in contravention of the provisions of section 28 and is, therefore, one of which the law will take no notice if it is sought to be enforced by the Pleader or set up in defence to a claim by the client for recovery of her money in the hands of her Pleader. Upon a consideration, then, of the authorities to which our attention has been drawn and upon the true construction of the statute, we are clearly of opinion that the previous judgment, to which one member of this Bench was a party, [*Kamini Debi* v. *Khetter Mohan* (12)] is correct, and that decision will consequently stand. The first defendant must pay the plaintiff his costs in this Court. We assess the hearing fee for the two occasions at two gold *mohurs*.

Rule made absolute.

(10) 136 P. R. 1898.
(11) 7 C. W. N. 300.
(12) 15 C. W. N. 681; 11 Ind. Cas. 382.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 178 OF 1909.
November 9, 1911.

Present:—Mr. Richards, K. C., Chief Justice, and Mr. Justice Banerji.

RAMNATH ZUTSHI—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 74—Penalty—Breach of contract—Actual loss not proved—Amount of compensation.

Where a contract provided for a penalty in the event of its breach, the party complaining of the breach is entitled to compensation even though he is unable to prove actual loss. The amount of compensation is to be such sum as the Court shall, under the circumstances of the case, think reasonable, limited, of course, to the amount specified in the contract.

First appeal from the decision of the Subordinate Judge of Jhansi, dated the 5th March 1909.

The Hon'ble Mr. *Motilal Nehru*, for the Appellant.

Mr. *Ryves*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff against the Secretary of State on foot of a contract of the 18th of March 1904 for the construction of certain buildings at a place called Mahoba in the Banda District. The buildings were required as the residence and Office of the Survey Officer and are situate in a place somewhat out of the way. According to the terms of the contract, the works were to be completed on or before the 30th of September 1904. As a matter of fact, the contract was not fulfilled until March 1905. The contract provided also that in the event of any part of the work not progressing satisfactorily the Public Works Department were entitled to take

RAMNATH ZUTSHI *v.* SECRETARY OF STATE.

away that portion of the work and give it to other contractors. There was also provision for a penalty of Rs. 5 for every day that the work remained uncommenced or unfinished after the proper date, the maximum amount of such penalty being a sum of Rs. 870.

It is common case that portion of the work was taken away from the plaintiff on the ground of unsatisfactory progress. It is also common case, as stated above, that the work remained uncompleted until the time we have mentioned. The plaintiff claimed the sum of Rs. 8,713-13-10. The defendant admitted the claim to the extent of Rs. 2,555-0-6 after taking credit for Rs. 870 the maximum amount of the fine for the delay.

The Court below gave a decree for Rs. 4,254-7-2, giving against the plaintiff for the penalty mentioned.

The plaintiff not being satisfied with the credit decree has appealed to this Court.

The first item to which our attention was invited was the sum of Rs. 870 the penalty. The learned Advocate on behalf of the appellant claims that under no circumstances should this sum be allowed having regard to the finding of the Court below. The finding he relies upon is that the defendants failed to prove actual loss. It is argued that time was not of the essence of the contract and that the learned Judge so finds. This being so, the plaintiff claims that the defendants having failed to prove loss is entitled to no damages. We do not think that this contention is well founded. The argument neglects to consider the provisions in the contract as to the fine for non-completion. It is quite true that if the contract had no provision as to the payment of a fine in the event of non-completion and if time was not of the essence of the contract and the defendant failed to prove loss he would be entitled to no damages or compensation. However, section 74 of the Contract Act expressly provides that where the contract provides for a penalty in the event of breach, the party complainant of the breach is entitled to compensation even though he is unable to prove actual loss. The amount of compensation is to be such sum as the Court shall, under all the circumstances, think reasonable, limited, of course, to the amount specified in the contract. We think, therefore, that the defendant was entitled to claim compensation.

The next question is as to the amount. The learned Judge, finding that the defendant did not prove actual loss says, "the correspondence on the record shows that the urgency of the work was throughout insisted on". Under these circumstances, we are unable to say that the learned Judge was wrong in awarding the full amount of the penalty.

Before we leave the question of the penalty, we may mention one other matter. The plaintiff contended that the delay (which he has to admit took place) was due to the obstruction he suffered at the hands of the Public Works Department Officials. The learned Judge has found that, even assuming that obstruction was given to the plaintiff, he has entirely failed to show that such obstruction was the cause of the non-completion of the works. This finding has not been seriously controverted and, of course, is a complete answer to this part of the plaintiff's case.

It was further contended that there had been a waiver of the penalty. The only ground for this suggestion was that after the plaintiff had furnished his claim in full the defendants put forward their claim where the only mention of the fine is in pencil. In our opinion there is no evidence whatever of any waiver. The document relied upon by the plaintiff clearly does not in any way show that the fine was waived, in fact rather the contrary. There are two entries relating to the fine, one shows what would be due if the fine was exacted, the other shows the amount if the fine was not exacted. Such entry could not in any way be regarded as a waiver of the claim.

On the general merits of the case it has not been shown to us that the learned Judge has made a mistake, in fact, as to any particular item of the claim of the plaintiff which he disallowed but it was suggested that he made a mistake in law in throwing the *onus probandi* on the plaintiff. At one period of the argument we were inclined to think that perhaps such a mistake of law had been made. It appears that during the course of the work memoranda were from time to time signed by one of the officials in the Public Works Department, namely a Sub-Overseer of the name of Ram Chander. These memoranda purport on the face of them to give in detail the amount of work done up to date. At the end is a certificate to the effect that the works have been satisfactorily executed and all materials delivered, that the necessary

measurements have been made by the Sub-Overseer and are clearly recorded in the measurement-book. These memoranda are useful for two purposes *first* of all they are sought to be at least a *prima facie* admission by both sides as to the state of the work on a particular date, and *secondly*, they enable the contractor to receive payments on account of his contract. It is difficult to understand how claims in respect of contract of such a nature could be satisfactorily adjusted between the parties without such periodic settlements. It must often happen that examination of the earlier work becomes impossible later on as the work proceeds. We were inclined to think that after the production of these memoranda the plaintiff should be absolved from proving any of the items specified in the memoranda and that the *onus* ought to lie upon the defendants of showing that any such item was incorrectly certified. Under ordinary circumstances, we consider that memoranda of this description ought to be deemed strong *prima facie* evidence of the completion of the contract as stated therein and that the *onus* should lie strongly on whichever side disputed the correctness of the entries to prove that they were wrong. We find, however, in the present case that both sides gave the go-by to these memoranda. They were disgracefully kept. The learned Judge says that they were wholly unreliable and incorrectly prepared, that there was great laxity of procedure and that the rules of the Public Works Department were neglected. The plaintiff did not come into Court relying, as he might have done, upon these memoranda as proving *prima facie* the case which entitled him to succeed unless the defendant proved the contrary. He came into Court on an independent case without any documents of any kind to support it, neither books nor accounts or even slips of paper. The consequence was that the Court below had to take the evidence of both sides and to weigh and consider that evidence as best as it could. As the result the plaintiff failed as to a large part of his case. The defendants were also punished for the laxity and neglect of their official. A large amount of the items claimed by the defendants for materials which were alleged to have been supplied to the plaintiff were disallowed. The learned Judge appears to have given the case great care and consideration and no attempt has been made to show that he has made any mistake upon the evidence. For the reasons we have already stated, and having regard to the way the case was conducted by the parties both on their pleadings and in the Court below we are clearly of opinion that no mistake in law was made.

The result is that the appeal fails and is dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 197 OF 1909.

November 3, 1911.

Present:—Mr. Richards, K. C., Chief Justice, and Mr. Justice Banerji.

JANKI DAS—PLAINTIFF—APPELLANT

versus

TIKA RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Arbitration—Award given after a very long time—Notice to revoke submission—Validity of award—Effect of delay.

The plaintiff and defendants entered into an agreement submitting their disputes to arbitration on 29th of September, 1905. Shortly after the reference, the arbitrators met and did something in that connection. Nothing, however, was done after that for a long time. On 16th of August 1906, plaintiff served a notice to revoke the arbitration. After the notice the arbitrators met again on the 20th of August and continued to sit for several days. No one took the least notice of the notice of revocation. The award was given on 24th of August 1906:

Held, that under the circumstances the award was not invalid and could not be set aside.

First appeal from the decision of the Subordinate Judge of Agra, dated the 5th of June 1909.

Mr. *Ryves* (with him Dr. *Tej Bahadur Sapru*, Messrs. *Govind Pershad* and *Gulzari Lal*), for the Appellant.

Mr. *Choudhri* (with him Hon'ble Dr. *Sunder Lal*, Hon'ble Mr. *Moti Lal Nehru* and Dr. *Satish Chandra Banerji*), for the Respondent.

JUDGMENT.—This appeal arises out of a suit to set aside an award dated the 24th of August 1906. Three brothers Janki Das, Tika Ram and Baldeo Das had a dispute about certain property, moveable and immoveable, belonging to their common ancestor. Accordingly, on the 29th of September 1905, they submitted their disputes to arbitration. Two of the brothers joined hands together and Janki Das, the plaintiff in the present suit, was the opposite party. Two arbitrators

JANKI DAS *v.* TIKA RAM.

were appointed for Janki Das and two arbitrators for Tika Ram and Baldeo Das. An Umpire Chandan Lal was also appointed. The award which is sought to be set aside is alleged by the defendant to be the award of these arbitrators and the Umpire. The plaintiff attacks the award on three grounds. He says, first, that there was such gross delay on the part of the arbitrators that he was justified in serving a notice on the 16th of August 1906 withdrawing from the arbitration and that the submission must be taken to have been revoked. His second ground is that, in point of fact, no valid award was made, and that the so-called award was not even signed by the Umpire. There was a third ground, which has not been pressed in the argument, namely, that the award did finally dispose of all the matters in dispute.

The learned Subordinate Judge came to the conclusion on the evidence that the arbitration was a genuine arbitration and that the award was good.

We have come to the same conclusion. With regard to the alleged delay, we find upon the evidence of Chandan Lal, who was examined on behalf of the plaintiff that shortly after the submission was signed the arbitrators all met, they framed rules for the due carrying out of the arbitration, the parties were required to make their different cases in writing, they were examined, questions were put to them both by the arbitrators and by each other and opportunity for cross-examination was allowed. It seems to us that the arbitration was carried out, in a *much more business*-like way than proceedings of this kind usually are. After these meetings (which would appear to have been amply sufficient to have decided the somewhat trivial dispute between three brothers concerning their family matters), not much appears to have been done until the 20th of August 1906. This is not altogether surprising; the tribunal consisted of five persons and there may have been some difficulty in getting them together. They did not all reside at the same place, and one of them at least was an invalid. Furthermore, the probabilities are that, as the result of the investigation of the matters in dispute which took place in October and in November 1905, it was pretty clear to all the parties what the result of the arbitration would be. However this may be, the plaintiff does appear to have served a notice attempting to revoke the arbitration on the 16th of August 1906. After that, the tribunal met again on the 20th of August and continued to sit for several days. No one appears to have taken the least notice of the notice served by the plaintiff. Chandan Lal, his own witness, although he denies now having signed the award, admits that the arbitrators met and he sat with them, though he says he took no part in the proceedings and formed no opinion. The other two arbitrators Badri Parshad and Jamna Prasad, who were examined, give a totally different version of the affair. They say that the arbitration continued in August, that the award was the work of the arbitrators and that it was dictated by the Umpire and signed by them all. The learned Subordinate Judge has accepted their evidence and we think he was amply justified in doing so. The evidence of Chandan Lal is improbable to the last decree.

It is said that further delay took place between the date of the award and its registration, and that this circumstance supports the plaintiff's case and suggests that the award was not *bona fide* and the name of the Umpire, Chandan Lal, was forged. We cannot find that there was any extraordinary delay. After the award was drawn up by non-professional persons it had to go to a Pleader to advise as to what was to be done therewith. After his advice, it had to go to the Collector in order that the amount of the stamp should be adjudicated upon. In all probability the Collector sent it to the treasury. We can well believe that a considerable amount of time was taken up in making the usual and necessary inquiries. The award could not be registered until all this was done and the duty actually paid.

We, therefore, think that the plaintiff's case fails upon the two main grounds, namely the delay on the part of the arbitrators in completing the award, and also on the allegation that it was not signed by the arbitrators and Umpire.

The third ground was not urged by learned Counsel and, so far as we can see, the award was a perfectly valid one and, therefore, the appeal fails. We accordingly dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

MEHR SINGH *v.* DEVI DYAL.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1094 OF 1909.

November 28, 1911.

Present:—Mr. Justice Johnstone and Mr. Justice Shah Din.

MEHR SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DEVI DYAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Succession—Sehgal Khatris *of Gujranwala and Eminabad—Hindu Law—Joint undivided property—Separation of two branches of a joint Hindu family—Separate and exclusive enjoyment of different portions of property by each branch for above 40 years—Presumption—Partition—Party sued unnecessarily—Costs.*

The onus of proving that *Sehgal Khatris*, residing in a town, who do not own agricultural property and have never carried on agriculture as a means of livelihood, are governed by custom, at variance with Hindu Law, in matters of succession to non-agricultural property situate in a town, is on the party who sets up such a custom. The *Riwaj-i-am* as well as the *Wajib-ul-arz* which govern agricultural *Khatris* do not apply to non-agricultural *Khatris*.

Where the following facts are proved:—

(1) that the two branches of a joint Hindu family separated in food and residence more than 40 years ago;

(2) that each branch held and enjoyed separately for over 40 years the two portions of a family property;

(3) that during the said period each branch treated as its exclusive property the share in its possession;

(4) that each branch alienated from time to time some fractions of the share in its possession and the other branch acquiesced in such alienations;

And there were also certain documents which taken together were inconsistent with the continuance of the family as joint:

Held, (1) that there is a justifiable inference that there was an agreement to partition the property in interest and right;

(2) that there was a disruption of the joint family;

(3) that, though there was no actual division of the property by metes and bounds, a separation in interest and right as regards the property did take place, and that thenceforth it was the subject of ownership in certain defined shares with the result that the character of undivided property and joint ownership was taken away from it, and;

(4) that such partition in law is as effectual as a partition by metes and bounds of undivided property held by the members of a joint Hindu family.

Where a defendant is sued unnecessarily and after dismissal of suit is made a respondent in appeal without just cause, he is entitled to costs in both the Courts.

Appeal from the order of the District Judge of Gujranwala, dated 19th June 1909 dismissing plaintiffs' claim.

Rai Bahadur Lala *Lal Chand*, for the Appellants.

Lala *Dwarka Das*, for Respondents Nos. 1 and 2.

Khwaja *Zia-ud-Din*, for Respondent No. 3.

JUDGMENT.—This is an appeal from the decree of the District Judge of Gujranwala dismissing the suit brought by the plaintiffs-appellants for possession of 2/3rds share of a *haveli* known as *haveli* Malwian, situated in the town of Eminabad, Tahsil and District Gujranwala. Attached as an appendix to this judgment is a pedigree-table which shows the relationship of the parties. The common ancestor, Sardar Mihan Singh, had three sons, Sahib Singh, Sukha Singh and Mahtab Singh. Sahib Singh died about *Sambat* 1890 leaving a son Gurdit Singh. Gurdit Singh had two wives. *Musammat* Ganesh Devi and *Musammat* Nand Kaur. By his first wife, *Musammat* Ganesh Devi, he had a son, Partab Singh, who predeceased his father leaving a widow, *Musammat* Jai Kaur and two daughters, *Musammat* Jahan and *Musammat* Lachhmi. *Musammat* Ganesh Devi had also a daughter, *Musammat* Hukam Devi, who left a son, Devi Dial, who is defendant No. 1 in this case. *Musammat* Gaban, daughter of Partab Singh, left a son Sant Ram who is defendant No. 2.

Sukha Singh, the second son of Sardar Mihan Singh, had four sons, Jodh Singh, Wir Singh, Sham Singh and Ganda Singh. Plaintiff No. 1, Sobha Singh, is a son of Sham Singh and plaintiffs Nos. 2 and 3, Sher Singh and Natha Singh, are the son and grandson respectively of Wir Singh. Jodh Singh has left descendants some of whom are *pro forma* defendants in the case.

Mahtab Singh, the third son of Sardar Mihan Singh, had two sons, Dal Singh and Gurmukh Singh, of whom the latter is said to have left Eminabad more than 40 years ago and settled in Gujranwala. His sons have been impleaded as *pro forma* defendants.

It will be seen from the above that the plaintiffs are from among the descendants of Sukha Singh, while defendants Nos. 1 and 2, who are the principal defendants in the case, are descended from Sahib Singh defendant No. 3. Ram Singh is a brother of *Musammat* Nand Kaur, widow of Gurdit Singh, and he is the only party who is not a member of Sardar Mihan Singh's family. The plaintiffs sued defendants Nos. 1 to 3 for

a 2/3rds share of the *haveli* in dispute substantially on the following allegations:—

(1) That the *haveli* in question had been built, owned and left by Sardar Mihan Singh, the common ancestor of the parties.

(2) That the three sons of Mihan Singh were members of a joint Hindu family and as such were joint owners of the said *haveli*: more than 40 years ago, Gurmukh Singh, son of Mahtab Singh, exchanged his 1/3rd share in the *haveli* with the 1/3rd share held by Sahib Singh, son of Gurdit Singh, in another ancestral *haveli* situate at Gujranwala with the result that Gurdit Singh became owner of 2/3rds share in the *haveli* in question, while the descendants of Sukha Singh became owners of the remaining 1/3rd share. The descendants of Gurdit Singh and Sukha Singh, however, continued to reside in the *haveli* as members of a joint Hindu family.

(3) That Gurdit Singh before his death, more than 35 years ago, executed a Will in respect of his property in favour of his two widows, *Musammat* Ganesh Devi and *Musammat* Nand Kaur, and his widowed daughter-in-law, *Musammat* Jai Kaur, and under that Will the said widows held the estate left by Gurdit Singh in lieu of their maintenance one after the other. The last surviving widow being *Musammat* Nand Kaur, who died a few months before suit.

(4) That the *haveli* in dispute was the joint property of the descendants of Sahib Singh and Sukha Singh who constituted a joint Hindu family and had always been held and treated as such; that according to Hindu Law and custom the plaintiffs, who are the collaterals of the late Gurdit Singh and co-sharers in the *haveli* in question, were entitled to the possession of the 2/3rds share left by the above-mentioned widows, and that defendants Nos. 1 to 3 had no right in the presence of the plaintiffs to the said *haveli* and were in unlawful possession of the same.

In answer to the plaintiffs' claim Ram Singh, defendant No. 3, pleaded that he was not in possession of any part of the *haveli* and that he had been sued without just cause. Defendants Nos. 1 and 2, who have contested the suit throughout, filed a written statement traversing the material allegations contained in the plaint and pleaded in effect that the *haveli* in dispute had been built not by Sardar Mihan Singh, the common ancestor of the parties, but partly by Sardar Sahib Singh and partly by his son, Sardar Gurdit Singh; that the portion of the *haveli* occupied by the descendants of Sukha Singh had been given to Sukha Singh by Sahib Singh for purposes of residence, that Gurdit Singh and Sukha Singh and after their respective deaths their heirs and descendants were not members of a joint Hindu family holding the *haveli* in question in joint ownership as co-parceners; that under the Will of Gurdit Singh executed by him in 1862 his widows and his daughter-in-law had become exclusive owners of the portion of the *haveli* in suit, their possession not being merely in lieu of maintenance for their respective lives; that the widows had from time to time alienated certain portions of the *haveli* in exercise of their rights of ownership; that the plaintiffs and their predecessors-in-interest had by their conduct recognised the widows' exclusive ownership in the *haveli* in dispute and were, therefore, debarred from claiming the same as part of the property of a joint family; that the parties were bound by Hindu Law under which defendant No. 1 as daughter's son of Gurdit Singh and defendant No. 2 as his great-grandson succeeded to the *haveli* in dispute in preference to the plaintiffs. In replication the plaintiffs varied their original allegations in the plaint as to the construction of the *haveli* by saying that it was built jointly by Sardar Sahib Singh and Sardar Sukha Singh with the money of *Musammat* Maina Devi, widow of Sardar Mihan Singh. They, however, reiterated their original allegations to the effect that the *haveli* as the ancestral property of the parties in which Gurdit Singh had a 2/3rds share and Sukha Singh 1/3rd share; that the whole *haveli* had been held and occupied as the undivided property of a joint Hindu family; that though shares in the *haveli* had been allotted as aforesaid there had been no separation of those shares by partition; that the Will of Gurdit Singh had not affected the joint character of the *haveli*, the widows having had only a life-interest in the same under that Will; that under Hindu Law and the custom applicable to the parties the plaintiffs had a preferential right of succession to the *haveli* in dispute as against

the contesting defendants, and that the plaintiffs had not abandoned their rights in the life-time of the widows.

Upon the pleadings of the parties, the District Judge framed eight issues which are set forth in his judgment.

The more material of those issues are the first four, which run as follows:—

(1) Did any portion of the *haveli* known as *haveli* Malwian belong to the late Sukha Singh, son of Sardar Mihan Singh? And, if so, in what capacity?

(2) In case he owned it as heir to Sardar Mihan Singh, did he not get his 1/3rd share partitioned in the life-time of Sahib Singh?

(3) Are the parties governed by custom?

(4) If they are governed by Hindu Law, cannot the defendants, Devi Dial and Sant Ram, be given priority to the plaintiffs?

On the 1st issue the District Judge held that the *haveli* Malwian had been built by Sahib Singh and not by Mihan Singh; that the portion of it which was occupied by Sukha Singh's descendants had been gifted to Sukha Singh by Sahib Singh; and that, therefore, the 2/3rds share of the *haveli* in dispute could not be treated as part of the undivided property of a joint Hindu family. He further held that, on the facts found by him, the principle of survivorship could not apply to a case of this kind, and that plaintiffs as descendants of the donee, Sukha Singh, could not claim possession of any portion of the *haveli* from the defendants. On this view of the case, a finding on issue No. 2 was unnecessary and was not recorded. On the 3rd and 4th issues the District Judge held that the parties, who were high caste *Khatris*, and residents of a town, were governed in matters of succession by Hindu Law and not by custom, and that under Hindu Law the defendants excluded the plaintiffs from succession to the property in suit. On the 7th issue, which related to the alleged acquiescence of the plaintiff in the exclusive title of the widows to the *haveli* in suit, the District Judge found in defendants' favour holding that alienation of different portions of the *haveli* had been made by the widows to the knowledge of the plaintiffs and their predecessors-in-interest. On these findings, the plaintiffs' suit has been dismissed.

In appeal, the points raised before the District Judge have been argued before us at considerable length on both sides, and, after giving our best consideration to the arguments advanced, we think that the decree passed by the District Judge is correct and, must be upheld. On the view that we take of the case, it is unnecessary to decide definitely whether the *haveli* in question was built by Sardar Mihan Singh, the common ancestor of the parties, or by his eldest son Sardar Sahib Singh, though we are inclined to agree with the District Judge that it was built by Sahib Singh. In our opinion, even if the *haveli* was built by Sardar Mihan Singh and, therefore, his three sons, Sahib Singh, Sukha Singh, and Mahtab Singh inherited it as joint property in their capacity of members of a joint Hindu family, there was a description of the joint family followed by a division of the *haveli* between the co-owner in the life of Gurdit Singh, more than 40 years before the date of suit; and everything on the record points to the portion of the *haveli* now in dispute having been treated ever since as the separate and exclusive property of Gurdit Singh and of his heirs and descendants. The plaint and the plaintiff's replication go a great way to support this view. In para. 2 of the plaint it is admitted that more than 40 years ago Sardar Gurmukh Singh, the only son of Mahtab Singh, (who was third son of Sardar Mihan Singh), abandoned his own share in the *haveli* in question in favour of Gurdit Singh after taking in exchange one-third share of the latter in the ancestral *haveli* at Gujranwala; and it is stated that, in consequence of this exchange, Gurdit Singh became owner of a two-thirds share in the *haveli*, Sukha Singh's descendants becoming owners of the remaining one-third. Reference is also made in the plaint to the Will made by Gurdit Singh in favour of his widows, which is dated 16th November 1862 (page 15 of the paper-book), and though Gurdit Singh died admittedly more than 35 years ago, his widows and his daughter-in-law have admittedly remained in possession of the said two-thirds share during their respective lives, the plaintiff and the other descendants of Sukha Singh, who are fairly numerous, being content with the one-third share which Sukha Singh occupied in the life-time of Gurmukh Singh. In their rep-

lication also, the plaintiffs concede that Gurdit Singh gave his one-third share in the *haveli* at Gujranwala to Gurmukh Singh and took his one-third share in the *haveli*, in question, as a result of which he became owner of two-thirds share in the latter *haveli* while the descendants of Sukha Singh became owners of the remaining one-third share (page 46). They further admit that they had all along been in possession only of the said one-third share, and though they add that "shares were allotted on account of a large number of family members," they do not make any attempt to explain why, after the death of Gurdit Singh, his two widows and his daughter-in-law alone continued to occupy two-thirds share of the *haveli* as before, and why their own branch, consisting as it did of a large number of members, contented itself with occupying the one-third share which Sukha Singh had originally occupied. No doubt, both in the plaint and in the replication the plaintiffs insist upon the whole *haveli* having remained throughout as the undivided property of their alleged joint family; and in their replication they even say that the descendants of Gurdit Singh and Sukha Singh have been in proprietary possession of the *haveli* "without specification of shares." But the facts admitted in the pleadings clearly amount to a separation of interests in the *haveli* in question and there is ample evidence on the record, to which we shall presently refer, of the actual separate enjoyment by the heirs and descendants of Gurdit Singh and of Sukha Singh, respectively, of the two-thirds share and one-third share above referred to, the two branches of the family having been also separate both in food and residence, at least ever since the death of Gurdit Singh and very possibly since the death of Sahib Singh.

The principles which govern the partition of joint property belonging to an undivided Hindu family have been laid down in several decisions of their Lordships of the Privy Council; and the question for decision in cases like the present is whether or not, with reference to those principles, the facts of the case in hand establish a separation of interests between the various members of a joint family as regards the particular piece of property in dispute which would amount to a division of the same without actual partition of it by metes and bounds. In the leading case of *Appovier* v. *Rama Subba Aiyar* (1) their Lordships of the Privy Council laid down the law in effect as follows:—"When the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share which he may claim the right to receive and enjoy in severalty, although the property itself has not been actually severed and divided." There may be a division of title, without division of the subject to which the title is applied: a division of the right without a division of the property by actual partition by metes and bounds. In the later case of *Doorga Pershad* v. *Musammat Kundun Koowar* (2), their Lordships say that the fair inference from the decision in *Appovier's* case (1) seems to be that, inasmuch as there may be a division of the kind there spoken of, *viz.*, a division which, though not carried out by a partition by metes and bounds, would nevertheless alter the status of the family, the question in every particular case must be one of intention, whether the intention of the parties, to be inferred from the instruments which they have executed and the acts they have done, was to effect such a division.

In a recent case in *Bala Bux* v. *Rukhmabai* (3) in which the plaintiff, a Hindu, claimed to be entitled on the death of his uncle in 1882 to the property of a joint family by right of survivorship, one of the members of which had separated himself in 1869, and no agreement by the other members to remain united or to reunite had been proved. The Judicial Committee laid down the law as follows:—"There is no presumption when one co-parcener separates from the others that the latter remain united. Where it is necessary, in order to ascertain the share of the outgoing co-parcener, to fix the shares in which the others are, or would be entitled to the separation of one may be said to be the virtual separation of all. And an agreement amongst the remaining co-parceners to remain united or

(1) 11 M. I. A. 75; 8 W. R. 1 (P. C.).
(2) 13 B. L. R. 235; 21 W. R. 214; 1 I. A. 55.
(3) 30 C. 725, 5 Bom. L. R. 469; 7 C. W.N. 612; 30 I. A. 130.

to reunite must be proved like any other fact." In another case reported as *Balkishen Das* v. *Ram Narain Sahu* (4) their Lordships of the Privy Council were of opinion that an *iqrarnama* executed by the members of a joint Hindu family, which stated in clear terms that defined shares in the whole joint property had been allotted to the several co-parceners, had the effect in law of causing a separation in estate and interest between all the co-parceners: and, following the principle laid down in *Appovier's* case (1), they ruled that the property of the joint family had been divided by the allotment to them of defined shares by the *iqrarnama*. The whole question of the partition of joint property held by an undivided Hindu family by allotment of defined shares to its members without actual partition by metes and bounds was again considered by the Privy Council in a very recent case reported as *Parbati* v. *Naunihal Singh* (5). In their judgment in that case, their Lordships reiterated the principles laid down in *Appovier's* case (1) and in the case of *Balkishen Das* v. *Ram Narain Sahu* (4) above referred to, and held that an agreement between the members of a joint Hindu family, whether oral or in writing, to hold and enjoy their joint property in certain defined shares, which agreement was duly acted upon as evidenced by the transaction and conduct of the members of the family with respect to the management of their property, has the effect of partitioning the same, though no actual division by metes and bounds, is established. Referring to *Appovier's* case (1) and the case of *Balkishen Das* (4), their Lordships observed in their judgment: "In both these cases the members of a joint Hindu family, some of them being minors, acting by and through their parents, executed instruments in writing providing, in the first case, that part, and, in the second case that the whole, of the joint family property should belong to and be enjoyed by the different members of the family in specified shares. The effect of this was held to be that, as to the property so dealt with, there was a division of rights; the status of the family was changed; the tenancy of the property severed and converted from something, to use the language of English law, like a joint tenancy into a tenancy in common, and the previously undivided family became by operation of law divided" (see page 421 of the report). After quoting some passages from the judgments in the above-mentioned cases, their Lordships observed: "There is not a suggestion in either of the above mentioned judgments that the agreement to partition the joint family property in interest, and right must be embodied in a deed or instrument in writing. It might be a parol agreement." In another part of the judgment, in discussing the documentary evidence adduced to show that there had been a disruption of the joint family and a separation of interests as regards the property held by it, their Lordships say: "but of the numerous documents given in evidence many are absolutely inconsistent with the continuance of the family as a joint Hindu family owning the family property jointly: none are inconsistent with the partition in interest and right of that property in the manner indicated in the petition; and some are inexplicable on any other assumption."

"If there be one thing more than any other inconsistent with the existence of a joint Hindu family, it is that the eldest male and manager for the family, should treat one member as the owner of his share of the entire property, and account with that member for the income of the property on that basis."

Again, at page 428 their Lordships say: "It is unnecessary to examine all the other documents in the case. Few, if any, of them are inconsistent with the defendant's case; many of them are quite inconsistent with that of the plaintiff. The High Court examined them in great detail. They deal with them, however, in what, in their Lordships' opinion was an erroneous method. They apparently only considered whether each document was by itself sufficient to rebut the *prima facie* presumption that, as the plaintiff's family were admittedly a joint Hindu family before 1861, it continued to be joint, and omitted to take into account the cumulative effect of all these documents."

We now proceed to consider whether or not, with reference to the principles laid down and the observations made by the Judicial Committee of the Privy Council in the above-mentioned cases, the two-thirds

(4) 30 C. 738; 30 I. A. 139; 7 C. W. N. 578.

(5) 31 A. 412; 3 Ind. Cas. 195; 11 Bom. L. R. 878; 10 C. L. J. 121; 13 C. W. N. 983; 5 M.L. T. 427; 6 A. L. J. 597.

share of the *haveli* in dispute can be held to be the separate property of Gurdit Singh's branch, for it is obvious that, if it can be so held, the plaintiffs who are descended from Sukha Singh, would have no right to succeed to the said share in the presence of Gurdit Singh's daughter's son, defendant No. 1, unless the latter were excluded from succession by some custom at variance with Hindu law. As we have already observed, according to the plaintiffs' own admission, the ⅔rds share of the *haveli* in suit has been in possession of Gurmukh Singh's branch ever since Gurmukh Singh exchanged his ⅓rd share in the Gujranwala *haveli* with his ⅓rd share in this *haveli* and it is admitted that after the death of Gurdit Singh his two widows, *Musammat* Ganesh Devi and *Musammat* Nand Kaur and his widowed daughter-in-law, *Musammat* Jai Kaur, occupied the portion in dispute and that, after the death of the last surviving widow, it has been in the possession of defendants Nos. 1 and 2. There is important evidence on the record to prove that Gurdit Singh and after his death his two widows treated the 2/3rds share of the *haveli* as their exclusive property, and that the plaintiffs have acquiesced in the exercise by them of rights of ownership in respect of the same. On the 16th November 1862 Gurdit Singh executed a Will in favour of his two widows and his widowed daughter-in-law (page 15 of the paper-book), and in that Will he refers to the portion of the *haveli* which is now in dispute as his own exclusive property. No doubt, the recitals in that Will are in no way binding on the plaintiffs, but the important point to note is that in that Will, which is the only document executed by Gurdit Singh in which he refers to the nature and extent of his own interest in the *haveli* at Eminabad, and of the existence of which, as appears from the plaint, the plaintiffs were fully aware, the 2/3rds share now in question is claimed by Gurdit Singh as his separate property, and no steps whatever have ever been taken by the plaintiffs to contest that claim. The only reasonable inference that can be drawn from the conduct of the plaintiffs in relation to the Will in question is that they were aware that a separation of interest had taken place between the members of the family as regards the Eminabad *haveli* which amounted to a partition of the same, though no actual division by metes and bounds had taken place. After the death of Gurdit Singh, they allowed the widows to hold and enjoy the 2/3rds share in dispute in accordance with the directions contained in the Will, and both the members of the family and outsiders treated the widows as exclusive owners thereof and dealt with them on that basis. On the 6th September 1875, *Musammat* Ganesh Devi, *Musammat* Nand Kaur, and Jai Kaur sold to Nihal Singh, brother of plaintiff No. 1, (who is defendant No. 4 in this case), a portion of the *haveli* in their possession known as Mastgarh and the vendee Nihal Singh subsequently sold that portion to one Lala Amar Nath. In the sale-deed the widows claim to be owners of Mastgarh by right of inheritance, and the boundaries of the property sold, as contained in the deed, show that they also claim to be exclusive owners of the big *deorhi* to the north and refer to the southern portion of the *haveli* as belonging to Sardar Sukha Singh. No objection whatever to this sale was made by any member of the family and the sale in question remains unchallenged up to the present moment. On the 24th December 1876, Sobha Singh, plaintiff, executed a written lease in favour of *Musammat* Nand Kaur in respect of a portion of the *haveli* consisting of one *dalan* and two *kothris* on an annual rental of Rs. 2-0-0. In that lease, Sobha Singh refers to *Musammat* Nand Kaur as owner of the house and agrees to vacate the same on due notice being given by her for the purpose. The execution of this lease is admitted by Sobha Singh (page 59). On the 31st *Baisakh Sambat* 1935, A. D. 1877, Sobha Singh plaintiff sold a 1/12th share of a *tawela*, which was admittedly part of the *haveli*, to his own brother, Nihal Singh, and in the sale-deed he refers to himself as the owner of the share sold, one of the boundaries of the same being entered as the *tawela* of the heirs of Sardar Gurdit Singh, deceased. On the 17th May 1879, three sale-deeds were executed by different members of the plaintiffs' branch of the family in respect of different shares in the *tawela*, *viz.*, 1/6th share by Nihal Singh, ⅛th share by Sher Singh, (plaintiff No. 2), and 1/12th share by Hakim Singh, son of Jodh Singh, the vendees in each sale being Diwan Anant Ram and Amar Nath. Each vendor refers to the share sold by him as the share to which he is entitled as owner in his own right: and it is noteworthy that the nor-

thern and the southern boundaries of the shares sold are put down in each deed as respectively the house of the heirs of Sardar Gurdit Singh and the *deorhi* of the said house. On the 9th September 1882 one Islam took a lease from *Musammat* Jai Kaur and Devi Dial, defendant No. 1, of a portion of the *haveli* known as *dharamsala* (page 14), and Sobha Singh, plaintiff, admits that he wrote the deed of lease on the record (page 48). Lastly, Ganesh Das, witness, proves that he wrote a lease dated the 4th July 1888 on behalf of one Jumma in favour of *Musammat* Nand Kaur, *Musammat* Jai Kaur and Devi Dial in respect of a *kothri* in the big *deorhi* of the *haveli* which Jumma had taken on rent.

The above-mentioned documents, taken together, lead irresistibly to the conclusion that there had been a disruption of the joint family of the parties in the life-time of Gurdit Singh, and that though there may have been no actual division of the Eminabad *haveli* by metes and bounds there took place a separation in interest and right as regards this *haveli* between Gurdit Singh and Sukha Singh and that thenceforth it was the subject of ownership in certain defined shares with the result that the character of undivided property and joint ownership was taken away from it. On the one hand, the widows and daughter-in-law of Gurdit Singh held, enjoyed and dealt with the portions of the *haveli* included in their 2/3rds share which they have always been in possession of, as their exclusive property, and, on the other hand, the descendants of Sukha Singh treated their own 1/3rd share including parts of the *tawela* attached to the *haveli* as their exclusive patrimony and dealt with it on that basis. From the circumstances and the facts of the case we are, therefore, justified in concluding that in the life-time of Gurdit Singh there must have been an agreement between him and Sukha Singh and Gurmukh Singh, son of Mahtab Singh, to partition the Eminabad *haveli* in interest and right; and, as laid down by their Lordships of the Privy Council, such partition is in law as effectual as a partition by metes and bounds of undivided property held by the members of a joint Hindu family. Further, in the words of their Lordships in *Parbati* v. *Naunihal Singh* (5), "of the numerous documents given in evidence many are absolutely inconsistent with the continuance of the family as a joint Hindu family owning the family property jointly, none are inconsistent with the partition in interest and right, of that property ****** and some are inexplicable on any other assumption." As their Lordships observe in the same case, each document discussed above may not be sufficient by itself to rebut the *prima facie* presumption that as the parties' family was originally a joint Hindu family it continued to be joint, but the cumulative effect of all these documents is overwhelming, and the only conclusion that can be reasonably drawn from the facts proved in this case is that there was a disruption of the family more than 40 years ago accompanied by a division of the *haveli* in question in interest and right which took away from it the character of joint property. On the death of Gurdit Singh, therefore, the plaintiffs were not entitled to the 2/3rds share in suit by right of survivorship under Hindu Law and they were excluded from succession by Gurdit Singh's daughter's son, defendant No. 1.

It now only remains to consider whether, in matters of succession, the parties are governed by any custom at variance with Hindu Law, for, if no such custom is established, Hindu Law must govern this case.

In this connection we have to observe that in their plaint the plaintiffs have relied on both Hindu law and custom as furnishing the rule of decision as regards their alleged right to succeed to the *haveli* in dispute, and in their replication they took up the same position, appealing both to the principles of Hindu Law, as expounded by Mayne in his Hindu Law and Usage, and to the *Riwaj-i-am* of the Gujranwala Tahsil prepared at the Settlement of 1867 (page 46 of the paper-book.) On the other hand, the defendants, both in their written pleas and in their oral statements, said that they were bound by Hindu Law and not by custom. On the issue framed in this connection, the District Judge has held that the parties are governed by their personal law and not by custom; and we have no hesitation in agreeing with him in that view. The parties are *Sehgal Khatris* residing in a town, they own no agricultural land and have never carried on agriculture as a means of livelihood, and the property in suit is a *haveli* situate in a town. Under these circumstances, the onu

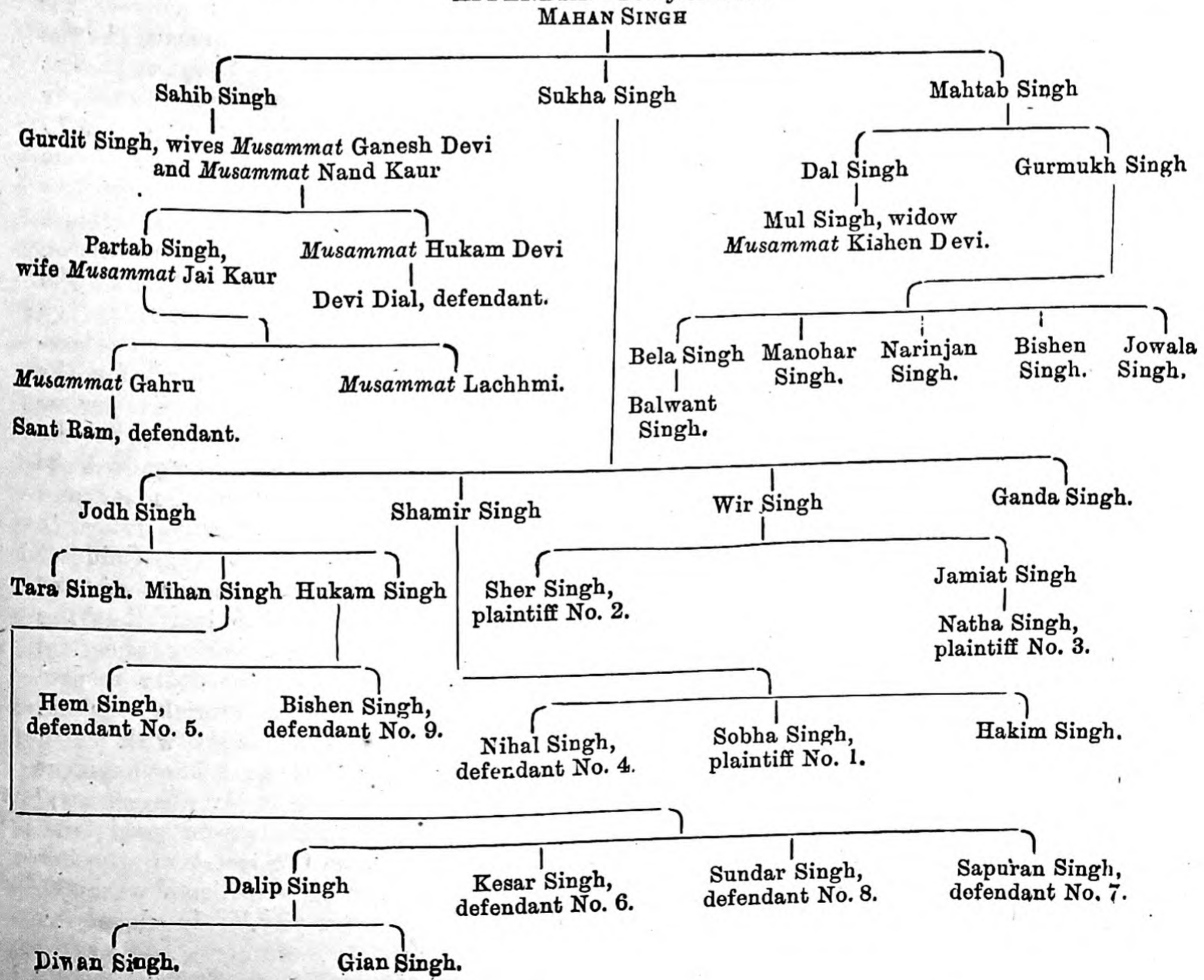
lay heavily on the plaintiffs of proving that they were governed not by Hindu Law but by custom, and we do not think that that onus has been discharged by them. The *Riwaj-i-am* of the Gujranwala district, prepared at the Settlement of 1867, on which the plaintiffs rely, governs agricultural *Khatris* and not the parties who have no connection whatever with agriculture and live in a town, and, for the same reasons, the *Wajib-ul-arz* of *Mauza* Eminabad prepared in 1856 cannot be held to govern the succession to the property in question. No instances of any value in support of the applicability of custom to the *Sehgal Khatris* regarding right of succession to non-agricultural property, such as the *haveli* in suit, have been cited, the balance of oral evidence on the question under consideration being, on the whole, in favour of the contestiug defendants' position.

On behalf of defendant-respondent No. 3, Ram Singh, it has been urged by Khawaja Zia-ud-din that his client was impleaded as a defendant in this case quite unnecessarily as he had never been in possession of any part of the *haveli*. We notice that Ram Singh disclaimed all interest in the subject-matter of the suit in his pleas and no evidence whatever was adduced by the plaintiffs to show that he had any interest in the same, and that it was necessary for them to sue him as a defendant. In the appeal also he has been made a respondent without just cause and, therefore, apart from the merits of the case, the appeal as regards him must fail and is hereby dismissed and he will get his costs in both the Courts.

For the above reasons, we hold that the plaintiffs-appellants have failed to prove that they are entitled to succeed to the 2/3rds share of the *haveli* in dispute to the exclusion of defendants-respondents Nos. 1 and 2, and, maintaining the decree of the lower Court, we dismiss this appeal with costs throughout.

Appeal dismissed.

APPENDIX.—*Pedigree-table.*



UMAR DIN *v.* BUDHE KHAN.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 46 OF 1909.

November 16, 1911.

Present:—Mr. Justice Johnstone and Mr. Justice Shah Din.

UMAR DIN *alias* BAGGA—PLAINTIFF—APPELLANT

versus

BUDHE KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Necessity—Duty of alienee to inquire that an antecedent debt is a just debt—Antecedent debt a decretal debt—Alienee an outsider—Rule as to inquiry.

Where an alienee, who is an outsider, finds that the alienor's debt, regarding which he must make inquiry, is a decretal debt he need not make any further inquiry, and the reversioners will not be allowed to go behind the decree. But this rule will not apply where it is clear that the alienee's suspicions should have been aroused by the surrounding circumstances, or where it is proved that he actually had knowledge of the bad faith of the decretal transaction.

Second appeal from the order of the Divisional Judge, Hoshiarpur, dated 20th October 1908, reversing that of the Subordinate Judge, 2nd class, Hoshiarpur, dated 20th June 1908, decreeing plaintiff's claim.

Bakhshi *Tek Chand*, for the Appellant.

Sheikh *Umar Bakhsh*, for the Respondents.

JUDGMENT.—Two appeals have been filed by Umar Din *alias* Bagga in connection with alienations by his father, defendant No. 1. In both the Courts below the two suits have been dealt with together.

The history of the case is as follows:—On 11th May 1897, Nabi Khan and Wadhu Khan mortgaged to Daulat Ram 91 *kanals* and 12 *marlas* of land for Rs. 700. On 1st March 1900, they executed a further mortgage deed of the same land for an additional sum of Rs. 212. These mortgages were without possession, but, inasmuch as the mortgagors failed to pay *munafa*, Daulat Ram brought a suit for possession on 20th May 1901, putting down Rs. 1,212 as the burden on the land. On 26th June 1901, the mortgagors put in a written statement contending that undue influence had been exercised and that, as a matter of fact, *munafa* had been paid; but on 2nd July 1901, the parties filed a compromise in which the mortgagors agreed that a decree for possession might be passed in lieu of Rs. 1,375, Rs. 150 of which was the money due to one Shiv Nath on another mortgage.

Next, on 14th September 1904, Nabi Khan, Wadhu Khan and *Musammat* Viro sold 59 *kanals* and 14 *marlas* out of the aforesaid land to defendants, Basanta, Rupa and others, for Rs. 1,452 and upon this sale a pre-emption suit was brought, the plaintiffs being Budhe Khan and Babu Khan, defendants, reversioners of the vendors, the suit was contested; but ultimately, on 11th May 1905, the pre emptors obtained a decree for pre-emption on payment of Rs. 77 to the vendee, the sum of Rs. 1,375 being left with them to pay to Daulat Ram, mortgagee, at their pleasure. Finally, the present suits were brought on the 3rd February 1908. One suit is for a declaration that the sale-deed of 14 September 1904 should not affect the reversionary rights of the plaintiffs after the death of the vendees, and the other suit is for a similar declaration with regard to the mortgages aforesaid. The first Court drew up issues and gave plaintiff a decree subject to payment of Rs. 924-6, to the mortgagees and Rs. 77 to the pre-emptors, but the lower Appellate Court dismissed the plaintiff's suit on the short ground that Rs. 77 was certainly paid in good faith by the vendees and that the item of Rs. 1,375 could not be impugned, because it had become merged in a decree of a competent Court.

The plaintiff now comes up to this Court with further appeals, and we have heard an able argument upon the point decided by the learned Divisional Judge. We need not go into the question of the passing of consideration or the existence of "necessity" for the various items in the mortgage-deeds, for we agree with the Divisional Judge that the plaintiff cannot contest the mortgage-deeds in these suits of his against the vendees and the pre-emptors. We need only refer to *Devi Ditta* v. *Saudagar Singh* (1) (middle) and to recall to mind the numerous *dicta* of Judges of this Court as to the duty that lies upon an alienee, who is taking ancestral property on sale or mortgage from a proprietor who is subject to Punjab custom. But, shortly, the two principles with which we are concerned are these. The payment of a just antecedent debt is "necessity;" *secondly*, the alienee must make in good faith reasonable inquiry into the question whether the alleged debts due by the alienor were for consideration and "necessity." In connection

(1) 65 P. R. 1900.

GOKUL CHAND v. SHIB CHARAN.

with these principles, there is, at the page quoted above, in the Punjab Record for 1900 an apt illustration by Mr. Justice Chatterji in the course of which he says that, when a vendee is an outsider and the debt in question is a decretal debt, the reversioner cannot go behind the decree. This is, of course, *obiter dictum* but we agree that it is correct; and the meaning of it, put in other words, is that, when a vendee or a mortgagee in cases like the present finds that a debt regarding which he must make inquiry is based upon an unsatisfied decree, he need make no further inquiry regarding it. Of course, if it can be shown that the alienee actually had knowledge that there was bad faith in the transaction, or if it is clear that the alienee's suspicions should have been aroused by the surrounding circumstances, then, perhaps Mr. Justice Chatterji's *dictum* would require qualification; but if a genuine outsider proposes to buy a land from a proprietor and in good faith undertakes to pay off a decree due by the alienor to a previous creditor, we think that the matter is concluded and that the reversioners cannot be allowed to interfere.

But in the present case arguing for the plaintiff Mr. Tek Chand contends that there is reason to believe that the vendees in the case were aware that the original mortgage debts were not for "necessity." He based this contention upon two propositions; *first*, that the vendees are residents of the same village Bahadurpur in which the land is situated and in which the vendors live; *secondly*, that although some seven years have passed since the purchase, the vendees or the pre-emptors have not yet redeemed the land. We do not think that these two considerations prove Mr. Tek Chand's point. In the plaint itself, the vendees are stated to be living at Ranchi in Chota Nagpur and not in the Punjab. There is no evidence as to how long ago they went to live at Ranchi but this much is clear that the vendees are not agriculturists but contractors and traders, and that all their interests appear to be in other and distant places. It cannot, therefore, be presumed that they were aware of the real facts concerning the mortgages of 1897 and 1900. Then, it is quite natural that the vendees or pre-emptors should not yet have redeemed the land from the mortgagee. The sum of money to be paid is large, and litigation has been going on. It is easy to understand that the vendees or pre-emptors would not like to pay Rs. 1,375 to the mortgagee until they were quite satisfied that all possible attacks upon their title had come to an end. The onus of proof that the vendees did not act in good faith is certainly on the plaintiff in the circumstances of the case and we do not think that he has discharged that onus.

We, therefore, dismiss both the appeals with costs.

Appeals dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 279 OF 1911.

November 4, 1911.

Present:—Mr Justice Chamier.

GOKUL CHAND—DEFENDANT—APPELLANT

versus

SHIB CHARAN—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 106—Lessee for a fixed term—Notice to quit delivered at a shop where defendant did not reside—Validity of notice to quit—Lessee holding over—Notice, whether necessary.

A notice to quit, sent by post and delivered by the postal peon to a person other than the defendant at the shop from which the defendant was sought to be ejected, but where the defendant did not reside, is not a good notice within the meaning of section 106 of the Transfer of Property Act.

If a lessee for a fixed term of years remains in possession of a house after the expiration of the term of the lease in defiance of the authority of the lessor, he is not entitled to a notice to quit under section 106 of the Transfer of Property Act.

Second appeal from the decision of the Additional Judge of Moradabad, dated 23rd December 1901.

Mr. *Haribans Sahai*, for the Appellant.

Mr. *Chaudhri*, for the Respondent.

JUDGMENT.—This was a suit by the respondent for the *ejectment* of the appellant from the southern portion of a shop situated in the town of Moradabad. The shop was originally the joint property of the respondent and the appellant. The respondent in 1900 sued for partition of the shop and separate possession of his share of it. The suit terminated in a compromise, according to which the shop was divided between the parties, the respondent getting the southern portion, and the appellant the northern portion of it. But it was agreed that the respondent should give to the appellant a lease of the southern portion for eight years. It was part of the compromise that the respondent should give the appellant a registered

lease. No lease was ever given but the appellant occupied the southern portion of the shop as the tenant of the respondent and it has been found by the Courts below that the term of eight years for which the appellant was to hold possession as tenant terminated on the 20th September 1908. Immediately after the expiry of the term, the respondent endeavoured to get the appellant to vacate the southern portion of the house. But the appellant resisted all efforts to dislodge him. Ultimately, on the 21st February 1910, the respondent brought the present suit. The appellant resisted the suit in the Court of first instance on the ground that the respondent's next friend agreed to allow the appellant to remain in possession of the respondent's share of the house until the respondent attained majority. That defence failed. In appeal to the District Judge, the appellant took two points neither of which has been discussed before me. At the hearing he was allowed to raise a third point, namely, that the respondent was not entitled to maintain the suit as no notice to quit, as required by section 106 of the Transfer of Property Act, had been served on the appellant. The lower Appellate Court called on the Court of first instance for a finding on the question whether any notice to quit had been given by the respondent to the appellant. The first Court then found that the tenancy terminated on the 20th of the month and that due notice to quit on the 20th of February 1910 had been given to the appellant through the post. That finding was affirmed by the lower Appellate Court. In second appeal to this Court it is contended that the notice which was given does not comply with section 106 of the Transfer of Property Act, because it was not given either personally to the appellant or to any of his family, or servant at his residence, or affixed to a conspicuous part of the house. It appears that the notice was sent by post and was taken by the postal peon to the shop now in question. The appellant says that he does not reside in the shop. This point does not seem to have been taken in the lower Appellate Court, but there is good reason for thinking that the appellant does not reside in the shop, for the respondent himself described the appellant in the plaint as resident of another part of Moradabad. It seems to me that it must be held that the notice does not comply with section 106 of the Transfer of Property Act. The respondent, however, contends that section 106 has no application to the present case. The relevant portion of that section is as follows:—'In the absence of a contract, a local law or usage to the contrary, a lease of immoveable property for any other purpose (which includes a lease of the kind now in question) shall be deemed to be a lease from month to month terminable on the part of either lessor or lessee by fifteen days' notice expiring with the end of the month of tenancy.' It is quite clear that between 1900 and September 1908 this was not a lease from month to month. It was a lease for eight years by virtue of the compromise, notwithstanding that the parties intended that there should be a registered document, for the compromise was incorporated in a decree. It is contended that the appellant remained in possession after the 20th September 1908 and from that date was a tenant from month to month. But the evidence shows that the respondent endeavoured to get the appellant out of the house as soon as the lease terminated. There is no ground for holding that the appellant remained in possession with the consent of the respondent. The appellant retained possession in defiance of the respondent and was not entitled to any notice to quit before the suit was brought. In my opinion, section 106 of the Transfer of Property Act does not apply to this case. Therefore, the respondent was entitled to a decree for possession of the southern portion of the shop, notwithstanding that the notice to quit does not comply with section 106. The appeal is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 181 OF 1911.

November 9, 1911.

Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.

QUDRAT ULLAH—PLAINTIFF—APPELLANT

versus

CHUNNI MAL—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s. 114—Presumption, extent of—Document alleged to have been lost by one of the parties, but loss not proved.

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QUDRAT ULLAH *v.* CHUNNI MAL.

Q. sued *C.* to redeem a mortgage on payment of Rs. 115, a portion only of the mortgage-money. The balance, *Q.* stated, having been paid to the mortgagee. He further stated that some of the payments would be proved if the mortgage-deed were produced as they were endorsed on that document. *C.* did not produce the mortgage-deed but stated that it had been lost. He could not, however, prove the loss:

Held, that under the circumstances the presumption under section 114 of the Evidence Act could not be pushed to the extent that the mortgage-deed, if produced, would have proved that only Rs. 115 remained due on the mortgage, the rest having been paid off to the mortgagee.

Second appeal from the decision of the Additional Judge of Moradabad, dated the 8th November 1910.

Mr. *Surendo Nath Sen*, for the Appellant.

Dr. *Tej Bahadur Sapru*, for the Respondent.

JUDGMENT.

CHAMIER, J.—This was a suit by the appellant for the redemption of a mortgage made by one Chajju Khan in favour of the respondent Chunni Mal on March the 11th 1898. Chajju Khan transferred all his rights in the property to the appellant on November the 16th, 1908. The deed seems to have been before the Courts below, but it cannot now be found on the record. It is said to contain a statement that the amount remaining due on the mortgage was Rs. 115. The appellant prayed for a decree for redemption of the property on payment of Rs. 115, alleging that the remaining amount claimable under the mortgage had been paid to the mortgagee. The respondent Chunni Mal pleaded that no payments had been made to him at all. In paragraph 3 of the plaint the appellant said that the original mortgagor had asserted that some of the amounts paid to the mortgagee were endorsed on the document and others were proved in other ways. The respondent Chunni Mal was called upon to produce the mortgage-deed. He said that he had lost it in September 1909. The Munsif found that it was proved that the document had been lost. He also found that the appellant had failed to prove that any payments had been made, and he passed a decree for redemption on payment of Rs. 718-7-6. His decree was affirmed on appeal by the Additional Judge with a trifling modification as to costs. But the learned Additional Judge held that Chunni Mal had failed to prove the loss of the mortgage-deed. He found in effect that Chunni Mal had invented the story of the loss of the document. He evidently thought that Chunni Mal was keeping back the mortgage-deed. In second appeal it is contended that the lower Appellate Court ought to have presumed that, if the mortgage-deed had been produced, it would have proved that all the sums alleged by the appellant to have been paid were in fact paid, leaving only Rs. 115 due on the mortgage. It is suggested that the learned Judge failed to notice that he was entitled, under section 114 of the Indian Evidence Act, to make this presumption against Chunni Mal. It is rather difficult to say with certainty whether the learned Additional Judge had or had not in his mind section 114 of the Evidence Act. But there is one passage in his judgment which suggests that whether he had that section in his mind or not, he realized that the non-production of the mortgage-deed by Chunni Mal was a strong point against him, for after discussing the appellant's evidence and other matters, he says, "the only circumstance against the contesting defendant is that the loss of the bond is not proved in my opinion." Speaking for myself, I am not satisfied that the learned Judge bore in mind the rule contained in section 114 of the Evidence Act which permitted him to presume that the mortgage-deed, if produced, would have been unfavourable to Chunni Mal. But, under the present Code of Civil Procedure this Court is entitled in second appeal to find the facts where the lower Appellate Court has failed to record a proper finding and it seems to me useless to send this case back in order that this presumption of fact may be dealt with. On the question whether the presumption should be pushed to the extent desired by the appellant, namely, that it should be presumed that the mortgage-deed, if produced, would have proved that only Rs. 115 remained due on the mortgage, I think that that would be going too far. It is quite clear from paragraph 3 of the plaint that it was not the case of the appellant in the Court of first instance and that he never was led to suppose that all the payments to that extent were endorsed on the mortgage-deed. If it was never his case that all the payments were endorsed on the mortgage-deed, it is impossible to presume that the deed, if produced, would have proved payments. The probability is that neither side has told the

truth. One party has alleged that a much larger sum has been paid than has in fact been paid, and the other party has met the allegation with the false statement that nothing has been paid. On the pleadings, and with reference to the other circumstances of the case, I am not prepared to push the presumption to the extent desired by the appellant who has failed to prove that any sums were paid on account of the mortgage. I am of opinion that the decree of the Court below is right and I think it should be affirmed.

KARAMAT HUSAIN, J.—I agree in the order proposed by my learned colleague.

BY THE COURT.—Order of the Court is, that the appeal be dismissed with costs including in this Court fees on the higher scale.

The objections are dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

CIVIL REVISION CASE No. 700 OF 1911.

November 30, 1911.

Present:—Mr. Justice Chevis.

PREM SINGH AND ANOTHER—DEFENDANTS—PETITIONERS

versus

MOKAND SINGH—PLAINTIFF—RESPONDENT.

Custom—Succession—Religious institution—Dharmsala—Mahantship—*Rule of succession—Necessity to ascertain—Right of owner's descendant to oust trespasser—Ejectment suit—Trespasser—Plaintiff bound to prove his own title.*

A plaintiff must prove his own title before he can oust a trespasser, even though the defendant has no title.

In a dispute about succession to the *mahantship* of a *Dharmsala* or other *wakf* property, the first duty of a Court is to ascertain the rule of succession which obtains as regards the particular shrine.

Bhai Bhagat Singh v. *Harnam Singh*, 49 P. R. 1892; *Gyan Parkash* v. *Hazura Singh*, 3 P. R. 1899, followed.

The mere fact that plaintiff is a descendant of the original owner of the *Dharamsala* does not entitle him to oust a trespasser.

Petition, under section 70 (1) (*a*) and (*b*) of Act XVIII of 1884 as amended by Act XXV of 1899, for revision of the order of the Divisional Judge, Amritsar Division, dated the 24th February 1911, affirming that of the District Judge, Amritsar, dated the 30th May 1910, decreeing plaintiff's claim.

Messrs. *Pestonji Dadabhoy* and *Arthur Grey*, for the Petitioners.

Lala *Hukam Chand*, for the Respondent.

JUDGMENT.—This suit relates to a *Dharmsala* at Amritsar. According to plaintiff, who sues for possession, the *Dharmsala* belonged to *Guru* Bhag Singh who put in Rangi Ram Singh as Manager, and plaintiff claims on two grounds,—

(1) As nearest heir of Rangi Ram Singh (propounding a genealogical tree according to which *Guru* Bhag Singh is plaintiff's spiritual grandfather and is also Rangi Ram Singh's spiritual uncle), and (2) as being now the owner in succession to *Guru* Bhag Singh. The plaintiff's claim is utterly denied, and the defendants plead that Prem Singh, defendant, was nominated by Rangi Ram Singh as his successor and that Rangi Ram Singh left a Will in Prem Singh's favour, and that Prem Singh was *chela* of Rangi Ram Singh.

The lower Courts have found that the defence is groundless and that Prem Singh has no rights. But as the Courts rightly observe even though defendants have no title, plaintiff must prove his title before he can oust even a trespasser.

The Courts have presumed to be genuine an old *ikrarnama* professing to have been executed on 30th April 1860 by Rangi Ram Singh in which he acknowledges that the *Dharmsala* belongs to *Guru* Bhag Singh and that he has been put in by Bhag Singh to do service. I see no sufficient ground for holding in revision that this deed is not a genuine one. But I do not see that it necessarily follows that everything stated in the document is correct. The first Court holds that the property is *waqf*. The Divisional Judge holds that the *mahantship* reverts on the death of Rangi Ram Singh without leaving a *chela* to *Guru* Bhag Singh, and that the latter is plaintiff's grandfather and that the spiritual succession is the same as natural succession, going from father to son as in the case of a Patiala shrine to which this *Dharmsala* is subordinate.

A good deal seems to me to have been taken for granted which has not been proved nor even put in issue. I understand that the Divisional Judge has not granted plaintiff a decree on the strength of the *Dharmsala* being private property, but on the ground that he has now succeeded to the *mahantship*. But what the rule of succession is as regards this particular shrine has never been put in issue. The rule of succession has to be ascertained in such cases [vide *Bhai Bhagat Singh* v. *Harnam Singh* (1); *Gyan Parkash* v. *Hazura Singh* (2)]. The shrine in question

(1) 49 P. R. 1892. (2) 3 P. R. 1899.

may or may not be subordinate to some shrine in Patiala (though no Patiala shrine was even mentioned in the pleadings), and the rule of succession here may or may not be the same as in the Patiala shrine; what the rule is in the Patiala shrine is also a matter which has never been put in issue. A rule of succession which is fairly common in cases in which the last *mahant* has nominated no *chela* to succeed him is, that a successor is nominated by the *bhik* and duly installed, but it is not claimed that plaintiff has succeeded by this method, and this rule is by no means the universal rule.

For the plaintiff it is contended that this is a suit by a man who has succeeded to the *mahantship* to oust a trespasser, and, further, that even if plaintiff has not regularly succeeded to the *mahantship* he is still entitled as being a descendant of the original owner to oust a trespasser. But for defendant it is urged, in reply to the latter point, that even taking it that Rangi Ram Singh was only agent of *Guru* Bhag Singh this relationship ceased on Bhag Singh's death and that Rangi Ram's possession was thereafter adverse to any successor of Bhag Singh, and that plaintiff's claim as owner to oust defendants is, therefore, time-barred.

It appears to me that the necessary points have not been put in issue and inquired into and I remand the case for inquiry by the first Court into the following issues:—

(*i*) Has plaintiff succeeded to the *mahantship*, according to the rule of succession governing this shrine?
Onus on plaintiff.

(*ii*) If not, is plaintiff the owner of the shrine and is he, as such, entitled to take possession in the absence of a *mahant*?
Onus on plaintiff.

(*iii*) Is plaintiff's claim *qua* owner time-barred?
Onus on defendants.

Return to be made through the Divisional Judge, who should record his opinion, within four months.

Execution of decree to be stayed meanwhile.

Case remanded.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 480 OF 1910.
June 22, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

BIROO GORAIN AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

JAINURAT KOER—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), *s.* 47, *O. XX r.* 2, *cls.* (2) *and* (3)—*Adjustment of decree out of Court —Not certified to Court—Fraud of decree-holder, whether Court can enter into investigation of—Limitation Act (XV of* 1877), *s.* 18—"*Kept from* knowledge *of right*"—Exercise *of right—Difference between—Substantial compliance with cl.* (2), *r.* 2, *O. XXI.*

If the adjustment of a decree out of Court has not been certified as required by rule 2 of Order XXI of the Code of 1908, the Court executing the decree cannot take notice of it. In such a case it is not open to the Court to investigate, under section 47 of the Code, allegations of fraud made by the judgment-debtor against the decree-holder.

Gadadhar Panda v. *Shyam Churn Naik*, 12 C. W. N. 485, explained.

Ramayyar v. *Ramayyar*, 21 M. 356, dissented from.

Periatambi v. *Vallaya*, 21 M. 409; *Ganapathy* v. *Changa*, 29 M. 312, referred to.

Kamini Debi v. *Aghore Nath*, 4 Ind. Cas. 402; 11 C. L. J. 91; 14 C. W. N. 357; *Nistarini Dassi* v. *Kazim Ali*, 12 C. L. J. 65; 7 Ind. Cas. 258; *Man Mohan Karmakar* v. *Dwarkanath Karmakar*, 7 Ind. Cas. 55; 12 C L. J. 312 and *Hiramony Biswas* v. *Musa Khan*, 7 Ind. Cas. 625, followed.

Even if it is established that the conduct of a decree-holder is fraudulent, the judgment-debtor is not entitled to obtain an extension of the time within which to make an application to the Court under clause 2 of rule 2 of Order XXI, because the judgment-debtor is not, by means of fraud, kept from the *knowledge* of his right to make the application, within the meaning of section 18 of the Limitation Act, but from the *exercise* of his right to make the application.

In such a case it is open to the judgment-debtor to institute a suit for damages for the fraud.

Poromanand Khasnabish v. *Khepoo Paramanik*, 10 C. 354, followed.

While an appeal from a decree was pending, the decree-holder applied for execution. The judgment-debtor appellant obtained an *ad interim* stay of execution. After that the judgment-debtor made an application to the Court of Appeal stating that the case had been adjusted and that he wanted to withdraw the appeal. Accordingly, the appeal was dismissed and the decree-holder respondent waived his right to costs. An application for execution which was pending in the Court below was also dismissed. Subsequently, the decree-holder again applied for execution of the decree:

Held, that, under the circumstances, the judgment-debtor by his application to the Court of Appeal had in substance complied with the requirements of clause 2, rule 2, Order XXI of the Code.

BIROO GORAIN *v.* JAINURAT KOER.

Appeal from the order of the Sub-Judge of Patna, dated August 6th, 1910.

Babu *Karunamoy Bose*, for the Appellants.

Babus *Dwarka Nath Chakrvarti*, *Lalit Mohan Banerji*, and *Smritish Chandra Ghose*, for the Respondent.

JUDGMENT.—We are invited in this appeal to set aside an order by which the Court below has summarily refused to entertain an objection of the judgment-debtors that the decree under execution has been completely adjusted out of Court. The circumstances under which this objection was taken are patent on the face of the record. The decree under execution was made in a suit for rent on the 24th of September 1903. An appeal was referred to this Court on the 8th January 1909. Three days later, the appellants applied for a Rule to stay proceedings in the execution which had already been commenced in the Court below. The Rule was granted and an *ad interim* stay was directed. On the 5th February 1909, the appellants presented an application to this Court in which it was stated that the matter in difference between the parties had been adjusted and that, in pursuance thereof, they had agreed to withdraw the appeal. This application was directed to be heard on the 8th of February. On that date in the presence of the Vakil for the appellants and the Vakil for the respondents the Court granted the application. The appeal was dismissed and the rule discharged ; the respondent also waived her right to the costs of the proceedings in this Court. On the 22nd of February, the Vakil for the respondent addressed a letter to the Deputy Registrar in which he prayed that as the appeal had been withdrawn, the order of this Court might be sent down to the Court below as the records were required for the purpose of another case. Five days later, the order of this Court was communicated to the Court below and the records were also returned. In the order which was drawn up, it was stated that the appellants had intimated to the Court that the matter in difference between the parties had been adjusted and on that footing the appeal had been dismissed without costs.

On the 2nd March 1909, the Court below recorded an order to the effect that the record had been received back and directed the decree-holder to take proper steps. On the 8th March the application for execution was dismissed as no steps had been taken in that behalf by the decree-holder. In this manner the application for execution which had been presented on the 4th November 1908 was disposed of by the Court below. It now transpires that on the 18th March 1909, the decree-holder presented a second application for execution, but it was dismissed for non-prosecution on the 11th May following. On the 6th of June 1910 the decree-holder presented the application on the basis of which the proceedings now before us were initiated. The decree-holder ignored the settlement alleged by the judgment-debtors in their application to this Court on the 5th February 1909 and prayed that execution might proceed on the footing of the application of the 4th November 1908. Notice was served upon the judgment-debtors who promptly preferred objections on the 25th of July 1910. These objections were of a two-fold character, namely, *first*, that the execution could not proceed because the decree had been adjusted in full, and, *secondly*, that if the execution could proceed, the decree-holder was bound to proceed against the properties mentioned in the prayer clause of the plaint before she could be allowed to proceed against the other properties of the judgment-debtors. The Subordinate Judge overruled these contentions and held that as the alleged adjustment had not been certified, it was not competent to the Court to take notice of it. The Subordinate Judge further held that upon the face of the objections the adjustment, if true, was between the decree-holder and persons who were not parties to the execution proceedings, and consequently the adjustment could not be of any value to the judgment-debtors. The Subordinate Judge also held that the discretion of the decree-holder to proceed in execution of her decree in any manner she chose, was not restricted by the facts stated in the prayer clause of the plaint.

The judgment-debtors have now appealed to this Court. On their behalf the decision of the Subordinate Judge has been attacked substantially on three grounds, namely, *first*, that although the adjustment has not been certified in the manner contemplated by rule 2 of Order XXI of the Code of 1908, as the

BIROO GORAIN *v.* JAINURAT KOER.

conduct of the decree-holder is fraudulent, it is open to the Court to investigate the allegations of fraud under section 47 of the Code of 1908; *secondly*, that the provisions of rule 2 of Order XXI of the Code have in substance been complied with; and *thirdly*, that if it is open to the decree-holder to proceed with the execution, she cannot sell the properties of the judgment-debtor in any manner she choses, but must proceed first against the properties mentioned in the prayer clause of the plaint.

In so far as the first of these objections is concerned, reliance has been placed upon the cases of *Gadadhar Panda* v. *Shyam Churn Naik* (1); *Ramayyar* v. *Ramayyar* (2) and *Trimbak Ramkishna Ranade* v. *Hari Laxman Ranade* (3). In our opinion, there is no foundation for this contention. Order XXI, rule 2, of the Code provides in clause (3) that payment, "which has not been certified or recorded as aforesaid, (*i.e.*, as explained in clause 1 or 2, at the instance of either the decree-holder or the judgment-debtor), shall not be recognized by any Court executing the decree." The contention of the learned Vakil for the appellants in substance is that in cases where the conduct of the decree-holder is fraudulent, it is open to the Court, in fact it is incumbent on the Court, to investigate the allegation of fraud under section 47 of the Code of 1908, notwithstanding the clear and specific provisions of clause (3) of rule 2 of Order XXI. This argument is obviously fallacious. A proceeding under rule 2, Order XXI, is a proceeding under section 47 of the Code, inasmuch as it decides a question between the parties to the suit and relating to the execution, satisfaction or discharge of the decree made in the suit. If the contention advanced on behalf of the appellants were to prevail in all cases where fraud is imputed to the decree-holder, the provisions of clause (3) of rule 2, Order XXI would become nugatory; in other words, the provisions of rule 2, would be superseded by the wider provisions of section 47. We are, therefore, unable, upon the clear provisions of statutory law, to give effect to the contention of the learned Vakil for the appellants.

As regards judicial decisions to which our attention has been drawn, *Gadadhar Panda* v. *Shyam Churn Naik* (1) does not, when analysed, support the contention of the appellants. No doubt, there are isolated expressions in that judgment which would support the view that it is competent to the Court to deal with a case under section 244 of the Code of 1882 when an allegation of fraud is made in relation to a case of payment or adjustment of a decree. But it is worthy of note that no question of limitation arose in that case. It cannot be held that the learned Judges intended to lay down that although the period of limitation within which an application by the judgment-debtor under clause (2) of rule 2 of Order XXI is to be presented to the Court has expired, it is still open to him to secure an investigation of the very same matter by application under section 47 of the Code of 1908. The only case which supports the contention of the appellants is the decision in *Ramayyar* v. *Ramayyar* (2). It is sufficient, however, to point out that a contrary view was taken by the learned Judges of the Madras High Court in *Periatambi* v. *Vallaya* (4) and the decision in *Ramayyar* v. *Ramayyar* (2) was expressly dissented from in *Ganapathy* v. *Chenga* (5). On the other hand, a series of decisions of this Court, amongst which may be mentioned *Kamini Debi* v. *Aghore Nath Mookerjee* (6); *Nistarini Dasi* v. *Kazim Ali* (7); *Monmohan Karmkar* v. *Dwarkanath Karmakar* (8) and *Hiramony Biswas* v. *Musa Khan* (9), show conclusively that the contention of the appellants ought not to prevail. The authorities on the subject were fully reviewed in the case of *Monmohun Karmakar* v. *Dwarkanath Karmakar* (8) where it was pointed out that in a case in which an application under clause (2) of rule 2 of Order XXI would be successfully met by the objection of limitation, the judgment-debtor was not entitled, under the colour of section 47 of Code of 1908, to obtain an investigation of the objection that the decree had been satisfied or adjusted out of Court. We adhere to the view taken in that case. We are also clearly of opinion that the decision in *Trimbak Ram Krishna Ranade* v. *Hari Laxman Ranade* (3)

(1) 12 C. W. N. 485.
(2) 21 M. 356.
(3) 34 B. 575; 12 Bom. L. R. 686; 7 Ind. Cas. 940.
(4) 21 M. 409.
(5) 29 M. 312.
(6) 11 C. L. J. 91; 14 C. W. N. 357; 4 Ind. Cas. 402.
(7) 12 C. L. J. 65; 7 Ind. Cas. 258.
(8) 12 C. L. J. 312; 7 Ind. Cas. 55.
(9) 7 Ind. Cas. 625.

BIROO GORAIN v. JAINURAT KOER.

is of no assistance to the appellants. We may further point out that even if it is established that the conduct of the decree-holder is fraudulent, the judgment-debtor is not entitled to obtain an exclusion of the time within which an application is to be made to the Court under clause (2) of rule 2 of Order XXI. Section 18 of the Limitation Act, which deals with the effect of fraud, is clearly of no avail to the appellants. That section provides that "when any person having a right to make an application has by means of fraud been kept from the knowledge of such right or of the title on which it is founded or where any document necessary to establish such right has been fraudulently concealed from him, the time limited for making an application against the person guilty of the fraud or accessory thereto * * * * * shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or in the case of the concealed document, when he first had the means of producing it or compelling its production." It is not suggested on behalf of the appellants that they were kept by means of fraud from the *knowledge* of their right to make the application mentioned in clause (2) of rule 2 of Order XXI. Their grievance is that they have been kept by means of fraud from the exercise of their right to make this application. Consequently, if we were to accede to the contention of the appellants, we should have to substitute for the phrase "from the *knowledge* of such right." the phrase "from the exercise of such right." But, clearly, the knowledge of a right and the exercise thereof are fundamentally distinct things. We are, therefore, of opinion that, in so far as the first contention of the appellants is concerned it must fail, notwithstanding the earnest appeal which the learned Vakil for the appellants made to us that the view we propose to take might involve considerable hardship to innocent persons. But if the judgment-debtor, notwithstanding the express provision of clause 2, rule 2, Order XXI, still enters into an adjustment with the decree-holder out of Court and omits to take the necessary precaution of making an application within the time allowed by law, he has no just ground of complaint when the decree-holder takes advantage of his omission to seek the protection of the law. Further, it is not by any means clear that the judgment-debtor in a case of this description is really without any remedy, because it is well settled, as pointed out in the case of *Poromanand Khasnabish* v. *Khepoo Paramanick* (10), that it is open to the judgment-debtor who has been defrauded in this manner to institute a suit for damages for the fraud. It is also clear as laid down in *Madhub* v. *Novodeep* (11); *Queen-Empress* v. *Bapuji Dayaran* (12); *Queen-Empress* v. *Mutthu Ramon* (13) and *Queen-Empress* v. *Pillala* (14), that the decree-holder, who has recourse to such a fraudulent act, renders himself liable to proceedings under the Criminal Law. In the present case, therefore, even if the appellants were to fail in their contention, they would not be wholly without a remedy. The first contention of the appellants, therefore, fails.

In so far as the second contention is concerned, it raises the question whether the judgment-debtor has not in substance complied with the requirements of caluse (2), rule 2, Order XXI. The learned Vakil for the appellants has contended that the petition of objection presented to the Court below on the 25th of July 1910 may be treated as in continuation of the application made to this Court on the 5th of February 1909 in which the fact of the alleged adjustment was notified to the Court. In our opinion, this contention is well founded and must prevail. No doubt, an application under clause (2), rule 2, Order XXI, ought to be presented to the Court in which the decree is under execution; and it ought to call upon the Court to issue a notice to the decree-holder to show cause why the adjustment should not be recorded as certified. Tested from this point of view, the application of the 5th February 1909 might, at first sight, be deemed open to objection. But the circumstances of this case are of a very special character. No doubt, an application for execution of the decree of the Court below was pending before the Subordinate Judge, but the decree itself was under appeal to this Court; and the only decree which could ultimately be

(10) 10 C. 354.
(11) 16 C. 126.
(12) 10 B. 288.
(13) 4 M. 325.
(14) 9 M. 101.

enforced by the decree-holder against the judgment-debtor would be the decree of this Court, whether that decree be one of affirmance, reversal or modification. Consequently, when the judgment-debtors notified to this Court that the decree had been adjusted, it could not be said that they had not acted in accordance with law. No doubt, that application did not call upon the decree-holder to certify the alleged adjustment, but it was not necessary to take such a step at that stage. In fact, although the allegation of adjustment was made, it was not repudiated by the learned Vakil for the decree-holder respondent. On the other hand, the Vakil for the respondent gave up his costs not only in the rule but also in the appeal. The fact undoubtedly points to the conclusion that there must have been some arrangement between the parties. It is also inconceivable that if no arrangement had been entered into between the parties, the judgment-debtor after having paid Rs. 365 as Court-fees on the memorandum of appeal presented on the 8th of January 1909 should have voluntarily asked for leave to withdraw the appeal on the 5th of February 1909. It was only after the decree-holder had applied to the Court on the 6th June 1910 to execute the decree, ignoring the alleged adjustment, that it became necessary for the judgment-debtor to apply to the Court to compel the decree-holder to certify the adjustment in question. We, therefore, hold, under the circumstances of the case that, treating the application of the 5th February 1909 presented to this Court and the petition of objection presented to the Court below on the 25th July 1910 as parts of the same transaction, there was sufficient compliance with the provisions of the law. The Court is never astute to impose a technical bar so as to give effect to a scheme of fraud, and it would be lamentable if we were constrained to hold that the application of the 5th February 1909 in which the allegation of adjustment was made, was of no avail to the judgment-debtor for the purposes of proceeding under clause (2), rule 2, Order XXI. In our opinion, the Subordinate Judge ought to have entertained the objection taken in the application of the 25th July 1910 and investigated it on the merits. The second contention of the appellants must, therefore, prevail.

In so far as the third contention is concerned it is not necessary for us to determine whether it is well founded. But we must point out that the decree now under execution is a perfect specimen of the mode in which a decree ought never to be drawn up. The decree as it stands is unintelligible and cannot be executed without reference to the judgment, possibly also without reference to the pleadings. If the question arises later on as to whether, in the event of execution of the decree, the decree-holder is in any way fettered as to the manner in which she should proceed against the properties of the judgment-debtors, the question must be re-investigated by the lower Court with reference to all the proceedings in the suit. The question, therefore, will be left open for future investigation.

The result, therefore, is that this appeal is allowed, the order of the Sub-Judge set aside and the case remanded to him in order that the objections taken by the judgment-debtors in their application of the 25th July 1910 may be investigated as evidence.

Appeal allowed.

We must add that the Subordinate Judge took a very narrow view of his duties in this matter, when he held that as, upon the face of the pleadings the alleged adjustment purported to have been entered into between the judgment-debtors on the one hand and persons who are strangers to the proceedings, on the other, the adjustment could not be of any avail to the judgment-debtors. But the allegation of the judgment-debtors is that the adjustment was entered into for the benefit of the decree-holder with her husband and her father-in-law. If this be so, the Court will discover the real nature of the transaction, and not impose technical bars to effectuate a scheme of fraud; that is, in a matter of this description, the Court is bound to look to the substance and not to the mere form of the transactions placed before it.

The appellants are entitled to their costs in this Court. We assess the hearing fee at five gold *mohurs*.

BALMOKAND *v.* AYA SINGH.

PUNJAB CHIEF COURT.
CIVIL REVISION No. 3204 OF 1910.
November 19, 1911.
Present:—Mr. Justice Robertson.
BALMOKAND AND OTHERS—CREDITORS—PETITIONERS
versus
AYA SINGH AND OTHERS—APPLICANTS—RESPONDENTS.

Insolvency Act (III of 1907), s. 37—Transfer to give preference—Mortgage in favour of a creditor discharging his debts—Debtor unable to pay his debts at the time—Annulment of transfer—Transfer of Property Act (IV of 1882), s. 53.

A debtor, who was clearly unable to pay his debts, executed a mortgage of what appeared to be his whole valuable assets in favour of some of his creditors by which their own debts were discharged, some of these debts being on account of *hundis* which had not then become due. A portion of the mortgage-money was to be paid in cash to the debtor before the Sub-Registrar. Within three months from the date of the alienation, the other creditors applied that the debtor be declared an insolvent. Eventually, the debtor was declared an insolvent on this application:

Held, that the transfer was made with a view to give preference to some creditors over the others and should be annulled under section 37 of the Insolvency Act.

The terms of section 53 of the Transfer of Property Act and the terms of section 37 of the Insolvency Act are not identical. There is this material difference that in the case of transfers to be set aside under the provisions of section 53 of the Transfer of Property Act, actual fraud must be proved; whereas, under section 37 of the Insolvency Act, it is only necessary to show that the transfer has been made with a view to show preference to one creditor, to whom a debt may be validly due, over another creditor.

Petition, under section 47 of Act III of 1907, for revision of the order of the Divisional Judge, Rawalpindi Division, dated the 15th June 1910, confirming that of the District Judge, Rawalpindi, dated the 5th March 1910, adjudicating in the matter of the insolvency of the firm of Aya Singh and Sons, Rawalpindi, and annulling the mortgage executed by the insolvent in favour of Balmokand and others on 1st March 1909.

Mr. *Pestonji Dadabhai*, for the Petitioners.

Babu *Sewa Ram Singh*, Messrs. *Nand Lal* and *Nanak Chand*, for the Respondents.

JUDGMENT.—This application for revision, for it is no more, has been argued at great length before me, but it will not be necessary to dispose of it in a long judgment.

As regards the first point, whether or not the District Judge was right in declaring the debtors' firm to be insolvent, there is no doubt whatever. Harnam Singh's own statement is clear, and in Balmokand petitioner's own evidence ample reason for such an order was shown. It is not now seriously contended that that part of the order was wrong, and I accordingly hold that the firm of Aya Singh and Sons was correctly declared insolvent.

As regards the second point whether the mortgage executed by the debtors in favour of Balmokand and other petitioners should be declared to be valid, the case requires a little further consideration. It appears that on 1st March 1909 a mortgage-deed was executed by Aya Singh and Harnam Singh for Rs. 13,000 in favour of three persons, Balmokand, Ram Narain and Gokal Chand, the present petitioners. The debts due from the mortgagor to Balmokand and Ram Narain and to Fakir Chand, a relation of theirs, were paid off by this mortgage-deed and the balance in cash, a sum of Rs. 5,600, was to be paid before the Sub-Registrar on registration. It is to be noted that some of the debts to Balmokand and others discharged by this deed were on account of *hundis*, the payment of which was not yet due, the property mortgaged constituting the whole immoveable property and practically the whole of the valuable assets of the debtors. Immediately on hearing of this, a petition was presented by certain creditors of Aya Singh and Harnam Singh on the 4th May 1909, *i.e.*, within three months of the alienation, upon which an order declaring the debtors to be insolvent was finally passed by the District Judge on the 5th March 1910. In that order the matter of this alienation by mortgage was dealt with in the following words:—

"There can be no doubt as to the insolvency of the firm of Aya Singh and Sons or that Aya Singh having mortgaged the greater part of his immoveable property in favour of some of his creditors has absconded. He has, therefore, given undue preference to some of his creditors and has under section 4 (*c*) committed an act of insolvency. For the reasons given I order that the firm of Aya Singh be declared insolvent, and under section 37 of the Act that the mortgage deed dated the 1st March 1909 be deemed fraudulent and void and that it is hereby annulled, the petition having been

presented within three months of the said date, *i. e.*, on the 2nd May 1909".

The main contention in argument before me has been that, admitting that the order declaring the debtors to be insolvent may have been correct, the order annulling the mortgage was not so inasmuch as the mortgage was a *bona fide* transaction intended to benefit the creditors. The section of the Act which deals with this point runs as follows:—

"(1) Every transfer of property or of any interest therein, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the receiver and shall be annulled by the Court.

"(2) This section shall not affect the rights of any person who in good faith and for valuable consideration has acquired a title through or under a creditor of the insolvent."

It is argued that this mortgage was not executed with a view to give certain creditors a preference over the other creditors within the terms of that section. It is difficult, of course, to see into the mind of an alienor and we are only competent to judge by his actions. It is argued that a specific issue should have been framed in respect of this mortgage and opportunity given to the mortgagees to produce evidence on the subject."

We will deal with this point first.

It appears that on the 15th July a general issue regarding the insolvency of the debtors was drawn up but no specific issue as regards this mortgage. Balmokand was, however, present, and on that day he was instructed to produce evidence on the 27th July. On the 27th July no evidence was produced nor at any subsequent stage nor does any application appear to have been made to the Court for the production of evidence. It is, however, contended that the whole attention of the Court and the parties was concentrated on the necessity of producing Aya Singh who had absconded and never appeared. There were two changes of Officers during the progress of the case. On the 5th March 1910, the case came before Captain Frizelle. On that occasion Harnam Singh was present and was examined and it would have been open to the petitioners to have subjected him to any cross-examination which they considered necessary and desirable. On that occasion Balmokand was represented by Counsel and the first Court records that he admitted the execution of the mortgage-deed dated the 1st March 1909 in favour of his client but claimed that it should be secured. There is nothing to show that he desired to produce any evidence on the point nor is it very easy to see what evidence he could produce. The facts are patent on the record. Nor does he allege in his grounds of appeal to the learned Divisional Judge that any specific application was made for an opportunity to call evidence or any application made to frame a specific issue as to the validity of the mortgage-deed. The circumstances, therefore, appear to be these:—

Aya Singh and Harnam Singh were clearly unable to pay their debts. They executed a mortgage-deed of what appears their whole valuable assets in favour of Balmokand and other petitioners by which their own debts were discharged, some of these debts being on account of *hundis* which had not then even become due. It is urged that the balance was to have been used for the liquidation of the debts of other creditors, but it was not necessary to effect any such alienation as this, in order to divide the purchase-money among the creditors. The authorities quoted in favour of Mr. Pestonji's contention in support of the validity of this alienation in all cases deal with transfers in which section 53 of Transfer of Property Act is concerned. The terms of section 53 of Transfer of Property Act and the terms of section 37 of the Insolvency Act are not identical; there is this material difference that in the case of transfers to be set aside under the provisions of section 53 of the Transfer of Property Act actual fraud must be proved, whereas under section 37 of the Insolvency Act it is only necessary to show that the transfer has been made with a view to show preference to one creditor to whom a debt may be validly due over another creditor. This is a marked distinction between the cases and it appears to me that the circumstances

under which this alienation was made make it perfectly clear that it was made with a view to give preference to one creditor over another and that the order annulling it under section 37 was perfectly correct.

I accordingly reject the petition with costs throughout.

Appeal rejected.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 1713 AND 1714 OF 1909.

August 7, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

SITAL PROSAD—APPELLANT

versus

BAJRANGI SAHAI—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 2, O. XXII, r. 5—Legal representative, determination of question as to decree—Appeal—Death of party before new Civil Procedure Code—Order after new Civil Procedure Code—Application of new Code.

An order under rule 5 of Order XXII of the Code of 1908 determining the question as to who is the legal representative of a deceased party, is not a decree and is not appealable under the new Code, though it was appealable under the old Code.

Where the party died in 1908 but the order was passed in 1909 under Order XXII, rule 5: *Held*, that, the order must be treated as one under the new Code and it is not appealable.

Appeals from the order of the District Judge of Darbhanga, dated June 2nd, 1909, affirming that of the Sub-Judge of that place, dated May 4th, 1909.

Babus *Jogesh Chundra Roy* and *Suredra Nath Ghoshal*, for the Appellant.

Babu *Karunamoy Bose*, for the Respondent.

JUDGMENT.

SECOND APPEAL NO. 1713 OF 1909.

The only question of law which calls for decision in this appeal is, whether an order under rule 5 of Order XXII of the Code of 1908 is liable to be questioned on appeal as if it were a decree. Seven persons as plaintiffs commenced a suit against eight persons as defendants for a declaration that they were the reversionary heirs of one Phekulal and that certain alienations made by the widow of Phekulal were unauthorised and did not bind the estate in their hands. During the pendency of the suit in the Court of first instance, the first plaintiff Sheo Sahai died. Thereupon, on 21st September 1908, the other plaintiffs applied to have it noted that they were the representatives-in-interest of the deceased. On the 20th February 1909, the appellant before us, Sital Prosad, made an application to have it recorded that he, as the son of the daughter of Sheo Sahai, was entitled to carry on the suit. The result was that a question arose between Sital Prosad and the other plaintiffs as rival claimants to the interests originally vested in Sheo Sahai. The Subordinate Judge on the 4th May 1909 held that Sital Prosad had failed to satisfy him that he was the representative-in-interest of Sheo Sahai, and accordingly dismissed his application. Sital Prosad then appealed to the District Judge. Objection was taken at once that the appeal was incompetent and this objection prevailed. Sital Prosad has now appealed to this Court and on his behalf it has been contended that the order in question must be taken to have been made by the Subordinate Judge under the Code of 1882 and that consequently the appeal to the District Judge was competent. In the alternative it has been argued that the order was in the nature of a decree and that consequently a first appeal and a second appeal are both competent. In our opinion there is no foundation for either of these contentions. It will be observed that although Sheo Sahai died in 1908 before the new Code of Civil Procedure came into force, the application by the other plaintiffs for substitution was made on the 21st September 1908 while the application by Sital Prosad was made on the 20th February 1909. They were, however, both considered and disposed of under the new Code and the order of the 4th May 1909 must be treated as an order under rule 5 of Order XXII of the Code of 1908. Now, it has not been disputed that, although an appeal was allowed against an order under section 367 of the Code of 1882 by clause (18) of section 588, an order under rule 5 of Order XXII, is not appealable as an order under Order XLIII. But it has been argued that the order is in the nature of a decree. A reference to section (2) of the Code, however shows that there is no foundation for this contention. The term "decree" as defined in that section means the formal expression of an adjudication which so far as regards the Court expressing it, conclusively determines the right of the parties with regard to all or any of the matters in controversy in the suit. The

matter in controversy in the suit is the validity of the alienation made by the widow of Phekulal. Whether Sital Prosad or any of the other plaintiffs is the legal representative of the first plaintiff, Sheo Sahai, is obviously not a question in controversy in the suit. Consequently, it cannot be suggested that an order under rule 5 is in the nature of a decree. In fact, it is plain that an order under rule 5 really embodies a summary investigation in so far as the contesting claimants are concerned. It is not intended that such determination should have any operation beyond the scope of the suit itself; the rights of the conflicting claimants must, if necessary, be determined in a separate suit properly framed for that purpose.

The result is that this appeal is dismissed with costs.

It is conceded that this judgment will govern the other appeal (Second Appeal No. 1714 of 1909) which is also dismissed with costs.

Appeals dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 444 TO 456 OF 1910.

September 20, 1911.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Phillips.

P. B. VEDACHELLA MUDALIAR AND ANOTHER—APPELLANTS

versus

VIJAYARAGHAVACHARIAR AND OTHERS—RESPONDENTS.

Madras Estates Land Act (I of 1908), s. 77 and Sch. 8—"Arrear" whether includes interest—Suit for interest on rent due—Jurisdiction of Revenue Courts.

The word "arrear" in section 77 and the corresponding provision in Schedule A of the Madras Estates Land Act (I of 1908), includes interest due and payable on arrears of rent.

Revenue Courts have jurisdiction to entertain suits for interest due on arrears of rent.

Second appeals against the decrees of the District Court of Chingleput, in A.S. Nos. 368, 370, 360, 362, 367, 372, 373, 374, 375, 376 to 379 of 1909, respectively, against the decision of the Sub-Collector of Chingleput in Summary Suits Nos. 132, 134, 17, 25, 48, 145, 14, 16, 24, 36, 42, 46 and 131 of 1909.

Mr. *R. Subramamania Aiyar*, for the Appellants.

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondents.

JUDGMENT.—In this case the Sub-Collector and the District Judge concurred in holding that a suit for interest on arrears of rent is not cognisable by the Revenue Courts under the provisions of Madras Act I of 1908. The definitions of rent and of arrears in the Act no doubt, *prima facie*, support that view, rent being defined in section 3 as "whatever is lawfully payable in money or in kind or in both to a landholder for the use or occupation of land in his estate for the purpose of agriculture" and arrear being defined in section 60 as "an instalment of rent not paid on the day on which it falls due." Section 61 then enacts that "an arrear shall bear simple interest at the rate of one half per centum per mensem from the date on which the arrear fell due until it is liquidated." Section 77 (clause 1) lays down that at any time after an arrear of rent has become due the landholder may institute a suit before the Collector for the recovery of the arrear. It does not say of a suit for "arrear and interest" though sections 60 and 61 taken together would, *prima facie*, tend to show that the word "arrear" does not of itself include interest. Clause 2 of section 77, in stating what other remedy is open to the landholder for the realisation of arrears, says that he may distrain the moveable property of the *ryot*. It is clear from section 78 that the landholder is entitled to distrain unless both the arrear and interest which it says he is entitled to include in his demand are paid. This is made clearer by section 127 which refers to the sale of the immoveable property for arrears of rent and interest. On going carefully through the sections of the Act, we cannot but come to the conclusion that the word "arrear" was intended to include also the interest due on it (See sections 78 (2) (*a*), 87, 112 and 122). We can see no reason for supposing that the Legislature intended to give jurisdiction to the Revenue Courts exclusively to try suits for arrears of rent and to exclude from their jurisdiction claims to interest and arrears. *Prima facie*, Revenue Courts were regarded as best fitted to try claims for rent between landholders and *ryots*. Although the language of the sections is by no means as clear as might be desired, we

SAHIB v. USMAN.

are satisfied that the intention clearly was to include interest in the expression "arrear" in section 77 and in the corresponding provision in Schedule A. The decrees of the lower Courts must, therefore, be reversed and the suit remanded to the Sub-Collector for disposal on the merits. Each party will bear his own costs throughout upto date.

Second Appeals Nos. 445 and 456 of 1910 follow.

SECOND APPEALS NOS. 446 TO 455 OF 1910.

For the reasons given in our judgment in Second Appeal No. 444 of 1910, the decrees of the lower Courts in so far as they disallow interest on the arrears of rent claimed up to the date of plaint will be set aside. The decrees will be confirmed in other respects. The suits must be remanded to the Sub-Collector in so far as the claim for interest up to the date of plaint is concerned, for disposal according to law. No order about costs in this Court.

Decree modified.

PUNJAB CHIEF COURT.

CIVIL APPEAL NO. 444 OF 1910.

November 27, 1911.

Present:—Mr. Justice Chevis.

Musammat SAHIB—DEFENDANT—APPELLANT

versus

USMAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Succession—Biloch Khosas *of Sanghar Tahsil, District Dera Ghazi Khan—Collaterals of* 6th *degree whether exclude a daughter—Burden of proof.*

The *Riwaj-i-am* of a village provided as follows:—"No limit has been observed in the past as to the degree of relationship, but the 3rd degree has now been fixed in consultation as the limit up to which collaterals can exclude a daughter:

Held, that such an arbitrary rule can have no weight.

Civil Appeal No. 76 of 1896, followed.

Where among *Biloch Khosas* of Tahsil Sanghar, District Dera Ghazi Knan, the contest was between the daughter of a late owner and his collaterals in the 6th degree, and the daughter admitted that collaterals up to the 3rd degree only could exclude her: *Held*, that it was for the daughter to prove that collaterals of the 6th degree did not exclude her.

Second appeal from the order of the Divisional Judge, Multan Division, dated the 17th November 1909, affirming that of the Munsif, 1st class, Dera Ghazi Khan, dated the 14th September 1909, decreeing plaintiffs' claim.

Mr. *Nand Lal*, for the Appellant.

Mr. *Raushan Lal*, for the Respondents.

JUDGMENT.—The parties are *Biloch Khosas* of the Sanghar *Tahsil* of the Dera Ghazi Khan District. The contest is between the daughter of the late owner and the collaterals in the 6th degree. The lower Courts have decided in favour of the collaterals and the daughter appeals to this Court.

The collaterals rely on ordinary custom. The daughter relies on an alleged custom whereby collaterals up to the 3rd degree and no further exclude a daughter.

Reliance is placed on the *Riwaj-i-am* of 1872-73 in support of the daughter's contention, but though the rule is here laid down as stated by her it is not worded as an existing custom, but frankly owns that no limit has been observed in the past as to the degree of relationship, and that the 3rd degree has now been fixed in consultation as the limit up to which collaterals can exclude a daughter. Such an arbitrary rule can have no weight, as has been laid down in Civil Appeal No. 76 of 1896, which is a similar case though not relating to *Khosas*.

And the *Riwaj i am* of the later Settlement lays down that a daughter gets no share, except that she can get a share up to that allowed by Muhammadan Law if her father has left it her in writing. Counsel for appellant quotes a ruling dated 20th December 1893 of an Honorary Civil Judge holding powers of a 2nd grade Munsif; there was no appeal in this case and I cannot take it as binding on me, nor can I consider a single judgment of this sort as sufficient to prove a custom.

As to the instances cited by the witnesses, Counsel calls my attention to one cited by Ghulam Hussain but as it relates only to a case of one daughter succeeding to the whole property to the exclusion of the other daughters I fail to see what use it is. Other instances Counsel admits are not in point.

It is for the daughter, having admitted that collaterals exclude a daughter, to prove that only collaterals, up to the 3rd degree can so exclude and this she has failed to do.

Then it is alleged that she succeeds by gift. The deed of gift has been excluded by the lower Courts for want of registration

SHADI KHAN *v.* BEEBEE UMDAN BEGAM.

Counsel relies on *Imam Bakhsh* v. *Karim Shah* (1) but here the deed is a simple deed of gift to take effect at once, so the ruling cited is inapplicable. Counsel then argues that the daughter held possession even prior to the writing of the deed, which was merely the record of an already accomplished fact. The deed, however, does not say this, and the plea seems to me a new one. Even if ground No. 6 of appeal to the Divisional Judge meant to plead this, the plea was apparently never raised in the first Court; had it been raised, an issue could have been framed and the matter inquired into. I think the Courts have rightly held the deed to be inadmissible in evidence. I uphold the decree of the lower Courts and dismiss the appeal with costs.

Appeal dismissed.

(1) 16 P. R. 1895.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 756 OF 1909.

November 24, 1911.

Present:—Mr. Justice Johnstone and Mr. Justice Shah Din.

SHADI KHAN—DEFENDANT—APPELLANT

versus

Musammat BEEBEE UMDAN BEGAM—PLAINTIFF—RESPONDENT.

Muhammadan Law—Dower—No dower named at marriage—Excessive amount named in earnest—Excessive amount named for "show"—"Proper dower," tests for determining—Limitation Act (IX of 1908), s. 5—Pauper appeal barred technically—"Sufficient cause", for extending time.

Where no dower is proved to have been named at marriage, "proper dower" according to Muhammadan Law should be allowed.

Where a dower, excessive in respect of the means of the husband, was promised in earnest, it cannot be reduced in the absence of custom allowing reduction.

Where an excessive dower was promised but only for "show", "proper dower" should be allowed, and in estimating the amount of such dower the status of the husband should be taken into account.

Obiter—"Proper dower" varies according to social position of the woman's family, *the wealth of her husband*, her own personal qualifications, the circumstances of the time and the conditions of society surrounding her.

Against a decree dated 18th May 1908, the defendant applied to the Chief Court on 16th June 1908 for leave to appeal as a pauper. An inquiry as to his financial condition having been ordered on 24th February 1909, the District Judge reported that he was a pauper. After that his father died leaving property which he inherited. Upon this the Chief Court held that he was not a pauper and in compliance with the Court's order he paid the necessary Court-fee on 21st June 1909:

Held, that under the circumstances, the appellant was entitled to the benefit of section 5 of the Limitation Act.

Intzam Begam v. *Waziran*, 47 P. R. 1899; *Durga Charan* v. *Dookhi Ram*, 26 C. 925, followed.

Second appeal from the order of the District Judge, Ferozepore, dated 18th May 1908, decreeing plaintiff's claim in part.

Shaikh *Taj-ud-Din*, for the Appellant.

JUDGMENT.

JOHNSTONE, J.—We have postponed consideration of our judgment in this case for a week because respondent, though served, did not appear and Counsel for appellant intimated that he had not heard from his client, these circumstances raising a suspicion that the case had been settled out of Court. We have now ascertained from respondent who appeared in person, that no compromise had taken place and we, therefore, proceed to judgment

The first point for decision is, whether the appeal is or is not barred by time. The lower Court's decree bears date 18th May 1908. On 15th June 1908 defendant-appellant applied for leave to appeal as a pauper. Inquiry into his financial condition was ordered and on 24th February 1909, the District Judge reported him a pauper. After that, however, his father died leaving property which he inherited and this Court then held that he was not a pauper. On 21st June 1909, obeying this Court's order, he paid the necessary Court-fee, Rs. 125. We have been referred to *Intizam Begam* v. *Waziran* (1), *Durga Charan* v. *Dookhi Ram* (2). The latter case being very similar to the present in its facts in this connection and it seems to us impossible to dismiss the appeal as time-barred. Technically, it may be time-barred, but it seems clear to us that the case is eminently one in which section 5, Limitation Act, should be invoked. Appellant was really a pauper until his father died and after that he carried out the order of this Court to the letter. We hold, therefore, that the appeal is within time.

The claim was against a husband for "prompt dower." It is said that Rs. 30,000 was claimable as such but that on account of poverty plaintiff would content herself with asking for Rs. 10,000. Plaintiff impleaded

(1) 47 P. R. 1899.

(2) 26 C. 925.

SHADI KHAN v. BEEBEE UMDAN BEGAM.

her father-in-law as well as her husband, The former according to plaintiff having stood as surety. The promise to pay Rs. 30,000 prompt dower was admittedly oral. Father and son put in a joint written statement in which they urged that it was never intended that such a promise as that of Rs. 60,000 as dower should be enforced, sums of that sort being stated among *Pathans* merely for purposes of ostentation, that in this case dower was fixed "according to Muhammadan custom"; that dower should only be allowed "according to the position of the parties", that defendants are poor and so forth, and that the suit should be dismissed with costs.

Issues were drawn up thus,—

(1) Was plaintiff's prompt dower on her marriage fixed at Rs. 30,000?

(2) Did defendant make a verbal contract with plaintiff for payment of this dower?

(3) Did defendant No. 2 contract with plaintiff to be surety for payment of such dower by defendant?

(4) If plaintiff succeeds in her claim for dower is defendant No. 2 jointly liable with defendant No. 1, therefore, (whatever its amount) by reason of their being joint owners of property?

(5) If plaintiff is entitled to dower from defendant No. 1, what is the proper amount of it?

The onus was laid on plaintiff in respect of the first four issues and "on the parties" in respect of the fifth.

The last issue was—

(6) Is plaintiff in possession of any property taken from either or both defendants which should be set off as part of that amount? Onus on defendant.

The District Judge finally decreed Rs. 2,000 against defendant No. 1 alone with costs. Defendant No. 2 having died, we need not go into the question of his liability at all. The reasoning of the District Judge may be briefly summarised thus:—

The engagement to pay Rs. 60,000 was entered into but only "for show" and is not enforceable. Defendants have failed in their attempt to prove that Rs. 53 was all that was promised. In the early part of the case defendants never thought of alleging that a small sum like this had actually been promised. Defendants tried to compromise the claim by offering Rs. 1,750 and this fact should be used in estimating what is a reasonable sum to award.

Defendant No. 1's eldest brother actually paid Rs. 2,000 as prompt dower to his bride. The circumstances to be taken into account are "the social position and wealth of the parties, the custom prevailing in their families and the status of the bride." The bridegroom belongs to a well-to-do family, but the bride does not. Therefore, Rs. 2,000 is a fair amount.

The appeal is based on the contentions that the Court below erred in estimating the "proper dower", and that the amount alleged being found a mere sham, Rs. 13·4, the minimum *sharai* "prompt dower" should have been decreed. There having been no appearance for the plaintiff-respondent and, therefore, no arguments on her behalf, we must take it that she simply supports the view of the Court below.

The first question then is, what was actually mentioned at the marriage as the dower to be paid? Lower Court says Rs. 60,000. Defendants said in their pleadings that dower was promised "according to Muhammadan custom" and they attempted to prove by evidence that Rs. 53 was named. In my opinion the lower Court is right in holding that this attempt was a complete failure and on the other side we have plaintiff's witnesses Nos. 1, 2, 3, 5 and 6 who swear that Rs. 60,000 was named. Whether this was named in earnest or not, I am convinced it was named and I would hold accordingly.

The next question is, whether the parties intended this large sum should be paid, a question to be answered in the light of surrounding circumstances. As defendant promised the sum, it is for him to show the promise was known by the opposite party to have been a mere sham. There is no direct evidence that this was so, and the indirect indications in the file are these. *First*, in a suit filed in the same year in which this marriage took place (1902), between *Pathans* of the adjoining District of Ferozepore, it was held that a dower of Rs 60,000 had been promised probably in earnest and the contract was enforced—See page 2, paper-book. The only essential difference between that case and this is that there the husband was a wealthy man, while here he is said to be "not wealthy" but merely well-to-do. *Secondly*,

SHADI KHAN v. BEEBEE UMDAN BEGAM.

plaintiff's witness No. 2 says Rs. 60,000 is customary "amongst us *Pathans*" and adds that at the wedding Rs. 1,000 or 1,100 worth of jewels and clothes were given. This implies no inconsiderable opulence in the husband and is recognition that the bride was a woman of some importance. *Thirdly*, plaintiff's witnesses, Nos. 3, 5, 6 and 7 all corroborate this account of marriage gifts to plaintiff. What witness No. 3 gave his own wife who was of an unknown tribe, not *Pathan*, is neither here nor there. *Fourthly*, plaintiff's witness No. 5 says defendants were worth Rs. 20,000 or Rs. 25,000 and plaintiff's father Rs. 8,000 or Rs. 9,000. *Fifthly*, witness No. 3 says defendant-appellant was first married to his daughter and promised her Rs. 60,000 as dower, but, when she was dying, got her to remit it. If this is true, defendant-appellant did not consider the promise a mere sham; and I see no good reason to doubt the statement. What plaintiff's witness No. 6 actually paid as dower to his wife is immaterial as we do not know she was one of plaintiff's female relatives.

Turning to defendant's evidence, the first witness does not help. What his sister got as dower proves nothing. A similar remark applies to the fourth witness and the dowers of his wives and to defendant No. 2 examined as a witness page 24, as regards the dowers of his wife and defendant No. 1's second wife, neither being stated to be a female relative of plaintiff.

My conclusion from the above is that defendant No. 1 has not proved that the promise to pay Rs. 60,000 was a mere sham in the proper sense of the phrase. The District Judge has, however, found that this sum was named "simply for show," and I am, therefore, perhaps precluded, in the absence of argument by plaintiff against the District Judge's finding, from holding the opposite; but I consider that I am not precluded from holding, on the above evidence, that the parties though they may have recognised that Rs. 60,000 was an excessive amount did not have in their minds any idea that plaintiff, as the price for surrendering her person to defendant No. 1, was valued at a nominal sum like Rs. 53. The third question is what is the "proper dower" in the present case on the hypothesis that Rs. 53 was not named and that Rs. 60,000 was named only for show. In connection with this I have consulted several text-books on Muhammadan Law and all the rulings I have been able to find bearing directly or indirectly on the question. These rulings I have noted below*.

The gift of *Shah Nazam-ud-din Ahamad* v. *Bibi Husaini* (3) that, if dower is to be estimated, the amount should be based on what it is customary for the wife's family to receive and not for the husband's family to give, though the means and position of the husband must not be wholly excluded from consideration.

In *Sugra Bibi* v. *Masuma Bibi* (4) the Judges refused to reduce the dower actually promised, even though payment might swallow up the whole estate.

In *Ahmad Hoosein* v. *Khadjia* (5) it seems to have been recognised that dower might have to be estimated.

In *Mulakh Do Alum Nawab Tajdar* v. *Mirza Jehan Kudr* (6) the Privy Council pointed out that under the Punjab Civil Code, held to be in force at the time in Oudh, the Courts could reduce dower to a reasonable figure.

But in *Suleman Kadr* v. *Mehdi Begum* (7) the same authority ruled, apart from the Punjab Code, that Courts in Oudh could not reduce dower below what was actually promised.

In *Ladoo* v. *Mahumdee* (8) it was ruled that a Court need not award full amount mentioned at marriage but could award a reasonable sum in accordance with the husband's position and the facts of the case.

In *Sahibzadi Begam* v. *Said-ul-Nisa Begam* (9) half a lakh had been claimed. Two principles were laid down, *first*, the Court cannot reduce to a "reasonable" figure a sum proved to have been promised, except on proof of custom allowing such reduction; *secondly*, but if

(3) 4 W. R. 110.
(5) 2 A. 573.
(5) 10 W. R. 369.
(6) 10 M. I. A. 252; 2 W. R. (P. C.) 55.
(7) 21 C. 135; 20 I. A. 144.
(8) 49 P. R. 1867.
(9) 123 P. R. 1880.

Shah Nazam-ud-din Ahmad v. *Bibi Hussaini*, 4 W. R. 110; *Sugra Bibi* v. *Masuma Bibi*, 2 A. 573: *Ahmad Hoosein* v. *Khadija*, 10 W. R. 369; *Mulkah Do Alum Nawab Tajdar* v. *Mirza Jehan Kudr*, 10 M. I. A. 252; 2 W. R. (P. C.) 55; *Suleman Kadr* v. *Mehdi Begam*, 21 C. 135; 20 I. A. 144; *Ladoo* v. *Mahumdee*, 49 P. R. 1867; *Sahibzadi Begam* v. *Said-ul-nissa Begam*, 123 P. R. 1880; *Muhammad Wazir Beg* v. *Fatima Begum*, 7 P. R. 1881; C. A. No. 980 of 1894, (Chief Court Punjab.)

Court finds the sum promised was merely nominal, the woman should get the "proper dower" under Muhammadan Law.

In *Muhammad Wazir Beg* v. *Fatiman Begum* (10) the facts were peculiar. Rupees 7,000 was found to have been promised and not to have been unreasonable at the date of the promise. Much less was claimed and still less awarded by the Court below and accepted by plaintiff.

Lastly, in the unpublished ruling C. A. No. 980 of 1894 of this Court, it was laid down that, where no dower was found to have been fixed at marriage, no reduction from an "unreasonable" to a "reasonable" sum was possible, and so Rs. 26-8 was awarded. It is pointed out that according to the evidence in that case the custom among the *Pathans* of Kasur, to which tribe the parties in the present case also belong, the custom was not to reduce large dowers but to pay nothing at all. It cannot be said that in the present case any such custom has been established.

It seems to me that the apparent conflict between the authorities is of a superficial kind, if we leave out the Chief Court case of 1837, as we can safely do in view of the two later rulings. There are three possible cases:—

(*a*) where no dower is proved to have been named at marriage;

(*b*) where a dower, excessive in respect of the means of the husband, was promised in earnest;

(*c*) where an excessive dower was promised but only for show.

As regards (*a*) we can, for the purposes of the present case, rule out C. A. No. 980 of 1894 because there a special custom that *nothing* is paid was found established; and we are left with *Shah Nazam-ud-din Ahamad* v. *Bibi Husaini* (3) which in effect lays it down that "proper dower" according to Muhammadan Law should be allowed.

As to (*b*) we have *Sugra Bibi* v. *Masuma Bibi* (4) and *Suleman Kadr* v. *Mehdi Begum* (7) forbidding reduction of dower promised in earnest. The Privy Council ruling in *Mulkah Do Alum Nawab Taidar* v. *Mirza Jehan Kudr* (6) need not be taken into account as it is based on the Punjab Civil Code. *Sahibzadi Begam* v. *Said-ul-Nisa Begam* (9) lays it down that reduction is inadmissible in the absence of custom allowing reduction; and *Muhammed Wazir Beg* v. *Fatima Begam* (10), as shown above, is not in point and is not in conflict with the Allahabad or Calcutta case.

As to (*c*) we have really on the second principle laid down in *Sahibzadi Begam* v. *Said-ul-Nisa Begam* (9) that in such cases "proper dower" should be allowed.

I have gone into this detail because I think an attempt should be made to classify and so to show clearly the principles on which Courts in this Province should act. The present case comes under class (*c*); and we must allow "proper dower", if it can be ascertained, and in default *sharai* dower, which is quite a different thing and may be taken as Rs. 26-8-0.

As regards the manner of estimating "proper dower," we have the aforesaid *dictum* in *Shah Nazam-ud-din Ahmad* v. *Bibi Husaini* (3); at first sight there seems to be a conflict between this *dictum* and the rules laid down in certain commentaries on Muhammadan Law, but I am of opinion that the conflict is only apparent. In effect, I take the Weekly Reporter ruling to mean that the husband's *status* is to be taken into account. Thus, though in Mulla's Principles of Muhammadan Law (1905) page 155, it stated that the "proper dower" for a woman is the average dower given to her father's female relatives, this a bald statement and evidently incomplete. Bailie's Digest of Imamiea Law, p. 71, gives as the criteria nobility of the woman, beauty of her person and custom of her female relatives. Nothing is said one way or the other as to husband's *status*, and the rule laid down, as we shall presently see, is clearly imperfect. Next, in his Digest of Anglo Muhammadan Law, 3rd Edition, page 120, Sir Roland Wilson says it is "doubtful" whether the husband's means should be taken into account at all. But when we turn to the other and more detailed commentaries we see that the husband's *status* cannot be left out of consideration.

In Boyle's Manual of Law relating to Muhammadans (1873), page 61, there is a hint that it is not right only to take into account the dowers given to females of the woman's father's family, for it is said that those dowers should be taken into account when those females are on a footing of equality with her. In B. N. Baillie's Digest, page 95, while it is said that the dowers of her father's

(10) 7 P. R. 1881.

female relatives but not of her mother are to be taken into account, yet, when comparison is made between her and for instance her sister, the sister's husband's *status* as compared with her husband's *status* must be considered. Turning to an authority probably greater than any of these, Amir Ali's Muhammadan Law, 3rd Edition, Volume II, page 476, the learned author notes that Radd-ul-Muhtar allows consideration of the *mother's* position, and that both Radd ul Muhtar and the Fatawa-i-Alamgiri lay it down that, in comparing a woman to her sister or other relatives, the latter's husband must be of similar standing to her husband; and, therefore, page 477, "proper dower" varies according to "social position of the woman's family, *the wealth of her husband*, her own personal qualifications, the circumstances of the time and the conditions of society surrounding her." Finally, Abdur Rahman in his Institutes of Musalman Law (1907), Article 77, includes "the condition of the husband" as one of the tests of "proper dower."

Basing my opinion on these authoritise, I would overrule the contention of defendant's Pleader that in estimating "proper dower" the husband's *status* is not to be taken into account.

There is no evidence as to actual dowers paid in plaintiff's father's family to females of that family. Neither party has been able to give any instances, and we are left to the other indications detailed in the account of the evidence of the parties given earlier in this judgment and to the circumstance that defendant's father, late defendant No. 2, tried to compromise the case by offering some 7½ *ghumaos* of land or Rs. 1,700 cash in lieu of dower—See P. W. 4 and the judgment of the Court below. Taking all this into account, it seems to me that plaintiff has shifted to the shoulders of defendant the *onus* of showing that Rs. 2,000 is more than the "proper dower", and this *onus* is undischarged.

For these reasons I would dismiss the appeal with costs.

SHAH DIN, J.—I agree generally in the foregoing judgment and in dismissing the appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 972 OF 1910.

November 28, 1911.

Present:—Mr. Justice Robertson.

FATEH DIN AND OTHERS—DEFENDANTS—APPELLANTS

versus

ALLAHA DITTA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Alienation—Vergal *or* Bargal Jats *of Jhelum District—Will by a sonless* Vargal.

A *Bargal* sonless Muhammadan *Jat* of the Jhelum District cannot validly bequeath his property by Will to his daughter's sons in presence of agnate collaterals.

Second appeal from the order of the Divisional Judge, Jhelum Division, dated the 6th June 1910, affirming that of the Munsif, 1st class, Jhelum, dated the 9th March 1910, decreeing plaintiff's claim.

Mr. *Nand Lal*, for the Appellants.

Bakhshi *Gokal Chand*, for the Respondents.

JUDGMENT.—The parties are *Vargal* of *Bargal Jats* of the Jhelum District.

The question for decision here is simply, can a *Bargal* sonless proprietor validly bequeath his property by Will to his daughter's sons in presence of agnate collaterals?

Now, it appears that the deceased Atar made several previous attempts to alienate this land in favour of his daughter's sons and there is no question of his desire and intention to bequeath the land to him. He endeavoured to do so first by means of an alleged adoption. The parties are Musalman *Jats* and it was held that amongst this tribe such an adoption is not valid. Then he endeavoured to alienate part of this land by sale to his daughter's sons Feroze, etc. That alienation was contested by the same reversioners who are plaintiffs in this case and it was then decided *inter partes* that Atar had no power to alienate his property even by sale with possession in presence of the collaterals. It is now sought to establish in a suit in which some, at any rate, of the parties are the same that although it has been decided that Atar had no power to alienate by adoption and further he had no power to alienate by sale, he has the power to bequeath his land by Will.

None of the instances produced of alienation by Will are cases which have occurred amongst this actual tribe of *Vargal Jats* except one which is of too recent a date to form a precedent. Some of the other cases are cases

occurring amongst other *gots* of *Jats* and these cannot be excluded from consideration as *Jats* of the Jhelum District probably follow practically identical custom, though they could not be held of the same value in cases of the same *got*. The answer of the *Jats* recorded at pape 54 of Talbot's Customary Law of Jhelum District is vague and unsatisfactory. In the ordinary course of events the right of alienation by Will follows upon the creation of the right to alienate *inter vivos*, but it is impossible to hold in this case that it can be said to exist in this tribe. It is, however, very significant that it has been decided in a suit in which some of the parties were indentical with those in this suit, (in which the broad issue of the power of Atar to alienate was drawn) that he had no power to alienate in any way in the presence of his collaterals without proving necessity. I prefer to base my judgment, that of a single Judge, largely upon this precedent and the actual evidence on the record rather than upon any broad consideration of the question of custom of the *Vargal jats*.

I accordingly dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 741 TO 743 OF 1910.

November 16, 1911.

Present:—Mr. Justice Abdur Rahim.

RAMANATHAN CHETTIAR AND ANOTHER —PETITIONERS

versus

SOKKANATHA GOUNDEN AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), *s.* 232-- *Oral assignment of decree—Whether application in accordance with law—Step-in-aid of execution—Limitation.*

The effect of section 232, Civil Procedure Code, 1882, is that no application for execution based on an oral assignment of the decree, can be entertained at all by Courts. Such an application is not one in accordance with law, nor is it a step-in-aid of execution. The assignee of a decree under an oral assignment has no *locus standi* at all to apply for execution.

Parvati v. *Digambar*, 15 B. 307, followed,

Hafizudin Chowdhuri v. *Abdul Aziz*, 20 C. 755, not approved.

Brojonath v. *Iswar Chundra Dutt*, 19 C. 482 and *Mangal Khan* v. *Salimulla Khan*, 16 A. 26, distinguished.

Where an application by a verbal assignee for execution of the decree has been dismissed it will not have the effect of enlarging the time even if written assignment is subsequently obtained after the expiry of limitation.

Petitions, under section 25 of Act IX of 1887, praying the High Court to revise the orders of the District Munsif of Erode, dated 6th August 1910, in E. P. Nos. 4311, 4312 and 4313 of 1907 respectively in S. C. S. Nos. 3121, 3128 and 3135 of 1902 respectively.

Mr. *T. M. Krishnaswamy Aiyar*, for the Petitioners.

Mr. *S. S. Vencatramana Iyer*, for the Respondents.

JUDGMENT.

IN C. R. P. No. 741 OF 1910.

The question of law involved in this case is, whether an application for execution of a decree made by a person who purported to be assignee of the decree by oral transfer can be regarded as an application in accordance with law or as a step-in-aid of execution, the assignee having, after the dismissal of the application and after the period of limitation had lapsed, obtained an assignment in writing. Section 232 of the old Code of Civil Procedure, 1882, says that if a decree be transferred by assignment in writing or by operation of law from the decree-holder to any other person, the transferee may apply for its execution; this means that the Court cannot, for purposes of section 232, recognize any other mode of transfer, such as an oral transfer. As pointed out in *Parvati* v. *Digambar* (1), as assignee of a decree under an oral assignment has no *locus standi* at all to apply for execution. Then, how can it be said that an application by such an assignee may still be in accordance with law, or a step-in-aid of execution. I think the position of the petitioners is clearly untenable; and their learned Vakil has not been able to adduce any authority in its support. Of the cases cited, those nearest to the point are the cases which lay down that an application by a representative of a deceased decree-holder for execution of the decree might be regarded as being in accordance with law or a step-in-aid of execution, even if the application is not accompanied with a succession certificate. But section 4 (1), clause (*b*) of the Succession Certificate Act (VII of 1889) merely lays down that the Court shall not proceed to execute the decree until the certificate is produced, and not that the representative cannot make the application until he has obtained the certificate. [See *Brojonath Surma* v.

(1) 15 B. 307.

Iswar Chundra Dutt (2) and *Mangal Khan* v. *Salimullah Khan* (3)]. The effect of section 232, Civil Procedure Code, 1882, however, is that no application based on an oral transfer can be entertained at all, and it would, therefore, be impossible to treat such an application as being in accordance with law, or as having the effect of furthering execution. The Court not having the power to recognize such an application, this application must be regarded in law as having no sort of effect. I may mention that the Vakil for the petitioners very rightly refrained from contending that I should ignore the provisions of the Civil Procedure Code in considering whether an application for execution is in accordance with law or is to be regarded as a step-in-aid of execution, because the Civil Procedure Code of 1882 was enacted after the Limitation Act came into force. Such a view seems to have been taken in *Hafizuddin Choudhri* v. *Abdul Aziz* (4), but it is contrary to a series of decisions and is obviously untenable. I hold, therefore, that the order of the District Munsif is right. The petition is dismissed with costs.

IN C. R. P. NOS. 742 AND 743 OF 1910.

These petitions follow C. R. P. No. 741 of 1910 and for the reasons recorded in the judgment therein C. R. P. No. 743 of 1910 is dismissed with costs and C. R. P. No. 742 of 1910 is dismissed.

Petitions dismissed.

(2) 19 C. 482. (3) 16 A. 26.
(4) 20 C. 755.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1050 OF 1910.

November 21, 1911.

Present:—Mr. Justice Banerjee and Mr. Justice Tudball

JAGAR NATH OJHA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAMPHAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), *O. XXI, r.* 35—*Suit and decree for joint possession.*

An action for joint possession is maintainable and a decree for such possession must be given unless the Court deems it unreasonable in the interests of all the parties concerned to pass such a decree.

Phani Singh v. *Nawab Singh*, 28 A. 161; A. W. N. (1905) 233, dissented from.

Bhairon Rai v. *Saran Rai*, 26 A. 588, followed.

Rahmat Chaudhri v. *Salamat Chaudhri*, A. W. N. (1901) 48; *Watson and Company* v. *Ram Chand Dutt*, 18C· 10; 17 I. A. 110; *Bhola Nath* v. *Busken*, A. W. N. (1894) 127, referred to.

Second appeal from the decision of the District Judge of Ghazipur, dated the 27th June 1910.

Mr. *Surrendro Nath Sen*, for the Appellants.

Mr. *Ahmed Kareem*, for the Respondents.

JUDGMENT.—The only question in this appeal is whether a plaintiff who had never been in possession but was entitled to possession jointly with other persons could be granted a decree for joint possession. The facts of the case are fully set forth in the order of our brother Chamier by which he referred this case to a Bench of two Judges. They are briefly these:—The property in suit, which is a share of *zemindari* originally belonged to one Lachhmi Ojha. It passed on his death to his widow, and on the widow's death to the plaintiff, to the respondents and to others. As the plaintiff did not obtain possession of the property, he brought the suit out of which this appeal has arisen, for possession jointly with the defendants. He also claimed damages but that part of the claim has not been pressed in this Court. Other reliefs were asked for with which we are not concerned in this appeal. The Court of first insance decreed a part of the claim but refused to grant a decree for joint possession. This decree was affirmed by the lower Appellate Court. The contention before us is that a decree for joint possession ought to have been passed in the plaintiff's favour. For the opposite contention reliance is placed upon the decision of a Bench of this Court in *Phani Singh* v. *Nawab Singh* (1). That case, no doubt, supports the view taken by the Courts below but, with great deference, we are unable to agree with it. In the Full Bench case of *Bhairon Rai* v. *Saran Rai* (2), it was held that where the plaintiff had been ousted from joint possession by the defendants, a decree could be made in his favour for restoration to joint possession. We fail to see that on principle there is any distinction between the case of a person who was in joint possession but was subsequently dispossessed and the case of a person who was entitled to joint possession but had not obtained such possession. As pointed out by our brother Chamier, an action for joint possession is a well known form of action both in England and in this country and, before the decision of the case of *Rahmat Chaudhri* v. *Salamat Chaudhri* (3),

(1) 28 A. 161, A. W. N. (1905) 233.
(2) 26 A. 588.
(3) A. W. N. (1901) 48.

decrees were always made for such possession. There may, no doubt, be cases in which the Court may not deem it reasonable in the interests of all the parties concerned to make a decree for joint possession. An instance of such a case is that of *Watson and Company* v. *Ram Chand Dutt* (4). Another case of the same kind is that of *Bhola Nath* v. *Buskin* (5). That a decree for joint possession can be made has until recently in this Court always been regarded as settled law but if any doubt existed on the point, it has been removed by the clear provisions of Order XXI, rule 35 of the present Code of Civil Procedure. In our opinion the circumstances of the present case are such as to entitle the plaintiff to a decree for joint possession. The Courts below were, therefore, wrong in not granting him such a decree. We accordingly allow the appeal, and vary the decree of the Courts below by adding to the decree made by those Courts a decree in the plaintiff's favour for joint possession of the property decreed. The appellant will have his costs in this Court and in the Courts below.

Appeal allowed.

(4) 18 C. 10; 17 I. A. 110.
(5) A. W. N. (1894) 127.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL NO. 150 OF 1910.
November 13, 1911.
Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.
SHAMINATH CHOUDHRI—PLAINTIFF—APPELLANT
versus
RAMJAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Compromise decree—Compromise obtained under undue influence—Suit to set aside the decree whether maintainable.

A suit to set aside a consent decree obtained under undue influence is maintainable.

Hadders Field Banking Company, Limited v. *Henry Lister and Son, Limited*, (1895) 2 Ch. 273; 64 L. J. Ch. 523; 12 R. 331; 72 L. T. 703: 43 W. R. 567; *Musammat Golab Koer* v. *Badshah Bahadur*, 2 Ind. Cas. 129; 13 C. W. N. 1197; *Sarvesh Chandra Basu* v. *Hari Dayal Singh*, 5 Ind. Cas. 236; 14 C. W. N. 451; 11 C. L. J. 346, referred to.

First appeal from the decision of the Additional Subordinate Judge of Gorakhpur.

Dr. *Tej Bahadur Sapru* (with him Mr. *Ramakant Malviya*), for the Appellant.

Mr. *Choudhri* (with him Messrs. *Govind Pershad* and *Purshottam Das*), for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the appellant to set aside a decree for partition of a joint family property which was passed upon compromise between the parties. The ground of suit is that the consent of the appellant to the compromise was obtained by undue influence exerted on him by the defendant-respondent Ramjas Chaudhuri. The suit has been dismissed by the Court below on the ground that no such suit is maintainable. The Subordinate Judge was of opinion that a decree could not be set aside by suit except on the ground of fraud or collusion. In the course of his judgment, he refers to section 44 of the Evidence Act. But that section does not purport to enumerate the grounds on which a decree can be attacked by a separate suit. There are cases, no doubt, which suggest that where a decree is attacked by a party on any ground other than that of fraud, he should proceed by way of motion or application for review of judgment. But all the recent authorities are to the effect that whether or not a party may proceed by way of motion or application for review of judgment he may proceed by suit. In the case of the *Huddersfield Banking Company, Limited* v. *Henry Lister and Son, Limited* (1) a consent order had been made for the sale of some power looms. The Banking Company afterwards ascertained that the power looms had been affixed to certain mills so as to become part of the property comprised in a mortgage security. At the time of the consent order it was supposed that the machinery was not affixed to the mills and, therefore, was not part of the security. The Company brought an action to have the order set aside. The action was resisted on the ground that the arrangements having merged in an order of the Court could not be set aside. Vaughan Williams, J., said "The real truth of the matter is that the order is a mere creature of the agreement, and to say that the Court can set aside the agreement and it was not disputed that this could be done if a common mistake were proved but that it cannot set aside an order which was the creature of that agreement seems to me to be giving

(1) (1895) 2 Ch. 273; 64 L. J. Ch. 523; 12 R. 331 72 L. T. 703; 43 W. R. 567.

the branch an existence which is independent of the tree. Under the circumstances I have come to the conclusion that I can set aside the order and give effect to what are the true rights of the parties." His views were affirmed by the Court of Appeal. Lindley, L. J., said "I have not the slightest doubt that a consent order can be impeached not only on the ground of fraud but on any grounds which invalidate the agreement which it impresses in a mere formal way than usual. In my mind the only question is whether the agreement on which the consent order was based can be invalidated or not. Of course, if that agreement cannot be invalidated, the consent order is good. If it can be, the consent order is bad." Lopes and Kay, L. JJ., expressed themselves to the same effect. The decision in that case was followed in *Musammat Golab Koer* v. *Badshah Bahadur* (2) and in *Sarbesh Chandra Basu* v. *Hari Dayal Singh* (3). The judgment of the Court in the last mentioned case contains an exhaustive review of the authorities both as to the grounds on which a decree obtained by consent or upon a compromise can be attacked and as to the procedure to be adopted in such cases. In our opinion the decision of the Court below is wrong. We allow the appeal, set aside the decree of the Subordinate Judge, and remand the suit in order that it may be restored to the file of pending cases and disposed of according to law. Costs which in this Court will include fees on the higher scale will be costs in the cause.

Appeal allowed.

(2) 13 C. W. N. 1197; 2 Ind. Cas. 129.

(3) 14 C. W. N. 451; 5 Ind. Cas. 206; 11 C. L. J. 346.

MADRAS HIGH COURT.

CIVIL APPEAL AGAINST ORDER No. 58 OF 1908.

October 19, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Abdur Rahim

SRIRANGA BUPALA BALAI RAO GARU AND ANOTHER—APPELLANTS

versus

RAJAH DAMARA KUMARA THIMMA NAYANIM BAHADUR VARU AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 375 A—Compromise in execution—Subsequent application for execution on basis of compromise—Estoppel—Question of law

In execution of a decree a compromise was effected by the parties as to the mode of satisfying the decree and accepted by the Court which dismissed the execution application then pending and directed that if the parties did not adhere to the compromise a fresh application for execution would have to be filed. Thereafter, several payments were made in accordance with the compromise but the whole amount due not having been paid it was sought to realize the balance in execution when the defendant contended that the terms of the compromise could not be enforced in execution:

Held, that the defendant was estopped from contending that the terms of the arrangement could not be enforced in execution.

Held, further, that the question whether estoppel arises on certain facts is a question of law, and that whatever its other effects may be, section 375 A of the Civil Procedure Code, does not in any way affect the rule of estoppel.

Appeal against the order of the District Court of North Arcot, dated 22nd October 1907 in E. P. No. 16 of 1906 in O. S. No. 12 of 1890.

The Hon'ble Mr. *T. V. Seshagiri Aiyar*, for the Appellants.

The Hon'ble Mr. *L. A. Govindaraghava Iyer*, for the Respondents.

JUDGMENT.—As regards one of the grounds on which the judgment of the lower Court is based, namely, that the decree is not executable against the successor of the *zemindar* who was party to the suit, it is enough to point out that this view cannot be supported in view of the decision of this Court in *Zemindar of Karvetnagar* v. *Trustee of Tirumalai Tirupati* (1) which is followed in *Deparu Kalappa Reddi* v. *Akkhappa Narayanim* (2).

We also think that the contention of the learned Vakil for the appellant that the respondent is estopped from contending that the terms of the compromise as evidenced by the petition dated the 16th February 1907 cannot be enforced in execution. The decree was one for partition of certain family jewels and one of the decree-holders assigned his interest in the decree to the appellant. Then the parties agreed before the executing Court that the appellant instead of having a share of the jewels would get a certain sum of money as their value, and they further agreed, as we read the petition, that the money was to be realised in execution. The Court there-

(1) 32 M. 429; 19 M. L. J. 401; 2 Ind. Cas. 18.

(2) 8 M. L. T. 297; 2 M. W. N. 75; 8 Ind. Cas. 392.

upon passed an order accepting the terms of the compromise and directed that the application then pending for execution be struck off, and in case the parties did not adhere to the agreement, a fresh application for execution would have to be filed. Then we find that several payments were made in accordance with this agreement, and afterwards the decree was ordered to be transmitted to another Court for execution for the balance of the money. Upon these facts, it seems to us that the defendant is estopped from contending that the terms of the arrangement cannot be enforced in execution. In so holding, we act upon a principle which had been well established in many cases [see *Sadasiva Pillai* v. *Rama Lingh Pillai* (3), *Gouree Sunkar Tribedee* v. *Amon Ali Chowdhry* (4); *Lakshmana* v. *Sukiya Bai* (5); *Sheo Golam Lall* v. *Beni Prosad* (6).] It is true that the matter was not presented in this light before the lower Court, but these facts which we have stated are not disputed, and it is really a question of law whether estoppel arises on these facts; and there can be no question in such a case of the respondent being prejudiced because estoppel was not pleaded against him in so many words. We may mention that much reliance has been placed by Mr. Govinda Raghava Iyer, the learned Pleader for the respondent, on section 375A of the Civil Procedure Code which he contends has the effect of preventing any compromise such as this being enforced in execution. But the section, whatever its other effects may be, does not in any way affect the rule of estoppel, and the learned Vakil for the respondent is unable to contend that it does.

We, therefore, set aside the order of the District Judge and remand the case. He will dispose of the Execution Petition No. 16 of 1906 according to law.

The costs will abide the result.

Appeal allowed.

(3) 2 I. A. 219 pp. 232, 233; 15 B. L. R. 383; 24 W. R. 193.
(4) 21 W. R. 309.
(5) 7 M 400.
(6) 5 C. 27; 4 C. L. R. 29.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 492 OF 1909.

November 23, 1911.

Present:—Mr. Justice Caspersz and Mr. Justice D Chtterjee.

PROMODA NATH ROY—DECREE-HOLDER—APPELLANT

versus

ALAMGIR KHAN CHOWDHURY AND OTHERS—JUDGMENT DEBTORS—RESPONDENTS.

Landlord and tenant – Co-sharer's suit for entire rent making other co-sharers parties—Decree for his share of rent only – Whether decree a rent decree or money decree —"Decree", meaning of—Reference to pleadings and judgment, if allowable.

A co-sharer landlord brought a suit for the entire arrears of rent making his co-sharers *pro forma* defendants and praying for a declaration that the decretal amount should be a charge upon the tenure in arrears. The Court held that as the plaintiff's share of the rent was separately collected, his co-sharers were not necessary parties and that the claim for their share of the rent was untenable. A decree was passed for the plaintiff's share of the rent to be realised from the assets of the tenant who had in the meantime died. This decree was not appealed against:

Held, that, although the suit was rightly framed as a suit for rent and a decree properly passed would be capable of execution under the special procedure of the Bengal Tenancy Act, yet in the present case the Court passed a money decree only and it was incapable of execution as a rent decree under the Act.

A Court can refer to the pleadings and judgment in order to ascertain the real meaning of a decree.

Appeal from the order of the Sub-Judge of Rajshaye, dated August 14th, 1909.

Dr. *Rash Behary Ghose*, Babus *Sarat Kumar Mitra* and *Satish Chandra Ghose*, for the Appellant.

Babus *Dwarka Nath Chakravarti*, *J. Bagchi*, *Shyama Charan Roy* and *Hira Prosad Chatterjee*, for the Respondents.

JUDGMENT.—The main question in controversy in this case is whether the decree obtained by the appellant can be executed as a decree for rent under the Bengal Tenancy Act. The learned Subordinate Judge has held in the negative, and the decree-holder appeals. The decree-holder is the owner of six annas and the opposite party defendants Nos. 2 to 6 are the owners of two annas of an eight annas *mehal* which was let out in *patni* to the ancestor of the judgment-debtors opposite parties. The decree-holder, as such 6 annas owner brought a suit to recover arrears of rent against the *patnidar* making the owners of the remaining two annas *pro forma* defendants, praying for a decree for the entire rent, as also, for a declar-

ration that the decretal amount should be a charge upon the tenure in arrears. Issue No. 7 in the suit ("Are the plaintiffs entitled to have a lien on the tenure in suit?") was evidently framed in consequence of the last prayer being objected to. The learned Subordinate Judge who tried the suit held that as the rent for the 6 annas had been separately collected, the co-sharers were not necessary parties and that the claim for their share of the rent was untenable. He held on the 7th issue, that the plaintiffs as part owners could not enforce a lien on the tenure and ultimately passed a decree for a sum which was to be realised from the assets of the *patnidar* Nur Mahomed Khan who had died in the meantime, his heirs being substituted on the record in his place. This decree was made in April 1907, and there was no appeal against it. When the decree-holder sought to execute this decree as a rent decree under the Bengal Tenancy Act, objection was preferred by the judgment-debtor, Shamsunnissa Khanum, that the decree was a money decree and must be executed as such. The Court of execution, reading the decree by the light of the judgment in the original suit, held the objection to be well founded.

It is contended in appeal before us that the decree is a decree for rent; that the Court below was wrong in referring to the judgment for the proper construction of the decree; that, even if the judgment could be referred to, the 7th issue was immaterial and should not have been raised or tried so that the matter cannot be *res judicata*, and that, in any case, the decree-holder is entitled to sell the tenure under section 158B. of the Bengal Tenancy Act.

Reliance has been placed on the case of *Rajah Promoda Nath Roy* v. *Rameni Kanta Roy* (1).

We have no doubt that the suit was rightly framed as a suit for rent, and a decree properly passed therein would be capable of execution under the special procedure of the Bengal Tenancy Act. The law on the point, however, had not as yet been quite settled, and the plaintiff was advised to make his special prayer for the declaration of a charge on the tenure. Inasmuch as the defendants contested that prayer, an issue was framed and decided against the plaintiff and a decree was passed for the amount in arrear to be realised from the assets of the deceased *putnidar*. Even without the light thrown by the judgment, this last mentioned portion of the decree indicates that the Court meant to pass a money decree. The judgment, however, makes the whole position clear and there is ample authority for the Court to refer to the pleadings and judgment in order to ascertain the real meaning of a decree. See *Jagatjit Singh* v. *Sarabjit Singh* (2); *Magniram* v. *Mehdi Hossein* (3). The decree in question was not appealed against, and has become final and is binding between the parties in execution. See *Ram Kirpal Singh* v. *Rup Kuari* (4). No question of *res judicata* can arise, as the question is raised not in another suit but in execution of the decree passed in the same suit. Again, the decree not being, in our opinion, a decree for arrears of rent, as contemplated by the Bengal Tenancy Act, the provisions of section 158B of that Act have no application. Moreover, the decree was passed before that section was enacted. We think, therefore, that the learned Subordinate Judge was right in his estimate of the nature of the decree, and we accordingly dismiss the appeal with costs 5 gold *mohurs*.

Appeal dismissed.

(1) 35 C. 331; 12 C. W. N. 249; 10 Bom. L. R. 66; 7 C. L. J. 139; 3 M. L. T. 151; 18 M. L. J. 43.

(2) 19 C. 159.
(3) 31 C. 95.
(4) 11 I. A. 37; 6 A. 269.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 352 OF 1911.

November 22, 1911.

Present:—Mr. Justice Banerji and Mr. Justice Tudball.

ABDUL HAKIM KHAN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

CHANDAN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Registration Act (XVI of 1908), ss. 73, 74, 77—Application for registration—Inquiry—No evidence produced—Order of refusal.

Where, owing to the absence of the parties, who were to attend for the purpose of an inquiry under section 74 of the Indian Registration Act, a Registrar dismisses an application made under section 73 of the

ABDUL HAKIM KHAN *v.* CHANDAN.

Act to have the document registered, the order of the Registrar is an order of refusal within the meaning of section 77 of the Act.

Sajibullah Sirkar v. *Haji Khosh Mohomed Sirkar*, 13 C. 264, followed.

Ulit Upadhia v. *Imam Bandi Bibi*, 24 A. 402, referred to.

Second appeal from the decision of the District Judge of Saharanpur, dated the 27th of January 1911.

Mr. *Brajnath Vyas*, for the Appellants.

Mr. *S. A. Haider*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-respondents under section 77 of the Registration Act to secure registration of a sale-deed which was admittedly executed by defendant No. 1 as general attorney of defendant No. 2. The suit was contested by both the defendants. Registration was refused by the Sub Registrar on the 20th of December 1908. Within the period of thirty days from that date the plaintiffs-respondents applied to the Registrar under section 73 of the Act. A date was fixed by the Registrar for an inquiry to be made under section 74. On the date fixed the parties did not appear, and the Registrar recorded an order dismissing the application. The plaintiffs then brought the present suit. The suit was resisted chiefly on the ground that there had been no inquiry by the Registrar under section 74 of the Act and that, therefore, there had been no such refusal to register as is contemplated by section 77. A plea has been raised in this Court that the application to the Registrar had not been made within the time allowed by law. There is no substance in this plea as it was admitted by the parties in the Court below that that application was made within thirty days of the order passed by the Sub-Registrar. This is manifest from the opening lines of the Appellate Court's judgment and it has not been shown to us that the statement contained in the judgment is incorrect. Both the Courts below decreed the plaintiff's suit relying upon the ruling in *Sajibullah Sirkar* v. *Haji Khosh Mahomed Sirkar* (1). They have held that the order of the Registrar is a refusal within the meaning of section 77. The point taken before us is that the applicants, *i. e.*, the present plaintiffs, not having appeared before the Registrar and not having adduced evidence, the inquiry which is ordered by section 74 was not made, and, therefore, the order of the Registrar is not a refusal such as is contemplated by the law. Reliance is placed upon certain observations in *Ulit Upadhia* v. *Imam Bandi Bibi* (2). The question for decision in that case was not that which is now before us. In that case the plaintiff *Musammat* Imam Bandi Bibi, had made an application to the Registrar to obtain an order for registration more than thirty days after the order of the Sub-Registrar refusing registration. It was, therefore, held that she had not fulfilled one of the conditions precedent to the bringing of a suit under section 77. In the course of the judgment certain observations were made by one of the learned Judges. On pages 406 and 407 Burkitt, J., says "the words 'refuses to order the document to be registered under section 76' imply, in my opinion, that the application must have been presented in time under section 73, and that after inquiry the Registrar has refused to direct it to be registered". Stress is laid upon the words that after inquiry the Registrar has refused to direct it to be registered. At the bottom of page 406 the judgment continues—"finally I would point out that the right of suit given by section 77 of the Act is a right consequential on a refusal under section 76, which refusal is based on the inquiry directed by section 74, and if there be no such refusal no right to sue accrues under section 77". In so far as those observations touch on the question of the inquiry made after an application, they were quite unnecessary for a decision on the point in issue in that case In the case now before us there is no material on the record to show to us what exactly happened in the present case, and we are not prepared to hold that where the District Registrar on an application duly presented within time has fixed a date for the purposes of an inquiry and has then refused to register the document because no evidence has been adduced before him no such refusal has been made as is contemplated by section 77. There is nothing in the circumstances of the case to show that the application under section 73 was not a *bona fide* application which the plaintiffs did not intend to prosecute. It is clear that they neither withdrew nor abandoned their application. The Registrar's order dismissing the application was one merely refusing to register the

(1) 13 C. 264.

(2) 24 A. 402.

document because no evidence of the execution thereof had been placed before him. We agree with the remarks in *Sajibullah Sirkar* v. *Hari Khosh Mahomed Sirkar* (1). In our opinion the decision of the Court below is correct. The appeal fails and is dismissed with costs.

Appeal dismissed.

CALCUTTTA HIGH COURT.
SECOND CIVIL APPEAL NO. 2276 OF 1909.
July 21, 1911.
Present:—Mr. Justice Mookerjee and Mr. Justice Caruduff
Mohant JAGARNATH DAS—PLAINTIFF—APPELLANT
versus
BIBI RUPA—DEFENDANT—RESPONDENT.

Hindu Law—Shebait—*Alienation by* Mohant—*Suit to set aside alienation—Burden of proof—Power of* shebait—*Alienation when to be justified—What has to be established to justify alienation.*

The question as to the party on whom the onus of proof lies in a suit to set aside an alienation of endowed property, is one not capable of a general and inflexible answer.

Hunoomanpersaud Panday v. *Babooee Munraj Koonweree*, 6 M. I. A. 393 at p. 419; 18 W. R. 81, referred to.

Where, at the time of such alienation, the plaintiff was joint Manager of the properties of the endowment and had special means of knowledge as to the funds available for the purpose of the management, it was for him to prove that there was no necessity for the alienation made by the *Mohant* in possession. The power of a *shebait* in respect of an alienation of endowed property is analogous to that of the Manager of the property of an infant.

Prosunno Kumari v. *Golab Chand*, 2 I. A. 145; 14 B. L. R. 450; 23 W. R. 253, *Doorganath* v. *Ramchander*, 4 I. A. 52; 2 C. 341, *Sheo Shankar Gir* v *Ram Sheiwak*, 24 C. 77, *Nawab Sir Syed Hossain Khan* v. *Mohant Bhagwan Das*, 11 C. W. N. 261; 34 C. 249; 6 C. L. J. 442; and *Madho Parshad* v. *Ram Ratan*, 11 Ind. Cas. 507; 14 C. L. J. 264; 15 C. W. N 838; (1911) 2 M. W. N 66; 13 Bom. L. R. 780; 21 M. L. J. 933; 10 M. L. T 481, relied upon.

The alienation of the *corpus* ought only to be resorted to as an extreme measure in the absence of other reasonable means of providing for the means of the endowment.

Natarja Desikar v. *Palaniappa Chetty*, 9 Ind. Cas. 281; 20 M. L. J. 969; 9 M. L. T 8?, referred to.

What has to be established to justify such an alienation is that, for the needs of the endowment, no other means was available short of an absolute alienation of the property. It is not enough to find that the sum paid by the transferee was applied for the purposes of the endowment Where there was no finding that the needs of the endowment at the time the alienation was made might not have been met by other means than an absolute transfer of a portion of the endowed property, the sale was held to be void.

Appeal from the decree of the Second Sub-Judge of Mozaffarpur, dated June 3rd, 1909, modifying that of the Additional Munsif of that place, dated February 15th, 1909.

Babus *Lachmi Narain Singh*, for the Appellant.

Babu *Umakali Mukherjee* and *Manmotha Nath Mukherjee*, for the Respondent.

JUDGMENT.—The subject-matter of the litigation which has given rise to this appeal is a parcel of 4 *bighas* of *Fakirana* land which admittedly formed part of the endowed properties belonging to the Panapur *Math*. It appears that *Mohant* Siaram Das, the spiritual head of this endowment, died on the 12th August 1905. Upon his death, disputes arose as to the succession to the office of *Mohant*, and on the 27th June 1906, these disputes were settled among three rival claimants by name Baldeo Das, Jagar Nath Das and Saligram Das. The parties agreed that Baldeo Das would continue to be the *Mohant* during his life-time and that upon his death, Jagar Nath Das would succeed as *Mohant* of the two *Asthals* at Panapur Nariar and Berhampura while Saligram Das would succeed as the *Mohant* of the *Asthal* at Chapra Rupnath. It was further arranged that, during the life-time of Baldeo, Jagar Nath would be joint manager with him in respect of the two *Asthals* to which he would be entitled to succeed upon his death, while Saligram would be the joint manager of the *Asthal* at Chapra Roopnath to which he would be entitled ultimately to succeed. This *ekrarnama* was duly registered on the 27th June 1906 and contained an express provision that *Mohant* Baldeo Das would not have any right of alienation of the properties of the endowment. The deed further recited that the properties of the endowment were subject to considerable ancestral debts, that is, debts incurred during the management of the preceding *Mohants*, that if payment of the said ancestral debts necessitated the sale of any property. Jagarnath and Saligram, by joining with Baldeo in execution of deeds of sale in respect of the properties appertaining to the *Asthals* at Panapur Nariar and Berhampura and Chapra Roopnath respectively, would pay off the ancestral debts, and that if Jagar Nath and Saligram

JAGARNATH DAS v. BIBI RUPA.

did not join in the execution of the deeds of sale, Baldeo Das would be entitled, upon giving notice, to execute deeds of sale under his own signature and pay off the ancestral debts thereby. It appears that, on the 9th April 1907, Baldeo Das executed a conveyance in favour of the defendant-respondent in respect of the disputed property. The plaintiff commenced this action on the 8th April 1908 for declaration that the transfer was void and that he was entitled to recover possession. The defendant resisted the claim on the ground that the transfer had been executed for justifying necessity and that she had consequently acquired an indefeasible title to the property transferred.

The Court of first instance found that out of the consideration-money of Rs. 800 paid for the conveyance, it had been established that Rs. 254 had been applied in satisfaction of a debt incurred to meet the expenses of the *sradh* ceremony of *Mohant* Siaram Das that, as to the remainder, there was no satisfactory evidence to show that it was needed for the benefit of the endowment. In this view, the Court of first instance gave a decree to the plaintiff for recovery of possession upon payment of Rs. 254 with interest thereon. Both parties were dissatisfied with this decision and appealed to the Subordinate Judge. The plaintiff contended that he was entitled to recover the property without payment of any sum at all. The defendant contended, on the other hand, that the plaintiff was not entitled to recover the property under any circumstances. The Subordinate Judge has affirmed the finding of the first Court that Rs. 254 was needed for payment of the debt incurred at the time of the *sradh* of Siaram Das. As regards the remainder, he has found that it was also needed to meet the expenses of the management of the endowment. Upon these findings, the Subordinate Judge has held that the whole of the consideration-money was applied for the benefit of the endowment and that the plaintiff was consequently not entitled to impeach the title of the defendant.

The plaintiff has now appealed to this Court and, on his behalf, the decision of the Subordinate Judge has been assailed on three grounds, namely, *first*, that the finding of the Sub-Judge upon the question of necessity cannot be supported, inasmuch as he had erroneously thrown the burden of proof upon the plaintiff; *secondly*, that the facts found do not show that there was any justifying necessity for the alienation and, *thirdly*, that even if there was any justifying necessity for the alienation, the transfer was void as it was in contravention of the provisions of the *charnamah* by which the transferor was bound.

In so far as the first of these contentions is concerned, there is, in our opinion, no substance in it. No doubt, ordinarily when a person takes a property from a limited owner and his title is impeached, the burden is upon him to show that he has acquired the property under circumstances which make his title unimpeachable. It was explained by their Lordships of the Judicial Committee in the case of *Hanoomman Persaud Panday* v. *Musammat Babooee Munraj Koonwaree* (1):— "No hard and fast rule can be laid down in cases of this description. The question, on whom does the onus of proof lie in such suits is one not capable of a general and inflexible answer. The presumption proper to be made will vary with circumstances and must be regulated by and dependent on them." The Subordinate Judge has pointed out that, at the time the alienation took place, the plaintiff was joint manager of the properties of the endowment. He had special means of knowledge as to the funds available for the purpose of the management at the time. It was for him to prove that there was no necessity for the alienation made by the *Mohant* in possession. The first ground, therefore, must fail.

In so far as the second ground taken by the plaintiff appellant is concerned, it is, in our opinion, well founded. No doubt, as has been laid down by their Lordships of the Judicial Committee in the cases of *Prosunno Kumari* v. *Golab Chand* (2) and *Doorganath* v. *Ram Chunder* (3) and also by this Court in the cases of *Sheo Shankar Gir* v. *Ram Sahewak* (4) and *Nawab Sir Syed Hossein Ali Khan* v. *Mohant Bhagwan Das* (5), the power of the *shebait* in respect of alienation of endowed property is analogous to that of the manager of the property of an infant. [*Madho Prasad*

(1) 6 M. I. A. 393 at p. 419; 18 W. R. 81.
(2) 2 I. A. 145; 14 B. L. R. 450; 23 W. R. 253.
(3) 4 I. A. 52; 2 C. 341.
(4) 24 C. 77.
(5) 11 C. W. N. 261; 34 C. 249, 6 C. L. J. 442.

JAGARNATH DAS v. BIBI RUPA.

v. *Ram Ratan* (6)]. It must be remembered, however, as pointed out by the learned Judges of the Madras High Court in the case of *Sreenath Devasigamani Pandarosannadhi* alias *Nataraja Desikar* v. *Palaniappa Chetty* (7), that the needs of an endowment may be very different from the needs of a human being and the test to be applied to determine what is justifying necessity in the case of an endowment may not be the same as in the case of a human being. Mr. Justice Krishnaswami Ayyar observed in the case just mentioned: "The *shebait* is in a position analogous to that of the guardian of an infant heir and he cannot alienate the *corpus* of the estate except for sufficient necessity. A decree can also be passed against the *corpus* of the property. A necessity justifying alienation of rent and income will not be such as will justify an alienation of the *corpus*. Alienation of the *corpus* ought only to be resorted to as an extreme measure in the absence of other reasonable means of providing for the needs of the endowment." In the case before us, there is no finding by the Subordinate Judge that the needs of the endowment at the time the alienation was made might not have been met by other means than an absolute transfer of a portion of the endowed property. It is not enough to find that the sum paid by the transferee was applied for the purposes of the endowment. What has to be established to justify the alienation is that, for the needs of endowment, no other means was available short of an absolute alienation of the property. We are, therefore, of opinion that upon the facts found by the Subordinate Judge, the sale cannot be supported. But as the sum advanced by the defendant has been applied for the benefit of the endowment, ordinarily the plaintiff would be entitled to ask the Court to vacate the sale only on condition that the sum paid is re paid to the vendor. It has been contended, however, by the learned Vakil for the appellant that he is not bound to pay this money, because the sale is not merely voidable but void because it was made in contravention of the provisions of the *ekrarnama*. This leads us to the consideration of the third ground.

(6) 15 C. W. N. 838: 14 C. L. J. 264; 11 Ind. Cas. 507: (1911) 2 M. W. N. 66; 13 Bom. L. R. 780; 21 M. L. J. 938; 10 M. L. T. 481.

(7) 20 M. L. J. 969; 9 M. L. T. 83; 9 Ind. Cas. 281.

In support of the third ground, our attention has been invited to the clause in the *ekrarnama* that *Mohant* Baldeo Das had no right of alienation. The learned Vakil for the respondent has contended with considerable force that this implies that there was to be no right of alienation except for justifying necessity. He has argued that, if this view is not adopted, the result would be that the endowment might be hopelessly embarrassed in cases of necessity where the necessity could not be met for the income of the properties endowed. We are unable to accept this contention as well founded. If the construction suggested by the learned Vakil for the respondent be accepted, we have to insert in the deed words not to be found there. At the same time, if the words proposed are inserted in the deed, the clause in question becomes superfluous. It would then merely provide that the *Mohant* would not have any right of alienation except for justifying necessity. In other words, the effect of the deed would be what the ordinary law is in cases of alienation by *Mohants*. On the other hand, it is clear that, in exceptional cases of the description suggested by the learned Vakil for the respondent, it would be open to the parties to bring a suit for administration of the endowed properties, and part of the endowed properties could be alienated under the direction of the Court so as to save the endowment. We are, therefore, clearly of opinion that the alienation in this case was contrary to the express provisions of the *ekrarnama* and as it has been found that the defendant at the time of her purchase had notice of the provisions of the instrument, she is clearly bound by the terms thereof. The deed in favour of the defendant is, therefore, clearly void and the plaintiff is entitled to have the sale cancelled without re-payment of the consideration.

The result is, that this appeal is allowed, the decrees of the Courts below discharged and the suit decreed. But, under the circumstances of the case, we are of opinion that each party should pay his own costs in all the Courts. We further declare that the plaintiff will not be entitled to any mesne profits up to the date of this judgment.

Appeal allowed.

RAGHUNATH PROSAD v. KASHI PROSAD.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 147 OF 1911.

August 15, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

RAGHUNATH PROSAD—JUDGMENT-DEBTOR—APPELLANT

versus

KASHI PROSAD AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 48—Fraud, interpretation of—Judgment-debtor's objection to validity of sale, if fraud proved—"Date of decree"—Order by Appellate Court—Decree-holder's power to add to period of limitation.

Section 48, sub-section (2) clause (*a*), Civil Procedure Code requires not only that there should be fraud on the part of the judgment-debtors, but also that the fraud should be of such a character as to prevent the decree-holder from executing the decree.

Seshachalam Chetti v. *Rajam Chetti*, 8 M. L. J. 203, relied upon.

The term "fraud" in section 48 should be interpreted in a wider sense than that in which it is generally used in English law.

Pattakara v. *Kangasami Chetti*, 6 M. 365, followed.

The conduct of a judgment-debtor cannot be deemed fraudulent simply because his objection to the validity of the sale of his property in execution, ultimately proves unsuccessful. And that objections cannot stand in the way of further execution of the decree.

In the course of execution proceeings in connection with a certain decree, an Appellate Court directed that the judgment debtor should pay a certain amount every month in satisfaction of the decree:

Held, that it was not the intention of the Appellate Court to supersede the original decree and that the order merely determined the mode of payment for the satisfaction of the decree, and that if clause (*b*) of sub-section (1) of section 48 of the Code be not applicable to the case, the decree-holder cannot execute the decree after 12 years from the date of the original decree though the application for execution is made within 12 years of the Appellate Court's order aforesaid.

A decree-holder cannot, by binding himself not to execute a decree for a certain period, add to the time which the law allows him to execute it.

The judgment of Sir Barnes Peacock in *Kristo Komal Singh* v. *Huree Sirdar*, 13 W. R. (F. B.) 44, referred to.

Appeal from the order of the Sub-Judge Patna, dated March 11th, 1911.

Moulvi *Muhammad Mustafa Khan*, for the Appellant.

Babus *Umakali Mukerjee* and *Manmatha Nath Mukerjee*, for the Respondents.

JUDGMENT.—This appeal is directed against an order by which the Court below has allowed the execution to proceed on the basis of a decree for money made on the 18th August 1897 against three persons by name Ram Prosad, Thakur Prosad and Raghunath Prosad. Ram Prosad died on the 1st April 1903 and Thakur Prosad on 13th February 1910. An application was made on the 1st September 1910 and was met at once with the objection that no order for execution could be made on the basis thereof under section 48 of the Code of Civil Procedure of 1908. The Subordinate Judge has overruled the objection and has held that the case is covered by sub section (2) clause (*a*) of section 48. The judgment debtor has now appealed to this Court and on his behalf it has been argued that the view taken by the Subordinate Judge is manifestly erroneous.

Section 48 provides that where an application to execute a decree, not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from one of two dates, namely, *first*, the date of the decree sought to be executed, and *secondly*, the date of default in making payment when the decree or any subsequent order directs any payment of money to be made at a certain date or at recurring periods. Sub-section (2) lays down that nothing in the section shall be deemed to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the term of twelve years when the judgment-debtor has by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application. In view of the date of the decree and the date of the present application for execution which, it is not suggested, is in continuation of any previous application, it is manifest that the objection under section 48 *prima facie* is well founded. In the Court below the decree-holders attempted to bring the case within clause (*a*) of sub section (2) and the Subordinate Judge has held that the decree holders were prevented by fraud from executing the decree at some time within twelve years immediately before the date of present application. He has relied upon three circumstances in support of his view that there was fraud on the part of the judgment-debtors of the description mentioned in the section. He has point-

RAGHUNATH PROSAD v. KASHI PROSAD.

ed out, in the first place, that after the properties of the judgment-debtors have been sold in execution of this very decree on the 13th June 1898, they took objection to the validity of the sale under sections 244 and 311 of the Code of Civil Procedure of 1882. The objection was disallowed on the 4th April 1899 and an appeal was preferred to this Court but was ultimately dismissed on the 22nd February 1901. The Subordinate Judge appears to have thought that as the objection of the judgment-debtors to the validity of the sale ultimately proved unsuccessful, their conduct must be deemed fraudulent. The second circumstance upon which the Subordinate Judge relies, is the fact of the institution of a suit by one Makunda Bibi who claimed title to the property on the foot of a mortgage, dated the 27th January 1897. The suit instituted by her ultimately proved unsuccessful and was dismissed on the 17th May 1902. The Subordinate Judge is of opinion that this suit was instituted by Mukunda Bibi at the instance of the judgment-debtors who had created in her favour a fictitious mortgage. The third circumstance upon which the Subordinate Judge relies is the institution of a suit against one Radha Krishna in respect of a house which was sold in August 1903. After the decree-holder had purchased this property Radha Kissen preferred a claim, which was allowed on the 5th September 1909. The decree-holder as purchaser instituted a suit for declaration of title which was decreed on the 15th November 1906. An appeal preferred against that decree was dismissed on the 17th May 1907.

In our opinion, none of the three circumstances upon which the Subordinate Judge has relied in support of his view is sufficient to show that there was fraud on the part of the judgment-debtors within the meaning of section 48, Code of Civil Procedure. It is worthy of note, in the first place, that the objection which was taken by the judgment-debtors was to the validity of an execution sale or of the title acquired by the decree-holder as purchaser. In other words, the decree-holder had to face an objection by the judgment-debtors not in his character as a decree-holder but in his character as an execution purchaser. In the second place, it is obvious that the objection, whether groundless or well-founded, could not stand in the way of further execution of the decree. There was nothing to prevent the decree-holder from proceeding with further execution during the pendency of the investigation into the validity of the objection. Indeed, the history of the litigation shows that the decree-holder did proceed to execute the decree notwithstanding the proceedings for inquiry into the objections mentioned. Section 48 requires not only that there should be fraud on the part of the judgment-debtor but also that the fraud should be of such a character as to prevent the decree-holder from proceeding with execution of the decree; that this is essential is shown by the decision in *Seshachalam Chetti* v. *Rajam Chetty* (1).

The only question which remains is, whether the circumstances mentioned by the Subordinate Judge can be treated as constituting fraud on the part of the judgment-debtor. The term "fraud" as used in section 48 is not defined in the Code. But the learned Judges of the Madras High Court pointed out in the case of *Pattakarra* v. *Rangasami Chetti* (2) that the term "fraud" in that section should be interpreted in a wider sense than that in which it is generally used in English law. This view has been adopted in subsequent decisions and it has been ruled that where the judgment-debtor has eluded arrest in execution of the decree or has prevented the execution of attachment processes, his conduct is fraudulent within the meaning of section 48 [*Bhagu Jethi* v. *Malek Bawasaheb* (3) and *Venkayya* v. *Raghava Charlu* (4.] [*Visalatchi* v. *Siva Sankara* (5); *Rai Shamkissen* v. *Damar Kumari* (6).] It is not necessary for us to consider whether some of these decisions upon their special facts, may not be open to legitimate comment. The true rule appears to have been laid down by the learned Judge of the Allahabad High Court in *Beni Prasad* v. *Kashi Nath* (7), where it was held that when a judgment-debtor keeps out of the way when warrants are issued for his arrest and puts in false objections in bad faith and thereby dishonestly evades payment of money justly due to the decree-holder and determines to take advantage of the delay which

(1) 8 M. L. J. 203.
(2) 6 M. 365.
(3) 9 B. 318.
(4) 22 M. 320.
(5) 4 M. 292.
(6) 11 C. W. N. 440.
(7) 6 A. L. J. 401; 2 Ind. Cas. 222.

he has dishonestly and fraudulently created, when an application for execution is made beyond 12 years from the date of the decree, the execution of the decree is not barred. In the case before us, it is impossible to hold that the conduct of the judgment-debtor was such as to prevent the decree-holders by fraud from proceeding with execution of their decrees. The inference, therefore, follows that the grounds upon which the decision of the Subordinate Judge is based cannot be supported.

The learned Vakil for the decree-holder has next endeavoured to support the order of the Subordinate Judge on a different ground. He has contended in substance that the case falls within clause (*b*) of sub-section 1 of section 48. That clause provides that 12 years may be taken to commence from the date of default in making a payment of money where the decree or any subsequent order directs payment of money to be made at a certain date or at recurring periods. The learned Vakil has, in this connection, invited our attention to an order made by this Court on the 7th April 1908 in the course of proceedings in execution of this very decree. It appears that Thakur Prosad, one of the judgment-debtors, had on a previous occasion agreed to pay Rupees 10 every month towards the satisfaction of the decree. Subsequently, the position of Thakur Prosad in life improved and the decree-holder contended that he ought to be compelled to pay a larger sum. The result was that the Court directed Thakur Prosad to pay Rupees 25 every month. The order of the Court was in these terms:—"The judgment-debtor appellant (Thakur Prosad) will pay to the decree-holder respondent Rupees 25 in satisfaction of the balance of the decretal amount with costs from this date until the whole amount is paid off. The amount must be paid by the 12th of each month. The appellant will pay the respondent the costs of this Court. In default of payment of any one instalment, the whole of the balance of the decretal amount will become due." It may be conceded that this order is an order of the description contemplated by clause (*b*) of sub-section (1) of section 48 inasmuch as it directs the payment of money at a certain date or at recurring periods. But the question still remains whether the present application for execution of the decree is made within 12 years from the date of default in making the payment directed. Now, it is obvious that there has been no default by Thakur Prosad in carrying out this order, because it is conceded that up to the 13th February 1910 when Thakur Prosad died he had regularly made the payments on the dates prescribed. But it is contended by the learned Vakil for the respondent that default was made by the other judgment-debtors Raghunath Prosad and the sons of Thakur Prosad after his death. In our opinion, this argument is based upon the fallacy that the undertaking to make the payment was not by Thakur Prosad personally but by him as the representative of the family to which he himself and the other judgment-debtors belonged. But the other judgment-debtors were not even parties to the appeal in which this order was made and there is no room for controversy in our opinion that the undertaking was by Thakur Prosad alone and that there was no default from the date whereof the decree-holder is entitled to claim the benefit of clause (*b*) of sub-section (1) of section 48.

The learned Vakil for the respondent has finally suggested that the decree which he was seeking to execute was not the original decree, but the order of this Court made on the 7th April 1908. This contention also is clearly unfounded. It was not the intention of this Court to supersede the original decree. The order of this Court merely determined the mode of payment for the satisfaction of that decree. We are further of opinion that it was not open to the decree-holder and the judgment-debtor by any agreement to extend the period prescribed by section 48 of the Code. In support of this proposition we may refer to the judgment of Sir Barnes Peacock in *Kristo Komal Singh* v. *Auree Sirdar* (8), where the learned Chief Justice observed as follows:—"The Court of execution has no power to alter the decree of the Court which passed it, and the parties cannot alter the law or a decree of Court even by consent. A man may bind himself not to execute a decree of Court within a certain period, but he cannot, by binding himself not to execute the decree for a certain period, add to the time which the law allows him to execute it." In our opinion, it was not open to the decree-holder to claim an extension of the time prescribed by section 48 by virtue

(8) 13 W. R. 44 (F. B.).

of the arrangement which was made on the 7th April 1908. The learned Vakil for the respondent has in conclusion urged that the case is very hard and that the decree-holder now finds himself in this difficulty because he consented to accept payment from the judgment-debtor by instalments. But it is incumbent on us to remember that, as was observed by Lord Campbell in the *East India Company* v. *Odit Churn Pal* (9), it is the duty of all Courts of Justice to take care for the general good of the community that hard cases do not make hard law.

The result, therefore, is that this appeal must be allowed and the order of the Court below discharged. The appellant is entitled to his costs both in this Court and in the Court below. We assess the hearing fee in this Court at two gold *mohurs*.

Appeal allowed.

(9) 5 M. I. A. 43 at p. 69.

MADRAS HIGH COURT.

CIVIL APPEAL AGAINST ORDER No. 154 OF 1910.

November 16, 1911.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

NATARAJA IYER—DEFENDANT—APPELLANT

versus

THE SOUTH INDIA BANK AT TINNEVELLY AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 46, 54—Civil Procedure Code (Act XIV of 1882), ss. 268, 274—Attachment of debt—Debt secured by a hypothecation bond—Moveable property—Immoveable property—General Clauses Act (X of 1897)—Transfer of Property Act (IV of 1882), s. 58.

A debt secured by a hypothecation bond is moveable property within the meaning of rule 46 of Order XXI, Civil procedure Code, 1908.

The provisions of rule 54 of Order XXI, Civil procedure Code, are not meant to apply to property of the nature of a debt secured by a hypothecation bond. The provisions seem to contemplate that the immoveable property should be in the nature of tangible property.

Karim-un-nissa v. *Phul Chand*, 15 A. 134, *Tarwadi Bholanath* v. *Bai Kashi*, 26 B. 305, *Debendra Kumar Mandal* v. *Rup Lal Das*, 12 C. 546, *Kasinath Das* v. *Sadasiv Patnaick*, 20 C. 805, *Baijnath Lohea* v. *Binoyendranath Palet*, 6 C. W. N. 5, *Bal Dev Dharup Marwadi* v. *Ram Chandra Bilwant Kulkarni*, 19 B. 121, *Munippa Naick* v. *Subramanya Iyer*, 18 M. 437, *Achamma* v. *Basappa*, 8 M. L. J. 1, followed.

Appasawmi v. *Scott*, 9 M. 5; *Sami Iyer* v. *Krishna Sami*, 10 M. 169, not followed.

Security must follow the debt and if the debt is once attached, the benefit of the security would accrue to the attaching creditor, if his remedy against the property still exists.

Appeal against the order of the Subordinate Judge of Negapatam, dated 6th July 1910, in Execution Application No. 271 of 1910 in O. S. No. 30 of 1903 on the file of the Subordinate Judge of Tinnevelly.

Mr. *T. R. Ramachandra Aiyar*, for the Appellant.

Mr. *M. Subramanya Iyer*, for the Respondents.

JUDGMENT.—The question in this appeal is, whether the sale in execution of a decree of a debt due to the judgment-debtor under a hypothecation bond is liable to be set aside on the ground of irregularity. It cannot be so set aside if it is to be regarded, as held by the lower Court, as moveable property within the meaning of Order XXI, rule 46, corresponding to section 268 of the old Code. The language of rule 46 which treats as moveable property a "debt not secured by a negotiable instrument," is undoubtedly wide enough to cover a debt secured by a hypothecation bond on a simple mortgage.

But, it is contended, that such a debt is immoveable property within the definition of such property as given in the General Clauses Act, as including a benefit arising out of land. It may be that a security of this character is a benefit arising out of land, but supposing that this definition would show that a simple mortgage-debt would, generally speaking, be regarded as immoveable property, still we have got to see whether the meaning is really what is contemplated by the provisions of the Civil Procedure Code relating to the execution of decrees.

It seems to us that the provisions of rule 54, Order XXI, corresponding to section 274 of the Code of 1882, are not meant to apply to property of the nature of a debt secured by a hypothecation bond. For instance, as pointed out in *Karim-un-nissa* v. *Phul Chand* (1), if the property to be attached is a mortgage-debt, where the mortgagee is not in possession nor is entitled to possession of the mortgage property, the requirements as to the proclamation of the order at some place or adjacent to the property, and the affixing in a conspicuous part of the property, could not be applied. These provisions seem to contemplate that the immoveable property

(1) 15 A. 134.

should be in the nature of tangible property. Further, the mortgagee, not being entitled to possession, his decree-holder would not be entitled to go upon the land for the purpose of proclaiming or affixing the order. Then, there is another difficulty in the way of holding that mortgage-debt is to be treated as immoveable property for the purpose of attachment. Rule 54 does not provide for any order prohibiting the mortgagor, that is, the person owing the debt, from paying the debt to the mortgagee whose right is sought to be attached, and without such an order, the object of attachment might be frustrated. Rule 46, on the other hand, provides for such prohibiting order being passed. The fact is, as pointed out in *Tarwadi Bholanath* v. *Bai Kashi* (2) and other cases, the security must follow the debt and if the debt is once attached, the benefit of the security would accrue to the attaching creditor, if his remedy against the property still exists.

Much reliance, we may also mention, has been placed on behalf of the appellant on the definition of mortgage as an interest in immoveable property as given in the Transfer of Property Act. But the real question, as we have said, is, whether it is immoveable property within the meaning of rule 54, Civil Procedure Code, and, for the reasons we have stated, it is difficult to regard it as such.

There is some diversity of judicial opinion on the question under discussion, but we are satisfied that the weight of opinion is, undoubtedly, in favour of the view we have taken. See *Debendra Kumar Mandal* v. *Rup Lal Dass* (3), *Kasinath Das* v. *Sadasiv Patnaick* (4); *Tarwadi Bholanath* v. *Bai Kashi* (2), *Karim-un nissa* v. *Phul Chand* (1); *Bainath Lohea* v. *Binoyendranath Palet* (5) and *Bal Dev Dharup Marwadi* v. *Ram Chandra Balwant Kulkarni* (6). As regards this Court, opinion seems to have fluctuated. While Turner, C. J., in *Appasawmi* v. *Scott* (7) was inclined to adopt the view which has the support of the majority of the High Courts, the other two learned Judges favoured a different view. In *Sami Iyer* v. *Krishna Sami* (8) the inclination was to support the view taken by the majority of the Judges in *Appasawmi* v. *Scott* (7). In *Muniappa Naick* v. *Subramanya Iyer* (9) the view adopted in *Debendra Kumar Mandal* v. *Rup Lal Das* (3) and *Kasinath Das* v. *Sadasiv Patnaick* (4) is expressly approved, though the learned Judges seem to imply that a sale under section 268 of the Code of 1882 might be irregular. *Achamma* v. *Basappa* (10) simply follows *Muniappa Naick* v. *Subramanya Iyer* (9). There is thus some uncertainty as to the exact view held by this Court on the point under discussion. But, as the conclusion at which we have unhesitatingly arrived is undoubtedly supported by preponderance of authority of the other High Courts, we do not think it necessary to refer the matter to a Full Bench. The appeal will, therefore, be dismissed with costs.

Appeal dismissed.

(2) 23 B. 305.
(3) 12 C. 546.
(4) 20 C. 805.
(5) 6 C. W. N. 5.
(6) 19 B. 121.
(7) 9 M. 5.
(8) 10 M. 169.
(9) 18 M. 437.
(10) 8 M. L. J. 1.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 799 OF 1910.

December 1, 1911.

Present:—Mr. Justice Johnstone and Mr. Justice Shah Din.

BISHNA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat RATTANI AND OTHERS—DEFENDANTS—RESPONDENTS.

Agent—Compromise—Power-of-attorney—Construction of deed—Words giving general powers—Ejusdem generis—Power to compromise not similar to power to refer to arbitration—Agent not signing on behalf of principal—One plaintiff signing for the other though not appointed agent.

Three brothers, *A.*, *B.* and *C.* were plaintiffs in a suit. *A.* and *B.* had given a special power-of-attorney for the case to *C.*, authorizing the latter to engage a legal practitioner or to prosecute the case himself, to present applications to Court and to refer to arbitration. The power of attorney then recited the following words:—"*garza ke kul sakhta pardakhta mukhtar mazhar ko manzur wa makbul hoga*"—"In short, everything done by the *mukhtar* will be binding on me."

A compromise in writing was put in; it was signed by *A.* and *C.* but *B.* neither signed the compromise nor appeared in Court to assent to it. *C.* signed the compromise only for himself and not on behalf of *B.* *A.* signed to the following effect:—"for myself and as *mukhtar* for the other plaintiff through *C.* *mukhtar*."

told, on the presentation of compromise, to B. on a given date. C. appeared on that date that B. had not come though told to do so, C was then acting only for himself.

(1) that the compromise did not bind B; at the words purporting to express acceptance rs done by the *mukhtar* must be interpreted ight of the powers previously specifically set The power to compromise, like the power to aw the suit or confess judgment, was not *generis* with the powers specifically set forth power of attorney. Power to refer to arbitra- ld not be likened to the power to compromise; *Begam* v. *Piari Begam*, 50 P. R. 1898, fol-

(3) that C. never acted in the matter of the compromise on behalf of B. and A's signature on behalf of the other plaintiff could not bind B as A. held no power-of-attorney from B.

Second appeal from the order of the Divisional Judge, Ludhiana Division, dated the 25th May 1910, reversing that of the Additional District Judge, Ludhiana, dated the 23rd February 1910, decreeing plaintiff's claim.

The Hon'ble Mr. *Muhammad Shafi*, for the Appellants.

Mr. *Devi Diyal*, for the Respondents.

JUDGMENT.—The parties to this case, as finally arrayed, are Bishna, Nikka Singh, and Dhanna Singh, sons of Samand Singh plaintiffs, and *Musammat* Ratni, *Musammat* Rani and Shera, minor defendants. The claim was for a declaration that a certain decree obtained by Shera against the two other defendants by collusion should not affect plaintiffs' reversionary rights. The suit having been instituted in December 1907, a compromise in writing was put in on 24th February 1908. Bishna did not sign that compromise or appear in Court to assent to it, and the first Court, therefore, while holding the other two plaintiffs bound by the compromise, found Bishna not bound and then on the merits granted him the declaration prayed for. Both Dhanna Singh and Bishna had given a special power-of-attorney for the case to Nikka Singh, but the first Court finally ruled that the powers given did not include authority to compromise, and further that it was more than doubtful whether Nikka Singh purported to act for Bishna in signing the compromise. On appeal, however, the learned Divisional Judge held that Bishna was bound and, therefore, decreed as to all the plaintiffs on the basis of the compromise.

The plaintiff Bishna has appealed against this finding, and Mr. Shafi on his behalf has had an easy task in showing that the first Court's decision is the correct one. The lower Appellate Court has misunderstood the facts of the case in at least one important particular. It is wholly wrong in writing that "Nikka distinctly asserted that he was acting as *Mukhtar* of Bishna and reported that Bishna would not attend Court as he accepted the compromise in full.' In reality, Nikka Singh, when told to produce Bishna on a given date appeared on that date and said that Bishna had not come, that he had told him to come and had warned him that he (Nikka Singh) was not acting for him, and *that now he (Nikka Singh) was acting only for himself*. There is thus in this incident nothing to support the idea that Bishna was bound by anything Nikka Singh said or did.

Next, the lower Appellate Court is not right in saying that the compromise was entered into by Nikka and Dhanna on behalf of Bishna. In the first place, Dhanna was not agent for Bishna at all; and *secondly*, Nikka expressly signed the compromise only for himself, while Dhanna wrote "for myself and as *Mukhtar* for the other plaintiff through Nikka Singh" "*Mukhtar*." *The other plaintiff*, no doubt, meant Bishna, but even so we cannot see that Nikka Singh, the only agent Bishna had, has, judging by the above words, acted as Bishna's agent in executing this compromise, whatever he may have thought he was doing.

Thirdly, we cannot agree with the Divisional Judge when he holds that the power-of-attorney covers the power to compromise. It authorizes Nikka Singh to engage a legal practitioner or to prosecute the case himself and to present applications in Court and to refer to arbitration. Then follow the words "*garze ke kull sakhta pardakhta Mukhtar mazhar ko manzur wa kabul hoga.*" We think that such words as these must be interpreted in the light of the powers previously specifically set forth, and, in our opinion, the power to compromise like the power to withdraw the suit or to confess judgment, is not *ejusdem generis* with those powers. The Divisional Judge, we think, is wrong in likening arbitration to compromise because in both the case is settled "out of Court," for, in arbitration, the case once instituted, is finally settled *by the Court*.

GANPAT PRASAD *v.* SARJU.

It is unnecessary to pursue the argument further, for in *Wazir Begam* v. *Piyari Begam* (1) we have an authority very much in point. There the wording of the power of attorney was much the same as in the present case, and it was held that the power to compromise had not been conferred. Another indication the same way is, that Nikka Singh himself hardly thought himself empowered to compromise for Bishna.

We may note, as an episode in the case with which we are not now concerned, that the first Court first simply dismissed Bishna's claim for default of appearance. and that this Court set aside that order and remanded for re-decision.

For the reasons stated above, we accept the appeal, set aside the judgment and decree of the lower Appellate Court and remand the case to the lower Appellate Court to dispose of the remaining questions raised in the appeal to the lower Appellate Court.

Stamp on appeal refunded. Other costs to be costs in the case.

Appeal accepted.

(1) 50 P. R. 1898.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 385 OF 1911.

November 23, 1911.

Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.

GANPAT PRASAD AND ANOTHER—DEFENDANTS—APPELLANTS

versus

ARJU—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 235—Agent and principal—Agent representing untruly the extent of his authority to third person—Breach of contract—Liability of agent to third person—Agent acting beyond the scope of his authority.

Section 235 of the Contract Act applies to a case where an agent untruly represents the extent of the authority given to him by his principal.

If a man makes a contract as agent, he promises that he is what he represents himself to be and he is liable for the breach of his contract whether or not he is aware that he is acting beyond the scope of his authority.

Second appeal from the decision of the District Judge of Banda, dated the 25th of March 1911.

Dr. *Tej Bahadur Sapru* (with him Mr. *Benode Behari*), for the Appellants.

Mr. *M. L. Agarwala* (with him Mr. *Gulzari Lal*), for the Respondent.

JUDGMENT.—There has been some dicussion in this Court as to what the lower Appellate Court intended to find, in our opinion, the findings are perfectly clear. The appellants here were commission agents carrying on business at Karwi in the Banda District. One Mannu Lal, the proprietor of a shop at Katri in the Central Provinces, had five hundred bags of grain stored at Badausa in the Banda District. On the 25th of December 1907, the defendants, acting as commission agents on behalf of Mannu Lal, sold the five hundred bags of grain to the respondent at the rate of 9 seers 6 chitaks to a rupee and the respondent paid them Rs. 51 as earnest money. Delivery of the grain was to be given in eight days. But Mannu Lal, the owner of the grain, refused to allow the appellants to deliver it to the respondent on the ground that he had not authorized them to sell the grain at the rate at which it was sold. The learned Judge finds distinctly that the appellants were authorized by Mannu Lal to sell the grain at the rate of $9\frac{1}{4}$ seers to a rupee and were not authorized to sell it as they did at the rate of 9 seers 6 chitaks to a rupee. He also finds distinctly that the appellants did not inform the respondent at the time of the sale that they were not authorized to sell the grain at the rate of 9 seers 6 chitaks to a rupee. He says "it follows from this finding that they untruly represented themselves to be authorized agents of Mannu Lal to sell his grain at the rate of 9 seers 6 chitaks to a rupee and are, therefore, liable under section 235 of the Indian Contract Act to compensate the respondent for the damages sustained by him." He gave the respondent a decree for Rs. 425 but refused to give him the costs spent by him in a previous suit against Mannu Lal, on the ground that he might have impleaded the appellants in the previous suit and so have saved the expense of the present suit. The respondent has filed cross-objections with regard to the refusal of the learned Judge to give him the costs of the previous suit. The objections were filed beyond time and the reason given for not filing them within time is unsatisfactory. We decline to consider the cross objections. On behalf of the appellants it is contended that section 235 of the Contract Act does not apply to the case. Dr. Tej Bahadur argues

that it was intended to apply to only the case of a person who represents himself to be the agent of another when in fact he has no authority from him whatever, but not to the case of a person who untruly represents the extent of the authority given to him by another. Dr. Tej Bahadur concedes, that the case of *Collen* v. *Wright* (1) on which section 235 is obviously based has been applied to both classes of cases in England. It seems to us clear that section 235 was intended to apply to both classes of cases. There is no distinction in principle between the case of a man who represents that he has authority from another when he has no authority whatever and the case of a man who represents that he has certain authority from another when he has authority of another description. In neither case can the man who makes the representation be said to be the authorized agent of the other with reference to the matter on which he has no authority. We agree also with the learned Judge of the Court below that the appellants must be taken to have untruly represented themselves to be authorized by Mannu Lal to sell his grain at the rate of 9 seers 6 chitaks to a rupee. For, as it was said in the case of *Collen* v. *Wright* (1), if a man makes a contract as agent he promises that he is what he represents himself to be and he is liable for the breach of his contract whether or not he is aware that he is acting beyond the scope of his authority. In our opinion the decision of the Court below is perfectly right and we dismiss the appeal and cross-objections with costs.

Appeal dismissed.

(1) 8 El. & Bl. 647; 27 L. J. Q. B. 215; 4 Jur. (N. S.) 357; 6 W. R. 123.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 543 OF 1910.

November 10, 1911.

Present:—Mr. Justice Abdur Rahim.

GOPAL ROW GADYRAM SAHIB—PLAINTIFF—PETITIONER.

versus

VEERAPPAN SERVAIKARAN—DEFENDANT—RESPONDENT.

Promissory-note, suit on—Promisee's name inserted in erroneous manner—Suit by real promisee—Maintainability of suit—Rectification of instrument, suit for, whether necessary.

A suit on a promissory-note can be maintained by a person intended as the real promisee of the note, although a wrong made is mentioned by mistake in the note, as promisee. The real promisee is entitled to produce evidence to show that the name given is a mistake.

Jacobs v. *Benson*, 63 Am. Dec. 609; 39 Maine 132 and *Willis* v. *Barrett*, 2 Starke's Report 29, relied upon.

Subbu Narayana Vanthiar v. *Ramaswamy Iyer*, 30 M. 88, 1 M. L. T. 377; 16 M. L. J. 503, explained and distinguished.

It is not necessary to bring a suit for rectification of the instrument before a suit on the promissory-note can be instituted.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Subordinate Judge of Tanjore, in S. C. S. No. 673 of 1910.

Mr. *P. S. Subramanya Iyer*, for the Petitioner.

Mr. *T. R. Venkatrama Sastri*, for the Respondent.

JUDGMENT.—What happened in this case was this. The plaintiff was entitled to some money from the defendant on settlement of accounts, and the defendant to secure the amount due, executed the promissory-note sued on. By a mistake of the writer, the name of the plaintiff's father was written as the person in whose favour it was executed instead of the plaintiff's name. The plaintiff's father was dead and his name was inserted by mistake, the parties intending all the time that the plaintiff was to be the promisee. The Subordinate Judge has non-suited the plaintiff on the ground that a suit for rectification of the promissory-note must be first brought and the instrument rectified before he can institute the suit. A suit for rectification of document is not cognizable by the Small Cause Court, but I do not see the necessity for such a suit. The case of the plaintiff is, that he is in fact the promisee and was intended to be such, but only his father's name has been entered by mistakes as if it was his own name. Evidence can be given to show that there was such a mistake. See Halsbury's Laws of England, Volume II, page 473, section 797, *Jacobs* v. *Benson* (1), and *Willis* v. *Barrett* (2); and there is no reason why the Small Cause Court cannot receive such evidence. Section 87 of the Negotiable Instruments Act, 1881, also seems to confirm the view, because, if a party to a negotiable instrument is entitled to make an alteration to carry out the common inten-

(1) 63 Am. Dec. 609; 39 Maine 132.
(2) 2 Starke's Rep. 29.

tion of the parties it stands to reason that evidence can be adduced to show that there has been a mistake. I do not think *Subba Narayana Vathiyar* v. *Ramaswami Iyer* (3) decides anything to the contrary. Here, what is sought to be proved is not that the parties intended that the benefit of the promissory-note should accrue to a person not named in the instrument, but that, by the promisee named in the promissory-note, the real promisee was intended.

The judgment of the Subordinate Judge is reversed and the suit will be remanded to him for trial on the merits. Costs will follow the result.

Decree set aside.

(3) 30 M. 88; 1 M. L. T. 377; 16 M. L. J. 503.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 755 OF 1910.

November 7, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Spencer.

CUDDAPARA ANANTARAZU GARU AND OTHERS—PLAINTIFFS—APPELLANTS.

versus

CUDDAPPARAZU NARAYANARAZU GARU AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (XV of 1877), Sch. II, Art. 120—Illegal attachment and sale—Suit for restitution and declaration—Limitation—Cause of action.

Where property has been wrongfully attached in execution of a decree and has subsequently been sold in pursuance of such attachment, a suit for a declaration that the attachment was illegal and for restitution is within time if brought within 6 years from the date of sale, though more than five years from the date of attachment. Though the attachment gives a cause of action for a declaratory suit, the sale gives a fresh cause of action as, till then, the title in the property does not pass from the owner.

Robert Skinner v. *Shankar Lal*, 31 A. 10 *n*; 5 A. L. J. 638 *n*; 1 Ind. Cas. 556 and *Narasimha Rao* v. *Ganga Ram*, 18 M. L. J. 590; 4 M. L. T. 271, relied upon.

Second appeal against the decree of the District Court of Cuddapah, in A. S. No. 159 of 1908, presented against the decree of the District Munsif of Nandalur, in O. S. No. 550 of 1906.

The Hon'ble Mr. *P. S. Sivaswami Aiyar*, Advocate-General, for the Appellants.

The Hon'ble Mr. *L. A. Govindaraghava Iyer*, for the Respondents.

JUDGMENT.—We think that the decree of the lower Appellate Court cannot be sustained. The learned Advocate-General for the appellant, though admitting that the attachment of 29th November 1898 was an invasion of the plaintiff's right and gave a cause of action for a declaratory suit, has, we think rightly, contended that the sale on the 30th June 1906 was a fresh invasion of the plaintiff's right and gave a fresh cause of action. The District Judge has referred to a second attachment, but apparently the first attachment was not discharged, and the Advocate-General does not base his argument on any allegation that the sale was not in pursuance of the original attachment of the 29th November 1898, nor is it contended that the attachment is a continuing wrong, but we think that the sale ought properly to be regarded as a fresh and greater invasion of the plaintiff's right so as to give a fresh cause of action. The sale, though held in pursuance of the attachment, was not a necessary consequence of it. The plaintiffs, no doubt, might then have sued, but we do not think they were bound to sue. [See *Robert Skinner* v. *Shankar Lal* (1).] The attachment gives the judgment-creditor certain right in execution, but the title to the property continues in the owner notwithstanding the attachment and it so continues even if the owner's objection to the attachment be disallowed. [*Narasimha Row* v. *Ganga Ram* (2).] But when a sale takes place and is confirmed, the title passes to the purchaser from the date of the sale (section 65, Civil Procedure Code). The owner's title is affected by a sale in an altogether different and greater degree than it is by an attachment. We think this gives the owner of the property a fresh cause of action. In the present case, the suit was brought within 6 years from the date of sale, and was, therefore, not barred by Article 120, Schedule II of the Limitation Act of 1877.

We must, therefore, set aside the decree of the District Judge, and direct him to restore the appeal to his file and dispose of it according to law.

The costs in this appeal will abide and follow the result.

Appeal allowed.

(1) 31 A. 10 *n*; 5 A. L. J. 638 *n*; 1 Ind. Cas. 556.

(2) 18 M. L. J. 590; 4 M. L. T. 271.

CALCUTTA HIGH COURT.
CIVIL RULE No. 2793 OF 1911.
August 3, 1911.
Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.
RAGHUNANDAN PROSAD SINGH AND OTHERS—PETITIONERS
versus
RAM NARAIN SINGH AND OTHERS—OPPOSITE PARTY.

Sanction to prosecute—Whether application in writing necessary—Inquiry—Sanction after great length of time—Criminal Procedure Code (Act V of 1898), s. 195.

Sanction under section 195 of the Criminal Procedure Code should ordinarily be given only on an application made by some person who may desire to complain of any of the particular offences specified in the section but whose complaint cannot be entertained without such sanction.

Durga Das Rukhit v. *Queen-Empress*, 27 C. 820; *In re Banarsi Das*, 18 A. 213; *Baperam Surma* v. *Gouri Nath Dutt*, 20 C. 474 and *Mufat Ali* v. *Emperor*, 10 C.W. N. 222; 3 Cr. L. J. 112; 2 C. L. J. 619, referred to.

It must be observed, however, that section 195 does not expressly provide that an application must be made for the grant of sanction. The rule stated above may be justified to this extent that before sanction is granted, the Court must be satisfied that there is some person who is willing to avail himself of it and carry on the prosecution.

An application for sanction need not to be made in writing nor need it be made before an inquiry is held under section 195.

An application was made to a Munsif for sanction to prosecute under sections 209, 210, 193 and 465 Indian Penal Code: the Munsif refused the application on the ground that it was undesirable to grant sanction to a private prosecutor, and his order was upheld on appeal:

Held, that in the circumstances of the present case it would be improper to grant sanction to the private prosecutor.

Rule against the order of the District Judge of Shahabad, dated November 7th, 1910.

Babu *Raghunath Singh*, for the Petitioners.

Mr. *K. Jaiswal* and Babu *Chandra Sekhar Prosad Singh*, for the Opposite Party.

JUDGMENT.—We are invited in this rule to set aside an order which purports to have been made under section 195 of the Code of Criminal Procedure. It appears that the opposite party bought at different times the interest of Jatadhari and Jagdeo Narain in certain estates. Subsequently, Jatadhari filed a rent suit against one Subhago and obtained an *ex parte* decree. On the 13th April 1907, an application was made to the Court which had tried the suit, for sanction to prosecute the partners, except Kuldip, for offences under sections 209, 210, 193 and 465 of the Indian Penal Code. The Munsif refused to grant the sanction on the 24th August 1907. He held in substance that this was an attempt by the petitioners for sanction to have by a cheap method an inquiry into their civil rights. An appeal preferred to the District Judge was dismissed on the 10th January 1908. At the same time, the learned Judge observed that if there was any civil suit or other judicial proceeding in which it transpired that there had been fraud and manufacturing of false evidence, sanction to prosecute could be properly asked for these. No civil suit or other judicial proceeding seems to have been subsequently commenced and on the 11th September 1909, Kuldip, alleging that he was the son of the daughter of Subhago, who had meanwhile died, made an application for return of certain documents. Notice was thereupon issued to the present opposite party to show cause if there was any objection to the return of the documents. They came forward and stated that the documents were forgeries and ought to be impounded. The learned District Judge thereupon refused to return the documents and directed the Police to inquire into the matter. The Police held an elaborate investigation and upon their report the learned Judge was satisfied that serious offences against public justice had been committed. He thereupon made the order now under consideration. His order was in substance to the effect that Ram Narain Singh and Jay Gopal Singh or either of them would be entitled to prosecute Kuldip, Jatadhari and Raghu Nandan for offences under sections 193, 209, 211 and 465, Indian Penal Code. These persons, subsequently, appeared before the learned Judge and represented to him that he had no jurisdiction to make the order in question. Thereupon the learned Judge, on the 20th February 1911, held that his order had been made without jurisdiction and he made a reference to this Court to have the order cancelled. This Court, however, declined to entertain the matter, unless an application was made in the regular way by the party concerned for cancellation of the alleged improper order. The present Rule was, subsequently, obtained by the petitioners.

RAGHUNANDAN PROSAD SINGH *v.* RAM NARAIN SINGH.

In support of the Rule it has been argued that the sanction granted under section 195 ought to be revoked because it was granted without jurisdiction. It has been contended, in the first place, that the proceedings for grant of sanction were irregular because no application had been made for that purpose by the party to whom sanction has now been granted. We are of opinion that there is no substance in this contention. It may be conceded that the cases of *Durga Das Rukhit* v. *Queen-Empress* (1), *In re Banarsi Das* (2), *Baperam Surma* v. *Gouri Nath Dutt* (3) and *Mufat Ali* v. *Emperor* (4) recognise the proposition that ordinarily a sanction under section 195, Criminal Procedure Code, should be given only on an application made for it by same person who may desire to complain of the particular offence but whose complaint cannot be entertained without such sanction. It must be observed, however, that section 195 does not expressly provide that an application has to be made for the grant of the sanction. The Rule recognised in the cases mentioned may be justified to this extent that before a sanction is granted, the Court must be satisfied that there is some person who is willing to avail himself of the sanction and to carry on the prosecution for the purpose whereof the sanction is granted. It does not follow, however, that such application must be made in writing or that it must be made before an inquiry is held under section 195. In our opinion, the objection taken on behalf of the petitioners is wholly groundless.

It has been argued, in the second place, that sanction ought to be revoked in view of the previous orders made by the Court which tried the rent suit and the learned Judge himself. As we have already stated, the application of the opposite party for sanction to prosecute the petitioners was refused on the 24th August 1907. That order, in our opinion, was, at the time it was made, based on good and sufficient grounds. The learned Munsif pointed out, upon the authority of the decision of this Court in *In the matter of Chundra Kant Ghose* (5), that in cases of this description, it was undesirable that sanction should be granted to a private prosecution. The order of the Munsif was sought to be assailed by way of appeal to the learned Judge, who also declined to interfere. In view of these facts, it is clearly improper that sanction should now be granted to these very persons for the prosecution of the petitioners. On this ground the sanction must be revoked.

But it does not follow by any means, as has been apprehended by the learned Counsel for the opposite party, that the ends of justice will be defeated. This is clear from section 195, Criminal Procedure Code, that steps may yet be taken very effectively to bring the offenders to justice if an offence has been committed, as the learned District Judge seems to hold on the result of the Police inquiry. The scope and object of section 195, Criminal Procedure Code, are perfectly plain, but have sometimes been misunderstood. The object of the section is to bar the institution of proceedings for prosecution in respect of certain offences unless such prosecution has been sanctioned by the Court concerned or action has been taken on the complaint of the Court. The policy of the law is that in cases relating to offences against public justice, the responsibility primarily rests with the Court concerned and the Court must decide whether it is necessary, for the sake of the purity of the administration of public justice, to have a prosecution, and whether such prosecution should be conducted by a private or by the public prosecutor. In the case before us, the application of the intending private prosecutor has already been refused; but the Court is still at liberty to adopt the other alternative. It will, therefore, be open to the proper authorities, the District Magistrate and the Public Prosecutor, to consider whether any action should be taken in this matter; but before it is decided to adopt such a course, one very important element must be borne in mind, namely, whether in view of the length of time which has already elapsed, a prosecution now commenced is likely to be brought to a successful termination.

The result, therefore, is that this Rule must be made absolute and the order of the learned District Judge set aside. The papers will be returned in order that further and

(1) 27 C. 820.
(2) 18 A. 213.
(3) 20 C. 474.
(4) 10 C. W. N. 222; 3 Cr. L. J. 112; 2 . CL. J. 619.
(5) 3 C. W. N. 3.

appropriate steps, if necessary, may be taken. The document impounded will be kept in custody and will not be returned.

Rule made absolute.

CALCUTTA HIGH COURT.
CIVIL RULE No. 2527 OF 1911.
June 27, 1911.
Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.
KRISHNA PROSHAD MANDAL—PETITIONER
versus
RABINDRA NATH DINDA—OPPOSITE PARTY.

Sanction to prosecute—Criminal Procedure Code (Act V of 1898), *s.* 195—*Filing forged document though not tendering in evidence—Attempt to use forged document—Penal Code (Act XLV of* 1860), *ss.* 471, 511—*Proceeding under section* 195, *Criminal Procedure Code —Costs.*

The filing of a forged document in a Court with the intention of relying on it at the trial of a case amounts to an attempt to use such document though the document itself was not actually used; and the person filing it may be prosecuted for offences under sections 511 and 471 of the Indian Penal Code.

Ambika Prasad v. *Emperor*, 35 C. 820; 8 Cr. L. J. 398, dissented from.

It is improper to award costs to a person who applies for sanction under section 195, Criminal Procedure Code.

Rule against the order of the District Judge of Midnapur, according sanction to the opposite party to prosecute the petitioner, passed in reversal of the order of the Munsif of Contai, dated 5th November 1910.

Babu *Khirode Narayan Bhuiyan*, for the Petitioner.

Babu *Jotish Chondra Hazarah*, for the Opposite Party.

Babu *Ram Charan Mitra*, Senior Government Pleader, for the Crown.

JUDGMENT.—We are invited in this Rule to set aside an order by which the Court of appeal below, in reversal of the order of the original Court, has directed the prosecution of the petitioner under section 195 of the Code of Criminal Procedure for attempt to commit an offence punishable under section 471 of the Indian Penal Code. The circumstances under which the order has been made are not disputed before this Court. On the 18th August 1909, the plaintiff, now opposite party before us, instituted a suit for recovery of arrears of rent against the petitioner. On the 7th September, the defendant filed his written statement in which he pleaded payment of the sum claimed to the officer of the plaintiff. On the 19th December the defendant filed what purported to be a receipt for the sum alleged to have been paid. On the 3rd March 1910, the plaintiff petitioned to the Court not to accept this receipt, because it had been filed too late. The plaintiff further appears to have impugned the genuineness of the document. On the 31st March, the defendant petitioned to the Court that the document then on the record might not be accepted as genuine. He asserted that the receipt filed by him had been removed from the record and in its place had been substituted the document which was justly impugned as forged by the plaintiff. On the 8th April, the suit was decreed, and we have been informed that no evidence was adduced by the defendant to prove the payment alleged to have been made by him. On the same day, the successful plaintiff prays that the receipt might be kept in safe custody, and on the 7th May following, he applied for sanction to prosecute the defendant. The defendant contended that he had not committed any offence. He denied that the receipt on the record had been filed by him and he reiterated his former statement that the document impugned as forged had been substituted by some person for the genuine document originally produced by him. The Court disbelieved this evidence and came to the conclusion that the document on the record had been originally filed by the defendant. But the Court refused the application under section 195, in view of the decision of this Court in the case of *Ambika Prasad* v. *Emperor* (1) which was treated as authority for the proposition that the filing of a document in Court was not an act which constituted an offence within the meaning of section 471 of the Indian Penal Code, because it had never been tendered in evidence. The plaintiff then appealed against this order. The learned Judge has held, upon the authority of the decision of this Court in *Queen-Empress* v. *Lala Ojha* (2), that the defendant is liable to be prosecuted for an offence under section 471 of the Indian Penal Code read with section 511; he has also directed the defendant to pay to the plaintiff the costs of the proceedings under section 195, Criminal Procedure Code.

(1) 35 C. 820; 8 Cr. L. J. 398.
(2) 3 C. W. N. 653.

KRISHNA PROSHAD *v.* RABINDRA NATH.

This decision has been assailed before us on two grounds, namely, *first*, that the petitioner has not committed any offence, and, consequently, his prosecution cannot be directed under section 195; and, *secondly*, that no order for costs ought to be made against him even if the order under section 195 is maintained. In our opinion the first of these contentions is unsustainable but the second must prevail.

It is clear upon the facts stated which have been determined only for the purpose of the present proceedings, that the applicant is liable to be prosecuted for attempt to commit an offence punishable under section 471, Indian Penal Code. The Courts below have concurrently found that the receipt in question is a forged document and was filed by the defendant in support of the allegation previously made in his written statement that he had paid to the officer of the plaintiff the sum claimed as arrears of rent. Two questions, therefore, arise for consideration, namely, *first*, whether the applicant has used as genuine a document which he knew to be forged, and, *secondly*, if this question be answered in the negative, whether he has attempted to use a document as genuine which he knew or had reason to believe to be forged.

In regard to both these questions, reliance has been placed, as already stated, upon the case of *Ambika Prasad* v. *Emperor* (1) which has been treated as an authority for the propositions that the mere filing of a document in Court without tendering the same in evidence does not constitute user of it within section 471 of the Penal Code. In our opinion, the head-note to the report is more comprehensive than the judgment, and we are not prepared to affirm it as an inflexible proposition of law that the filing of a document in Court can never constitute an user of it within section 471, Indian Penal Code, till it has been actually tendered in evidence. It has further been argued, on the strength of this decision, that the filing of a document in Court does not constitute an attempt to use it as evidence, and that, consequently, the petitioner is not liable to be prosecuted under section 471 read with section 511, Indian Penal Code. No doubt, there is one isolated sentence in the judgment in the case of *Ambika Prasad* v. *Emperor* (1) which lends some apparent support to this contention. But if the learned Judges intended to lay it down as an inflexible rule that what has been done in the case before us did not in law constitute an attempt to use the document, we are not prepared to accept that view as well founded. Here the petitioner has done everything that was necessary to enable him to tender the document in evidence at the trial. He had produced it and filed it in Court; and his purpose admittedly was to rely upon it at the trial with a view to support his plea of payment of the sum claimed by the plaintiff. Upon these facts, we are of opinion that the case is, undoubtedly, one of an attempt to use the document, though possibly not a case of using the document itself. It is not necessary for our present purpose to give a definition of an attempt to commit an offence within the meaning of section 511, Indian Penal Code. The line of separation between preparation and 'attempt' may in some cases be very fine and the question whether what has been done amounts only to preparation or constitutes an attempt must depend upon the circumstances of each case. The danger which necessarily pursues an endeavour to define what constitutes a 'preparation' and an 'attempt' is well illustrated by the decision in *Empress* v. *Riosat Ali* (3) where Sir Richard Garth, C. J., relied upon the case of *Reg.* v. *Chaseman* (4) and *Macpherson's* case (5) for the purpose of defining what constitutes an attempt. The cases relied upon, however, have been, subsequently, overruled in England [*Queen* v. *Brown* (6) and *Queen* v. *Williams* (7).] Without undertaking, therefore, to define the term 'attempt,' we hold that the circumstances of the case before us show that the prosecution of the petitioner has been rightly ordered and that order will stand.

But in so far as the order of the Court below directs the payment of costs by the petitioner to the opposite party, it must be set aside. A proceeding under section 195 of the Criminal Procedure Code ought not to be treated as a proceeding between private parties. The person who applies for sanction presumably does so in the interests of the administration of public justice, and if that be his real point of view, he cannot very

(3) 7 C. 352; 8 C. L. R. 572.
(4) Lewis & Cavros 145.
(5) Dean & Bell 202.
(6) 24 Q. B. D. 357.
(7) (1893) 1 Q. B. 320.

well claim costs from the party against whom he obtains the order. Besides, the grant of sanction does not establish the guilt of the person against whom the order is made; if ultimately it transpires that the person is innocent, the order for payment of costs by him to the party who obtained the sanction cannot very well be justified. We, therefore, make the Rule absolute in part and set aside the order for payment of costs. The order of the Court below is affirmed in other respects.

Rule made absolute in part.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 598 OF 1911.

November 16, 1911.

Present:—Mr. Justice Tudball.

EMPEROR—PROSECUTOR

versus

BEHARI LAL AND OTHERS—ACCUSED.

Ferries Act (IV of 1878), *s.* 22—*Unauthorised collection by servants of lessee—Liability of lessee—Master and servant—Act done beyond scope of duty.*

B. as the lessee of a ferry employed *C.* to attend to the ferry and collect the tolls. *C.* in contravention of law extorted unauthorized and excessive toll from certain passengers and thereby committed an offence under section 22 of the Ferries Act. *B.* was prosecuted for this offence and convicted:

Held, that the conviction of *B.*, who was not present and took no part in the extortion, was bad in law.

Queen-Empress v. *Tyab Alli*, 24 B. 423, distinguished.

Reference submitted by the Sessions Judge of Farrukhabad, dated the 18th of October 1911.

The *Government Advocate*, for the Crown.

JUDGMENT.—This is a reference by the Sessions Judge of Farrukhabad. The facts of the case are as follows:—The applicants for revision in the Court below, namely, Behari Lal and Bashir-ud-din, are the lessees of Singhi Rampore Ferry. As such lessees they employed certain persons to attend to the ferry and collect the tolls. These servants in contravention of the law extorted unauthorized and excessive toll from certain passengers thereby committing an offence under section 22 of the Ferries Act. The lessees, who apparently were not present and took no part in the extortion, have been prosecuted for this offence, and have been convicted and fined, apparently, on the ground that whatever the servants have done in the course of their employment that act is the act of the masters. The learned Government Advocate has called my attention to a ruling in *Queen-Empress* v. *Tyab Alli* (1). That is a case under the Arms Act. The accused therein was a licensed vendor of arms and ammunition and he employed a certain man as a salesman. The latter sold certain Military Ammunition to certain persons without previously ascertaining that such persons were legally authorized to possess the same. It was pointed out in the judgment of that case that the question for decision was whether the accused had or had not "*delivered*" the stores, as section 22 of the Indian Arms Act, 1878, makes penal a "*delivery*" of Military stores et cetra. The learned Judges who decided the case remarked as follows:—"We fail to see how it can be contended that, under these circumstances, a delivery of goods by the man in charge would not be a delivery by the owner of the shop? It is not a question of intention, of *mens rea*, or of knowledge; it is the delivery which the Act makes penal and the delivery by the Manager is clearly in this case a delivery by the licensee." The rule laid down in *Attorney-General* v. *Siddon* (2) runs as follows:—"Whatever a servant does in the course of his employment with which he is entrusted and as a part of it, is the master's act." The offence in the present case is a very different one. It consists of extortion of unauthorized tolls from passengers. The servants in doing this act did something which was outside the scope of their employment. In this very offence there is decidedly a *mens rea*, a criminal intent. If it were an act done by the servant within the scope of their employment, then the conviction of the master would, in the present case, be a good one. But, in my opinion, the principle laid down in *Attorney-General* v. *Siddon* (2) does not apply to the present offence. The conviction of the lessees is bad in law. I accept the reference and set aside the conviction and sentence. The fine, if paid, be refunded.

Conviction set aside.

(1) 24 B. 423.

(2) (1830) 1 C. & J. 220; 1 Tyr 41; 9 L. J. (o. s.) Ex. 7.

BABU PERSHAD *v.* EMPEROR.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 510 OF 1911.
November 14, 1910.
Present:—Mr. Justice Tudball.
BABU PERSHAD--PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 110, 406 —Judgment of lower Appellate Court very sketchy—Evidence not examined or weighed carefully—High Court's power to interfere on merits—Revision—Practice—Reputation—Evidence—Admissibility.

The High Court will not ordinarily interfere on merits with proceedings under section 110 of the Code of Criminal Procedure provided that the Court hearing the appeal under section 406 shows in its judgment that it has really and not merely nominally considered the evidence on the record.

Where the judgment of a District Magistrate, deciding in appeal a case under section 110 of the Code of Criminal Procedure, is very short and does not show that the evidence was at all examined and carefully weighed, the High Court will interfere on merits in revision.

Sham Lal v. *King-Emperor*, 6 A. L. J. 487; 2 Ind. Cas. 225; 9 Cr. L. J. 528, referred to.

In a proceeding under section 110 of the Criminal Procedure Code a list of crimes in which the accused was suspected by a Police Officer is inadmissible in evidence to establish the reputation of the accused.

Revision against an order of the District Magistrate of Meerut.

Mr. *Boys* (with him Messrs. *R. Alston* and *Sital Prashad Ghosh*), for the Applicant.

The *Assistant Government Advocate*, for the Crown.

JUDGMENT.—This is an application in revision from an order of the District Magistrate of Meerut whereby he dismissed the applicant's appeal from the order of a first class Magistrate binding him over to be of good behaviour in his own bond for Rs. 2,000 with two sureties for Rs. 2,000 each for a period of one year. As remarked by Alston, J., in the case of *Sham Lal* v. *Emperor* (1), the High Court will not ordinarily interfere on the merits with proceedings under section 110 of the Code of Criminal Procedure provided that the Court hearing the appeal under section 406, shows in its judgment that it has really and not merely nominally considered the evidence on the record. In the present case some fifty three witnesses for the prosecution were examined by the Court of first instance. The case was keenly contested by the applicant, who called about one hundred and twenty witnesses to establish his good character. The Magistrate who heard the case wrote a judgment covering some eight or nine pages of typed matter. He discussed the evidence and came to a conclusion in respect thereto. The District Magistrate decided the appeal in a judgment of some fourteen lines. He has merely stated therein that the Sub-Divisional Magistrate had tried the case carefully and conscientiously and had given sound reasons for his conclusions and that he (the District Magistrate) agreed with his reasons and considered that the evidence on the record warranted the order passed. There is no attempt, whatsoever in this judgment to show that the evidence was at all examined and carefully weighed. It is a judgment written as if it were the case of a revision and not of an appeal. The learned Judge of this Court before whom this application was filed, therefore, admitted it in order that the evidence might be examined with the assistance of the applicant's Counsel. I would, therefore, call the attention of the District Magistrate to the remarks by Alston, J., in the above mentioned case with which I fully agree.

There are certain facts in this case which are either admitted by the prosecution witnesses or clearly proved on behalf of the applicant. The latter is a *Brahmin* by caste and a resident of the town of Ghaziabad, his father Debi Diyal is a retired *Kanungo* and apparently a well-to-do man. It has even been said by one of the witnesses for the prosecution that he is worth a *lakh* of rupees. He owns *zemindary* in several villages, house property and also earns an income by money-lending. The accused is a man of about 36 years of age who has acted as general-attorney on behalf of his father. Income tax has been jointly assessed on both father and son and there can be no doubt that the son has been managing his father's estate especially when the latter was in service. The accused has two uncles who have served in the Police force as Sub-Inspectors and his cousins are in Government service in the Postal Department. He is also a general attorney on behalf of these cousins. He is, moreover, the only son of his father. It will thus be seen that the surrounding circumstances of the accused's life are not such as tend to make a man an habitual thief, receiver of stolen property, a harbourer of thieves or so dangerous or desperate a character that it is unsafe to allow him to mix with the public. Furthermore, it is in evidence that

(1) 6 A. L. J. 487; 2 Ind. Cas. 225; 9 Cr. L. J. 528.

the applicant was a candidate] for a seat on the Municipal Board of Ghaziabad. In 1902 he very keenly contested with one Abdullah Khan the seat which the latter had held for many years. He was defeated but he contested the validity of the election in the Court of the District Magistrate. Sub-Inspector Juni Singh, a witness for the prosecution, has clearly admitted that there is ill-feeling between Abdulla Khan and Debi Dayal also over property. There is no doubt that the property of Ibadullah, a brother of Abdullah Khan and father of the witness Siraj Ahmed, was attached and sold up by Debi Diyal. The evidence of Syed Farazand Ali, Tahsildar, also shows that when he became Tahsildar of Ghaziabad in 1906 the accused made a complaint to him that the local Police Officer (who was then Agha Sher Ali Khan) was doing his best to dishonour him. One Budhu was prosecuted under section 110 of the Code of Criminal Procedure and was bound over to be of good behaviour. This was apparently in the year 1909. He, I understand, was one of the applicant's servants, who has, however, been dismissed since the case. In the course of the case against Budhu some of the witnesses, who are also witnesses in the present case, namely, Sheo Charan Das, Siraj Ahmed, Gokul Chand, Bhagwan Das, Madda Mal and Zaharia Mal, stated in their evidence that Budhu was an associate of the present applicant and that the latter was a *badmash*, against these six witnesses the present applicant filed a suit for damages for defamation in the Civil Court. These suits have been subsequently dismissed, I understand on a technical point, namely, that the statements were privileged. It is in these circumstances that the present case was launched against the applicant sometime towards the end of the year 1910. The charge against him falls under clauses (*a*), (*b*), (*c*) and (*f*) of section 110 of the Code of Criminal Procedure. It is that he is by habit a robber and house-breaker; that he habitually receives stolen property; that he habitually protects and harbours thieves, and that he is so desperate and dangerous a character as to render his remaining without security for good behaviour, hazardous to the community. In addition to a mass of irrelevant and inadmissible evidence which has been admitted on the record, the other prosecution evidence was directed to proving the applicant's reputation. It was further alleged that he had committed certain specific offences for none of which he was ever prosecuted excepting one case in which he was convicted of an offence under section 232, Indian Penal Code, and fined Rs. 25. In the matter of the charge under clause (*f*) of section 110 this one conviction is practically the sum total of the evidence to prove that the applicant is desperate and dangerous to the community. One witness does, indeed, state that the applicant extorted money from a man who is now dead. He further stated that the accused attempted to extort money from a person who is still alive, but who is not called to prove the fact. This witness is speaking solely from hearsay. Several witnesses have stated that they are so afraid of him that they remain indoors after dark. They say that they fear for their lives. I have examined the record. Not one of them can give a reasonable cause for this fear. In so far as the charge under clause (*f*) is concerned, there is practically no evidence at all. The charge under this clause cannot be proved by general repute. The one case of assault which has been established against the applicant is utterly insufficient to prove that he is a dangerous character. I would point out that the Magistrate took into evidence the record of a case against the accused in which on the 13th of October 1909 he was fined a sum of Rs. 10 for failing to attend the police station on summons issued by the Sub-Inspector. This record is perfectly irrelevant. It does not, for a single instant, indicate that the accused is a man of bad or violent character. It is one instance of the evidence which was inadmissible but on which the Magistrate placed great reliance. Coming to the charges under clauses (*a*), (*b*) and (*c*), eliminating inadmissible evidence, there remains a considerable number of witnesses of the town of Ghaziabad and neighbouring villages, who have testified to the fact that the applicant has the reputation of being a man, who habitually harbours thieves, commits theft and receives stolen property. The majority of these witnesses have stated that they have seen the accused associating with various persons some of whom they declare to be persons of bad character, but in the majority of these cases, however, beyond

the opinion of the witnesses themselves there is nothing to show that these alleged associates are persons of bad character. In the cases only of Mohan Kedarn and Budhu have the convictions been established. The question remains whether this evidence for the prosecution is worthy of acceptance. I have gone minutely and with great care through both that for the prosecution and the defence. Omitting the Government servants, namely, the Police Officers and the Tahsildar, seventeen of the witnesses are residents of the town. Others are of the neighbouring villages. As I have noted above, the accused is a man of about 36 years of age. The majority of witnesses against him state that it is only during the last three or four years that he has taken to evil ways. One or two have stated that he has always been such a man. All of these witnesses are neighbours, many of whom have known him all his life and nearly all have known him for a long period. It is impossible for the two statements to be correct, namely, that the man has been a bad character all his life and that he has only been a bad character during the last three or four years. As I have already pointed out, the surrounding circumstances of his life are not such as tend to make a man become an habitual thief or receiver of stolen property. If he had been such all his life it is clear that all his neighbours must have heard of this many years ago. We may take it, therefore, for granted that of the two statements made by the prosecution witnesses in this respect one is more likely to be correct which goes to show that it is only in later years he has taken to evil courses. But there are very clear indications in the evidence of the witnesses themselves as well as from the surrounding circumstances that the witnesses have done their best to exaggerate and to make things look as black as possible against the accused. I take the case of Sheo Charan Das as an example. He is a *zemindar* and money-lender of Ghaziabad. He gives the reputation of the accused. He states that he associates with Mohan, Budhu and certain others who were his servants and of whom Budhu was bound over. His statement that Murli and Ghasi, goldsmiths, are also his associates is valueless as evidence. He states that these goldsmiths melt down stolen property for the accused. The basis of his knowledge he cannot give, nor is it established that Murli and Ghasi are men of bad character. He then states what he must know to be a lie, *i. e.*, that the accused has no honest occupation, although it is proved from other evidence that the accused lends money and has obtained decrees in the Civil Courts. The character of this witness is further indicated by a little episode in his life, which has been proved. Prosecution witness No. 11 is one Chaudhari Bhagwan Das, who like Sheo Charan Das is a member of the Municipal Board. On the 8th of February 1909, Sheo Charan Das and Madda Mal, Prosecution witness No. 4, and Ram Chandar, Prosecution witness No. 7, and one other person presented a petition to the District Officer as against Bhagwan Das. They therein gave to Bhagwan Das the very character and reputation which they now ascribe to the present accused. In his cross-examination Sheo Charan Das admitted having made this complaint and stated that at that time Bhagwan Das was a man of bad character but that he had since reformed and is now a good man. Bhagwan Das, when examined as a witness for the prosecution in this case, stated that Sheo Charan Das, etc., had filed this petition against him because the present accused Babu Prasad, being hard pressed by the Police had gone to him to seek his assistance and to pray him to intercede on his behalf with the Police Officer. He says that seeing Babu Prasad on several occasions in his company these misguided men Sheo Charan Das, et cetera jumped to the conclusion that he and Babu Prasad were alike and, therefore, filed the petition of the 8th of February 1909. That petition is on the record. An examination of it shows that while Sheo Charan Das et cetera, set forth therein the names of many persons of alleged bad character with whom they said Bhagwan Das was associating, they nowhere in that petition mentioned the name of Babu Prasad. Now, Babu Prasad is said (*vide* the evidence of Agha Sher Ali Khan, Sub-Inspector) to have had a hand in every crime which was committed in the years 1908 and 1909 in the town of Ghaziabad. Two thefts occurred in the two houses, which adjoin that of the accused on either side. Even in these cases, according to the Sub-Inspector, the accused had a hand. I do not for a moment believe the statement of the Sub-Inspector. It is palpably gross exaggeration, even if Babu Prasad were a man of bad

character. But granting that Babu Prasad is an habitual thief and receiver of stolen property and has been so far several years to the knowledge of all these witnesses, and granting that Bhagwan Das's statement is true, it is impossible to understand why the petition of the 8th February 1909 contains no mention of the present accused. As a matter of fact, there is nothing to show that Bhagwan Das was ever an habitual thief or receiver of stolen property. The petition was probably the outcome of ill-feeling over some local matter; apparently no action was taken on it. It shows how persons of Sheo Charan Das's position and character are ready to make a false statement of this kind and it is a most significant fact that the petition mentioned above contains no trace of the present accused's name. In a case like the present one, where a man has been for thirty-two years of his life apparently a respectable and honest member of society and who is said to have taken to evil courses without any ostensible reason it would, I think, be dangerous to rely on the statement of a man of this description, Sheo Charan's credibility is also indicated by other portions of his evidence. He states that Debi Dayal accused's father is a wealthy man and that he owns a small share in "one" village. He does not know that Debi Dayal is a money-lender. He knows of no ill-feeling between Abdul Khan and Debi Dayal. Now, this witness is a joint *zemindar* with Abdulla Khan in several villages. He must know that Debi Dayal is a money-lender. The ill-feeling between Abdulla Khan and the accused must be a matter of notoriety in a small town like Ghaziabad, especially since the contest over membership of the Municipality. The witness is clearly lying. The remarks I have made in respect of this witness, who is one of this most respectable of the prosecution witnesses, apply with equal force to Zaharia Mal, Madda Mal, Gokal Chand, Sambhu Ram Chander, Mannu Lal, Bhagwan Das, Girdhari and Chajju Mal. Of the other Ghaziabad witnesses, Akhtar Buland Khan, a petition-writer, is clearly shown by his cross-examination to be inimical to the accused. The majority of these Ghaziabad witnesses are connected with each other by relationship or business. One of the prosecution witnesses No. 16 curiously enough states that the accused is a man of good character. The witness Siraj Ahmad Khan was examined at a late stage of the case, He also states that the accused has no ostensible means of livelihood, but he is clearly a man who is moved by bitter ill-feeling against the accused. In a matter of reputation it would be a gross absurdity to place any reliance on the evidence of a witness like this. Abdulla Khan is his uncle. He holds a *mukhtar-nama* on behalf of his father. He has been cross-examined. He states that he does not know whether or not the accused had his father's property sold up.....He even says that he does not know that the accused contested his uncle's seat on the Municipal Board. He states that the accused threatened him after he had given evidence against Budhu. He adds that he filed no complaint in respect thereto as he did not know that the accused could be bound over. He pretends to be terrified by the accused. It is curious conduct for a Pathan. The remaining witnesses come from the neighbouring villages of Ghaziabad. An examination of their evidence will show that a large number of them, in fact the majority are co-sharers in villages in which Abdulla Khan and Sheo Charan Das, et cetera, are also co-sharers. Mohan Singh is a *Thela-wala*, Bansi and Bhawani are persons who ply carts for hire, very few of these witnesses are persons of any social standing. Most of them state that they have known the accused only for a few years though he has lived all his life in their neighbourhood. Many of them admit that they obtained their information as to the accused's character from Bhagwan Das, Sheo Charan Das and Madda Mal. The evidence of Salig and Hardeo Singh is purely hearsay and is of no value in regard to the accused's character. They nearly all mention different persons as being associates of the accused. They say these men are bad characters. There is no evidence to show this nor are there proofs on the record of any conviction against them. I take the evidence of Bhagwan Singh as a typical example of this class of witness. He says: I live in Karera about two miles off Ghaziabad. I am a *zemindar* paying revenue Rs. 100 on my own account and Rs. 1,025 as *lambardar*. I have known the accused for three years. I have often seen him with Wali Dad of Mula who is a bad character. His gang was connected

with the dacoity in Razapore. Hence, I consider him a *badmash*. He admits that Abdulla Khan and Ramrichpal are co-sharers in his village. Now, the Razapore dacoity or robbery was not committed in his presence so that his statement merely amounts to this that he heard certain rumours and, therefore, considered the accused a *badmash*. As evidence establishing reputation, this is valueless. It establishes no reputation whatsoever. In this second batch of witnesses I also note that one Chote speaks for the accused and states that he is a good man. There remains the evidence of the Police Officers and the Tahsildar. The Police Officers are, of course, not impartial witnesses considering the relations that have clearly been existing between them and the accused. Their evidence, moreover, on the face of it contains gross exaggerations and mis statements. The Police Officers state that the accused has no means of subsistence which is palpably false. I notice that the Magistrate allowed the first Police Officer to put in a list of crimes in which he himself and another Officer suspected the accused. This class of evidence is quite inadmissible in such a case as this to establish the matter of a man's reputation. No doubt, a Police Officer is a competent witness to speak to the reputation of persons who dwell within his circle. No doubt, in the course of inquiries his suspicion may have been directed against certain persons and he may by reason thereof have received an impression as to their character and their reputations. He, no doubt, is entitled, when he has sworn to the reputation of a man, to give the basis of his knowledge and to point out how he has come to consider the accused a man of bad character. But it is quite a different thing for the Magistrate to take into evidence a list of cases in which other Police Officers, who have not been called as witnesses, have remarked in their diaries that suspicion had fixed itself on a certain person. If the local Police feel at all disposed to do harm to any resident of their circle it is a very simple matter for them to enter in their diaries from time to time that suspicion has fallen on certain persons and then finally to have their names registered in the Police register of bad characters and ultimately to take steps against them. I do not say that this is either always or frequently done. But it is so easily done that this class of evidence is of very little value and, unless the actual Police Officer is called who made the inquiry in his diary, a list of such cases is totally inadmissible in evidence. It is also very easy for a Police Officer to say that suspicion fell on the accused in certain cases. I note here that in the case of one Nanak in which suspicion was said to have fallen on the present accused, Nanak has himself been called as a witness for the defence and has given the lie to this statement. There is another case in which one Kedaru was convicted in 1909, certain witnesses have actually stated that the accused joined with Kedaru in commiting the offence. The untruth and the exaggeration of this statement is evident from the fact that the Police Officer cannot even say why he did not send up the accused for trial. Referring to the evidence of Agha Sher Ali Khan, Sub-Inspector, I see that he makes reference to the capture of a gang of men who were carrying arms in a grove in Ghaziabad. The men in that case were sent up for trial, were convicted under the Arms Act and were also bound over to be of good behaviour. I see that in the course of the case it was alleged that the accused Babu Prasad had sent for the gang to commit crime. The untruth of this is palpable. For if there had been any evidence whatsoever on the point, the Police most assuredly would have prosecuted Babu Prasad along with the others. This witness showed great bias against the accused and was thus led to make incredible statements. He alleged that crime had been very rife in 1908 and 1909 in the town, and that all investigations showed that the accused was concerned in them. He even states that the accused was concerned with the burglaries in the houses of those persons who live next door to him. It is hardly possible to believe this. He admits that on no occasion has he ever searched the accused's house. The Magistrate allowed him to give hearsay evidence to the effect that he had heard that Mohan and Ghasi, goldsmiths melted down property for the accused. The Tahsildar Syed Farzand Ali Khan has limited himself to stating that Babu Prasad did not bear a good character but that his reputation was "very bad indeed." He added that he had no personal opinion about the accused. He admitted that his informants

on the question of Babu Pershad's character were Bhagwan Das and Siraj Ahmed whom I have already discussed. He admitted that when the accused made a complaint to him about the Police he made no inquiry about the matter. It is surprising to me that a man of this witness's position, holding the post of a Magistrate, should have lent himself to a case like the present one. The fact that Siraj Ahmed and the accused were on bad terms must have come to his knowledge. Likewise, the character of the other Ghaziabad witnesses. According to himself, he merely swallowed what those persons told him and his statement is valueless as evidence. The Magistrate took into evidence the record of the case, *Emperor* v. *Budhu*, under section 110, Criminal Procedure Code, which was decided on the 23rd September 1909. Now, the record of this case was inadmissible except to prove the fact that Budhu, an alleged associate of the applicant, had been bound over. But the Magistrate in his judgment says, "from the evidence of witnesses in the above case and from the Magistrate's judgment it is fully established that the said Budhu was an associate of the accused whom the Magistrate styles a notorious *badmash* according to the witness." To treat this record as evidence in this matter was most unfair to the present accused who was no party to the former trial of Budhu and had no opportunity of defending himself. Practically, the Magistrate has taken into evidence against the accused the statement of witnesses who were examined in a case to which the accused was no party and whom he had no opportunity of cross-examining; next the Magistrate took into evidence the record of the case, *Emperor* v. *Dalip*, under section 109 of the Code of Criminal Procedure decided on the 23rd September 1909. This was equally inadmissible in evidence. No evidence whatsoever (except hearsay) has been produced to show that the present accused has any concern with the accused in that case. The Magistrate has clearly taken into consideration the evidence of the witnesses in that case, for he refers to it in his judgment. He has also taken into evidence the case against the same persons under the Arms Act and also the record of the case against the present accused under section 174, Indian Penal Code, which I have already mentioned. He has also taken into consideration the record of the civil suit brought by Debi Dayal against other persons for recovery of money on the basis of a mortgage-deed. Babu Prasad was no party to that suit, though his father was. It is said that the Munsif came to the conclusion that Babu Prasad was guilty of fraud. How this evidence is admissible to prove that the accused is a habitual robber, receiver of stolen property or harbourer of thieves I fail to see. The Magistrate has taken the Munsif's judgment as evidence, proving that the accused was an extravagant man from whom his father had separated. The Munsif may on the evidence before him have come to that conclusion for the purpose of that case. But as Babu Prasad was no party to that suit it is clear that that judgment was not admissible in evidence to prove that the accused is an habitual thief, robber or receiver of stolen property.

In the view I have taken of the evidence for the prosecution, it is unnecessary to discuss the evidence for the defence at any length: I wish to lay no stress on it, because, in my opinion, the prosecution evidence is tainted and is unworthy of acceptance. But I cannot conclude my judgment without pointing out how unjust the Magistrate has been in the manner in which he weighed this evidence. He divided the witnesses into three groups, (*a*) Brahmins, of whom there were sixty-four, (*b*) Railway servants and (*c*) forty-seven men of different castes. The Brahmins he rejected *en bloc* because they were Brahmins. The Railway servants he rejected *en bloc* because the local Police in the year 1910 had successfully prosecuted a European Railway official named Mr. Roots for illicit importation of cocaine. The balance of forty-seven he rejected because most of them said that they had no personal knowledge of the accused's character, the rest he said were either partizans of the accused or were threatened by him. The Magistrate did not deign to point out the grounds on which he held that some of the witnesses were his partizans. He selected one witness Niadar as an example of those cowed by the accused. Mula Mal, a brother of Niadar, at the trial of Budhu, stated that Babu Prasad was Budhu's asso-

In re THEOPHILUS RAMAPPA.

ciate and a bad character. Niadar has in the present case come forward to state that the accused is a man of good character. The Magistrate concludes that Niadar had done this in order to avert the wrath which had fallen on the head of his brother, because Babu Prasad sued him for defamation. There is no presumption that Mula Mal stated the truth any more than that Niadar has stated the truth, yet for no real reason the Magistrate concludes that the latter is a liar. The Magistrate has also generally rejected the evidence for the defence because the witnesses state that they do not know other local bad characters. He also says that they have not had a sufficient opportunity of watching the movements of the accused. The majority of them are neighbours and have had just as much opportunity as the witnesses for the prosecution. I would point out that the Magistrate had nowhere in his judgment even mentioned the fact that the present accused had complained against the Police to the Tahsildar. In his judgment he even goes so far as to cast a slur on the character of the accused's father, though the witnesses for the prosecution themselves have almost unanimously stated that his character is above suspicion. He says in his judgment.—"The prosecution witnesses put the accused's father's present worth at about a *lakh*. How that was acquired I must not discuss here." This innendo is unjust and unfair. A document was produced on behalf of the defence to show that the father of the accused had made adverse remarks against the Ghaziabad Police in an application to the Collector of Aligarh for leave. In respect to this, the Magistrate remarks that it is not shown that the Ghaziabad Police had any information of it at all. Yet, curiously enough, he omits all mention of the other petition presented to the *Tahsildar* which I have already noted above. Towards the end of the judgment the Magistrate observes,—"Moreover, it would appear from the record that the present prosecution was proposed as far back as February 1910, but it was not sanctioned until the authorities had fully satisfied themselves on the point." This was not a relevant fact in the first place, and in the second place there is no evidence to establish it, any more than there is to establish he explanation given by the accused himself, of this very delay in launching the prosecution against him. His explanation is that in February 1910 the then District Magistrate, Mr. Poster, and the Superintendent of Police after inquiry into the matter decided to take no proceedings against him and that the present proceeding was only taken on the arrival of a new District Magistrate who was ignorant of the true facts. It is unnecessary to say any more. The evidence against the accused is, in my opinion, open to very grave suspicion and the case is not one in which a Court would be justified in calling on the applicant to give security for his good behaviour. The appeal was one which, in my opinion, was worthy of much more consideration at the hand of the lower Appellate Court than it actually received. I admit the application, the order of the Magistrate is set aside *in toto*.

Application allowed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 185 OF 1911.
CRIMINAL REVISION PETITION NO. 142 OF 1911.

November 7, 1911.

Present:—Sir Ralph Benson, KT., Judge, and Mr. Justice Sundara Aiyar.

In re THEOPHILUS RAMAPPA—PETITIONER.

Penal Code (Act XLV of 1860), s. 408—Criminal breach of trust by servant—Various sums of money received by servant from master at various times by false representations and not accounted for.

The accused, as the servant of a firm, obtained various sums of money from the Manager of the firm at various times by false representations that they were required for paying coolies but could not account for them afterwards:

Held, that the accused was guilty of criminal breach of trust as a servant.

Queen v. *Hamilton Thompson*, 32 L. J. M. C. 57; *Queen* v. *Cooke*, 40 L. J. M. C. 68, referred to.

Petition, under sections 435 and 439, Criminal Procedure Code, praying the High Court to revise the judgment of the Sessions Judge of South Canara, in Criminal Appeal No. 62 of 1910, confirming the conviction, but reducing the sentence passed on the petitioner by the Treasury 1st Class Magistrate of South Canara, in C. C. No. 3 of 1910.

Dr. *S. Swaminathan*, for the Petitioner.

Mr. *C. F. Napier*, Public Prosecutor, for the Crown.

ORDER.—The accused, who was the superintendent of Messrs. Killick Nixon's Coffee Casing Works has been convicted of criminal breach of trust by misappropriating a large sum of money made up of amounts which he received from the Manager at various times on the false pretence that they were required for paying coolies who garbled coffee. The point argued in revision is that the receipt of each sum of money making up the aggregate amount by false representation amounted to the offence of cheating; that the charge against the accused really was that he committed various offences of cheating more than three in number, and that a single charge for all these acts of cheating was illegal. It is urged that the subsequent appropriation of the amounts by the accused to his own use would not amount to criminal breach of trust as the criminal intent was present at the time of the receipt of the money from the Manager. This argument is not sound. When the accused received the money he did so as a servant of the Company for the express purpose of using it for his master's benefit in a particular way. He was, therefore, entrusted with the money, and his appropriating it to himself clearly amounts to criminal breach of trust.

Dr. Swaminadhan relied on the case of *Queen* v. *Hamilton Thompson* (1) where, in similar circumstances, it was held that the offence committed was not larceny; but that case was disapproved of in the latter case of *Queen* v. *Cooke* (2) where it was pointed out that the earlier case merely held that the accused received money by false pretences, but the question whether his subsequent retention of it would amount to larceny was not considered. We are of opinion, therefore, that the conviction is right. We ought to observe that, in our opinion, Counsel ought to have brought to our notice the later decision, which weakened the case relied on by him. The petition is dismissed.

Petition dismissed.

(1) 32 L. J. M. C. 57.
(2) 40 L. J. M. C. 68.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 1460 OF 1911.

November 30, 1911.

Present:—Mr. Justice Kensington.

EMPEROR—PROSECUTOR

versus

GANDA SINGH—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 35, 397, 438, 439—Accused convicted in two separate cases—Second sentence ordered to run from date of order—Direction illegal—Concurrent sentence, when can be passed—Revision—Effect to be given to real intention of Magistrate—Reduction of sentence.

The question whether sentences should be concurrent or consecutive arises only in cases of separate convictions *at one trial*. In all other cases, section 397 is imperative and should not be disregarded.

On 30th March 1910 *A*. was sentenced to four years' rigorous imprisonment. On 19th April 1910, he was convicted in a separate case by the same Magistrate and sentenced to three years' imprisonment which the Magistrate ordered should run from the date of his order. The first sentence was reduced on appeal to two years. On a reference to the Chief Court that the Magistrate's direction as to the commencement of the sentence in the second case was illegal;

Held, (1) that the direction was illegal and ought to be expunged from the order;

(2) that as the intention of the Magistrate was that *A*. should undergo a total period of 4 years' imprisonment, effect should be given to this intention and, consequently, the second sentence should be reduced to a term of two years to commence from the date of expiry of the first sentence.

Case reported by the District Magistrate, Lahore, under section 438 of the Criminal Procedure Code.

FACTS.—In case No. 14/7 decided by the Additional District Magistrate, Lahore, the accused Ganda Singh was sentenced on 30th March 1910 to undergo 4 years' rigorous imprisonment, including 3 months' solitary confinement, under sections 366/109, Indian Penal Code, and in Case No. 24/7 the same accused was sentenced by the said Additional Divisional Magistrate, on 19th April 1910, to undergo 3 years' rigorous imprisonment.

In both cases appeals were lodged and in Case No. 14/7 the sentence of accused Ganda Singh was reduced to 2 years' imprisonment, while in Case No. 24/7 the appeal was rejected by the learned Sessions Judge.

In the judgment of the latter Case No. 24/7 the Additional District Magistrate noted that Ganda Singh is sentenced to 3 years' rigorous imprisonment from the date of the order, *i. e.*, 19th April 1910; this order is contrary to section 397, Indian Penal Code.

The proceedings were forwarded for revision on the following grounds:—

POUNUSAWMY NAIDU v. EMPEROR.

That the order of the Additional District Magistrate in Case No. 24-7 dated 19th April 1910 regarding commencement of the sentence, in face of the previous sentence in Case No. 14-7, appears to be contrary to section 397 of Criminal Procedure Code, and those words ought, therefore, to be expunged, or the sentence reduced in order to give effect to the Magistrate's wish as, according to section 397, Criminal Procedure Code, the sentence cannot run concurrently.

It is, therefore, requested that necessary alterations in the order may be made accordingly.

The files of the case are also submitted.

ORDER.—The Additional District Magistrate, when sentencing Ganda Singh on the 19th April 1910 (Case No. 24-7 of 1910), overlooked the application of section 35, Criminal Procedure Code.

It is only in case of separate convictions at one trial that the question arises whether sentences should be concurrent or consecutive. In all other cases, section 397 is imperative.

Ganda Singh had been previously convicted by the same Magistrate on 30th March 1910 and sentenced to 4 years' imprisonment, since reduced to two years on appeal. The Magistrate was not competent to direct that the fresh sentence of 19th April 1910 should run from the date of his order and that portion of his order is set aside.

It seems to have been the Magistrate's intention that Ganda Singh should undergo a total period of 4 years' imprisonment. To give effect to this intention, as near as may be, it is hereby ordered on revision that the second sentence of 19th April 1910 be so far reduced that the period of imprisonment for that offence shall be for two years instead of three years, to commence on expiry of the sentence awarded on the earlier conviction of 30th March 1910.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 557 OF 1911.
CASE REFERRED No. 107 OF 1911.
November 23, 1911.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

N. POUNUSAWMY NAIDU AND OTHERS —ACCUSED

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 349, clause 2—Case sent for disposal to higher Magistrate—Power of superior Magistrate to send back case to former—"Pass such order as he thinks fit," meaning of.

Where a case is sent by a Sub-Magistrate under section 349, Criminal Procedure Code, to a Sub-Divisional Magistrate for disposal, the latter has no power to return the case to the former for disposal, but should dispose of it himself.

The provision in clause 2 of section 349, Criminal Procedure Code, that the Magistrate to whom the proceedings are submitted may pass such order as he thinks fit, means that he may pass such other final order disposing of the case as he thinks fit.

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the District Magistrate of Tinnevelly, in his letter dated 14th September 1911.

Mr. *Joseph Satya Nadar*, for the Accused.

Mr. *P. R. Grant*, for the Crown.

ORDER.—We agree with the District Magistrate's view that the Sub-Divisional Magistrate to whom the case was referred by the Sub-Magistrate was bound to dispose of the case himself and that he had no power to send the case back to the Sub-Magistrate for disposal. The provision in clause 2 of section 349 of the Criminal Procedure Code that the Magistrate to whom the proceedings are submitted may pass such order as he thinks fit, means, when taken in conjunction with the words immediately preceding, *viz.*, (judgment), and sentence, that he may pass such other final order disposing of the case as he may think fit. We set aside the conviction of the accused by the Sub-Magistrate and direct the Sub-Divisional Magistrate to dispose of the case himself.

Conviction quashed.

BALA PASBAN KULDIP LAL *v.* GURWAR MISSER.

CALCUTTA HIGH COURT.
CIVIL RULE No. 4125 OF 1911.
August 22, 1911.
Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.
BALA PASBAN KULDIP LAL—PETITIONER
versus
GURWAR MISSER—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), *ss.* 195 476—*Sanction, granting, revoking or refusing to grant —Judicial proceeding—Competency of order under section* 476 *while hearing appeal under section* 195 (6)—*Sanction to stranger to suit.*

The grant of sanction to prosecute, the revocation of sanction already granted, and the refusal of an application to grant sanction, are all judicial acts.

A District Judge in an appeal under sub-section (6) of section 195 of the Criminal Procedure Code affirmed the order of a Munsif and refused to grant sanction to a stranger to a suit, and at the same time made an order under section 476:

Held, that it was perfectly open to the Judge to take proceedings under section 476, inasmuch as the fact of the commission of an offence had been brought to his notice in the course of a judicial proceeding under sub-section (6) of section 195.

In re Mathura Das, 16 A. 80, dissented from.

Queen-Empress v. *Sheikh Beari*, 10 M. 232; *Queen-Empress* v. *Seshadri Ayyangar*, 20 M. 383 and *Pampapati Sastri* v. *Subbia Sastri*, 23 M. 210, followed:

Held, also, that the Judge acted properly in refusing to grant sanction to a stranger to the suit.

Rule granted against the order of the District Judge of Mozaffarpur, refusing to grant the sanction to prosecute the opposite party.

Babu *Shoroshi Charan Mitra*, for the Petitioner.

Babu *Ram Charan Mitra*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside an order of prosecution under section 476, Criminal Procedure Code, on the ground that it has been made without jurisdiction. The circumstances under which the order in question has been made may be briefly recited.

It appears that, in the course of a rent suit, process was served upon the defendant. The peon learnt subsequently that there had been false personation in connection with the service. He reported the matter to the Court with the result that a fresh summons was issued and served on the real defendant. An application was thereupon made by a stranger to the suit for sanction to prosecute three persons under section 205, Indian Penal Code. The Court refused the application, mainly, on the ground that sanction ought not to be granted to a person who was not a party to the proceeding and was apparently in no way interested in the matter before the Court. He then appealed to the District Judge under sub-section (6) of section 195, Criminal Procedure Code. The learned Judge held that no sanction ought to be granted to a stranger, but upon the facts placed before him, he came to the conclusion that proceedings should be taken under section 476, Criminal Procedure Code. He, therefore, gave notice to the parties, took evidence and made an order under that section, because, in his opinion, a strong *prima facie* case was established that the offence alleged had been committed.

We are now invited to set aside this order on the ground that it was incompetent to the learned Judge to make an order under section 476 inasmuch as the commission of the alleged offence was not brought to his notice in the course of a judicial proceeding. In support of this view, reliance has been placed upon the cases of *Jadunath Mahta* v. *Jogadish Chandra Deb* (1) and *In the matter of Mathura Das* (2).

In the first of these cases it was ruled by a Division Bench of this Court that when a *Nazir* of a Subordinate Judge has been resisted in execution of a decree and the Subordinate Judge has thereupon taken action under section 195, Criminal Procedure Code, he cannot be said to have acted judicially. It was further held that a proceeding before the District Judge in the same matter under sub-section (6) of section 195 was not a judicial proceeding. In so far as the first of these propositions is concerned, it is clear that it cannot be maintained in view of the decision of a Full Bench of this Court in the case of *Shaikh Bahadur* v. *Eradatullah Mallick* (3), where it was pointed out that an execution proceeding is a judicial proceeding within the meaning of section 476, Criminal Procedure Code. It is possible that the learned Judge who decided the case of *Jadunath Mahta* v. *Jagdish Cunder Deb* (1) acted on the view subsequently adopted in the case of

(1) 7 C. W. N. 423.
(2) 16 A. 80.
(3) 6 Ind. Cas. 801; 37 C. 642; 14 C. W. N. 799; 12 C. L. J. 45.

BALA PASBAN KULDIP LAL *v.* GURUWAR MISSER.

Har Charan Mukerjee v. *King-Emperor* (4) that an execution proceeding is not a judicial proceeding. That view, however, as we have just stated, can no longer be maintained. In so far as the second proposition is concerned, the learned Judges stated their opinion with considerable hesitation, and we take it that they did not intend to decide the point finally. But if the case really involves a decision upon that point, we are unable to accept it as sound on principle. It cannot be disputed that the grant of a sanction under section 195, Criminal Procedure Code, is a judicial act; consequently, the revocation of a sanction already granted is equally a judicial act. It cannot, therefore, be doubted that the refusal of an application to grant sanction is precisely of the same nature as the two orders just mentioned.

In so far as the case before the learned Judges of the Allahabad High Court is concerned, [*In re Mathura Das* (2)], it is clearly distinguishable, though based upon very questionable grounds. There it was held that an application under section 195, Criminal Procedure Code, made to a District Judge wes not a judicial proceeding and did not entitle the Judge to make an order under section 476, Criminal Procedure Code. We are not prepared to accept this view as well founded. Whether the application ought to have been made in the first instance before the primary Court or whether it might have been properly made before the learned Judge, there is no room for doubt that an application under section 195, Criminal Procedure Code, for grant of sanction is a judicial proceeding. The view we take is supported by the decision of a Full Bench of the Madras High Court in the case of *Queen-Empress* v. *Sheikh Beari* (5), where it was ruled that sanctioning a prosecution for an offence is a judicial act. The same view was taken in the cases of *Queen-Empress* v. *Seshadri Ayyangar* (6) and *Pampapati Sastri* v. *Subba Sastri* (7). In the case before us, the application under section 195 when presented to the Court of first instance did commence a judicial proceeding and the order of refusal was a judicial act. Consequently, the proceeding before the District Judge, under sub-section (6) of section 195 in which he was invited to review the propriety of the order of refusal of the Court of first instance, was also a judicial proceeding. The learned District Judge, undoubtedly, acted properly in refusing to grant sanction to a stranger to the suit. At the same time, it was perfectly open to him to take proceedings under section 476, inasmuch as the fact of the commission of an offence had been brought to his notice in the course of a judicial proceeding under sub-section (6) of section 195. The contention, therefore, that the order of the District Judge was made without jurisdiction cannot be supported.

It has been argued, in the next place, that no order should be made in this case during the pendency of the civil suit. We are of opinion that there is no substance in this contention. The matter in controversy in the civil suit has no bearing upon the question to be investigated at the criminal trial, that question is whether an offence has been committed under section 205, Indian Penal Code, which has obviously no bearing upon the question to be determined in the suit for rent.

It has finally been suggested that section 476 should be restricted in its application in the same manner as section 195 has sometimes been restricted in other words, as the Court does not ordinarily grant sanction under section 195 to a person in no way connected with the proceeding, the Court should similarly refuse to direct a prosecution under section 476 when the fact of commission of an offence has been brought to its notice by a stranger. We are not prepared to accept the limitation suggested, and are of opinion that the order of the District Judge should not be disturbed.

The Rule is, therefore, discharged.

Rule discharged.

(4) 1 C. L. J. 161; 2 Cr. L. J. 110; 32 C. 367; 9 C. W. N. 364.
(5) 10 M. 232.
(6) 20 M. 383.
(7) 23 M. 210.

MADRAS HIGH COURT.
CIVIL APPEAL No 167 OF 1907.
October 9, 1911.
Present:—Mr. Justice Abdur Rahim and Mr. Justice Spencer.
GUJJALAPADI SUBBA NAIDU AND OTHERS—APPELLANTS
versus
GUJJALAPADI VENCATASUBBA NAIDU, MINOR BY MOTHER AND GUARDIAN CHELLAMMA—RESPONDENT.

Decree, amendment of —Application to correct decree to bring it into accordance with judgment—Obvious slip or mistake.

An application to a Court to correct a decree so as to bring it into conformity with the judgment can be entertained only where the Court has made an obvious slip or mistake. Where the conclusions arrived at by a Court though they may be wrong are clearly set forth in its judgment, objections that they are wrong cannot be entertained at the announcement of the judgment.

Application to the High Court in Civil Appeal No. 167 of 1907 to correct the decree so as to bring it into conformity with the judgment.

The appeal was originally heard by the Hon'ble Justices Abdur Rahim and Krishnasawami Iyer, who delivered the following judgment on January 12th, 1911:—

Mr. *K. Srinivasa Iyengar*, for the Appellants.

Dr. *S. Swaminathan*, for the Respondent.

JUDGMENT.

KRISHNASAWMI IYER, J.—This is a suit for partition. The plaintiff's father, the defendants Nos. 1, 2 and 3, the father of the defendants Nos. 4 to 9 and the husband of the 10th defendant were brothers and members of an undivided Hindu family. The plaintiffs claim a fifth share, the 10th defendant's husband having died before suit. The plaintiff's father also being dead, and the plaintiff being himself a minor, he is represented by his mother as his next friend. It is admitted by the plaintiff that for about three years before suit, the several branches have been cooking their meals separately and living in different houses (*vide* paragraph 5 of the plaint). On the other side, it is admitted for the defendants that certain pasture lands, debts due to the family, an indigo vat and certain family jewels are still undivided. They made a division, it is said, of the family lands except the pasture lands referred to above, of the cash and grain belonging to the family, of certain debts due on the pledge of jewels, and of the moveables generally.

Part of the division, *i. e.*, with reference to the lands and moveables, is alleged to have taken place about the year 1898. The rest of the division is alleged to have taken place on the 13th July 1899. Exhibit I, which purports to be a receipt to the first defendant executed by the other five sharers, is relied on in support of the second division. It is dated the 14th July 1899.

The first question is whether the division evidenced by Exhibit I is true. The case is beset with considerable difficulty as neither party has told the whole truth. Exhibit I purports to bear the mark of the sharers, the plaintiff being represented by his mother. It also bears the attestations of the defence witnesses Nos. 1, 7, 8, 9, 12 and 13. The 14th defendant who is examined as the second witness for the defence, and the defence 3rd and 4th witnesses who are not attestators of Exhibit I support the partition of 1899. The District Judge has discredited the evidence of these witnesses as regards the execution of Exhibit I and the partition of 1899. I am unable to agree with him. I see no force in his criticism of the evidence of the defence 3rd and 4th witnesses. He has overlooked the fact that on the very first day of the trial the 1st witness for the defence spoke of the division of the cash and the moveables on one day and of the execution of Exhibit I on the subsequent day. There is nothing, therefore, in the evidence of the defence third witness which is calculated to throw doubt on the genuineness of Exhibit I. It is true the witness has made a mistake when he said that the tenth defendant's husband was dead at the time. But he was speaking to an event that had occurred about 8 years before his deposition and the tenth defendant's husband having died shortly after the partition of 1899. The witness's mistake is easily explained. The defence fourth witness referred to in Exhibit I as one of the mediators, also supports the partition of 1899, and nothing has been urged against his testimony. The first and twelfth witnesses examined on behalf of the defendants are discredited by the District Judge, because the former has purchased some lands from the fourth defendant and the latter was indebted to the family. These circumstances do not appear to be sufficient for rejecting their testimony. The defence wit-

nesses Nos. 7, 8 and 9 and 13 seem to be interested in some pasture lands sold under Exhibit F to one Chinta Subbiah by the first defendant a fortnight before the institution of the suit. It is suggested by the District Judge that the conveyance of the pasture lands was probably a bribe to the witnesses. They deny the insinuation and, although there may be some suspicion attaching to the transaction, I do not think their testimony can be altogether ignored. A more important point which the District Judge makes against the genuineness of Exhibit I is that it does not bear the attestation of the plaintiff's maternal uncle Changamma Naidu who is alleged to have been present at the time of the partition and who is certainly now looking after the plaintiff's affairs. I agree that this is a circumstance of some value against the truth of Exhibit I. On the other hand, there are several circumstances which make in favour of the partition of 1899 and the genuineness of Exhibit I. In the first place it does not appear to me that such a large number as eight independent persons, *viz.*, defence witnesses Nos. 1, 3, 4, 7, 8, 9, 12 and 13, would have entered into a conspiracy with the defendants to concoct the document against the plaintiff. If Exhibit I was not genuine, it would have included a reference to a partition of the lands, and thus made out a case of more or less complete partition. The defendant's case being that there was a partition in 1898, nothing would have been more appropriate than a recital of such a partition in Exhibit I. There is evidence of separate dealings by some of the members of the family which the District Judge had not succeeded in explaining on his theory of no partition. If, on the other hand, the cash and debt bonds belonging to the family were really divided in 1899, such division would afford an adequate explanation for the separate dealings of some of the members. Exhibit X, dated the 7th of July 1903, spoken to by defence witness No. 5, evidences a debt of Rs. 200 due to the plaintiff. The explanation given by the plaintiff's mother and his maternal uncle that it was money which stood outstanding in the name of their father, although it had been given by him as *stridhanam* to his daughter, is improbable on the fact of it and is inconsistent with the evidence of defence witness No. 5. That witness did not support the story of the plaintiff's witness No. 2 that his father lent the money. I have no hesitation in holding that the plaintiff's version on this matter is a pure after-thought, for it was not suggested in the cross examination of the defence witness No. 5 who was examined before the plaintiff's witness. Again, Exhibit XI*a* shows separate sales of chillies grown by the plaintiff, the fourth defendant and the 10th defendant. Here, again, the explanation attempted by the plaintiff's 1st, 2nd and 4th witnesses that it was Guruvadu that supplied the chillies and not the plaintiff's mother is contradicted by the defence witnesses Nos. 4 and 9 and by the document Exhibit XI and cannot be accepted. These separate transactions of the plaintiff must have been due to the possession of separate funds and the strong probability is that the separate funds came into existence by means of the partition of 1899. The 4th defendant has made purchases under Exhibits III, IV and V and taken a pro-note Exhibit G-3 and a mortgage Exhibit XVII. These transactions would not be inconsistent with the plaintiff's case if the 4th defendant was the *de facto* manager of the joint family. He has also made a sale of part of the land purchased, but all these transactions are subsequent to the year 1900. Some evidence has been given in the case of separate cultivation. I shall, however, deal with it in connection with the question of the partition of the lands. Some stress was laid during the argument on the fact that no evidence has been adduced to show what has become of the large sum of Rs. 2,546 allotted to the plaintiff at the partition. But the plaintiff's maternal uncle who is conducting the litigation on his behalf is a well-to-do man and resident in a distant village and the defendants' inability to trace this money cannot, under the circumstances, be urged against the truth of their case. A more formidable objection was as to what has become of the money taken by the defendants at the partition. The answer may, however, be in the fact that they took bonds and not money in great part at the partition and that those bonds are now represented by the outstandings in the name of the fourth defendants. On the whole, I am inclined to hold that the balance of evidence and the probabilities are in favour of the genuineness of Exhibit I and the partition of 1899.

GUJJALAPADI SUBBA NAIDU *v.* GUJJALAPADI VENKATASUBBA NAIDU.

The next question is about the alleged partition of the lands in 1888. The defendants admit that pasture lands have not been divided. They have adduced evidence of separate cultivation. Certain *keylu* and estimate accounts for *faslis* 1311, 1312 and 1313, *viz.*, Exhibit IV produced from the custody of the *zemindari* Karnam showing heaps and measurement in the names of sharers separately are relied on. I do not think it is safe to accept them when the duplicates in the *zemindar's* office have not been produced. These accounts relate to the period after misunderstandings must have arisen and there is no explanation why, if the partition of the lands was in *fasli* 1308, the accounts of *faslis* 1309 and 1310 are not forthcoming to show separate cultivation accounts. Exhibits A, B., C. and D. which show the entire cultivation in the name of 1st defendant in *faslis* 1307, 1312, 1313 and 1314, are against the case set up by the defendants. Although it may be, that in consequence of the admitted separate living and separate cooking and the division of the cash and certain of the outstandings in 1899, the parties began to cultivate separately, I have no doubt that a partition of the lands has not been effected. The strongest circumstance against the truth of the partition is the absence of all reference to it in the receipt, Exhibit I, the lands themselves being the villages of the Venkatigiri *Zemindari*. The division is said to have been made by the casting of lots and that must have been after lists were framed. The lands consist of numerous items. The original suggestion that was made during the argument that such plot was divided into six shares and lists would, therefore, be unnecessary is entirely against the specification in the schedule attached to the additional written statement filed by the defendants on the 13th of March 1906. The defence witness No. 1 says that lots were cast in six shares. If the division was true there must have been lists. But none is produced. I am clearly against the defendant's case that there was a partition of the lands in the year 1898.

As regards the second issue, no argument has been addressed to us. We must, therefore, accept the finding of the District Judge. We must also accept the finding on the third issue. As cattle were divided under Exhibit I the cattle now found in the fourth defendant's possession cannot be deemed to be family property. There is nothing to show that there was any cash belonging to the joint family at the date of the suit. In view of the finding as to the genuineness of Exhibit I, the argument of the District Judge as to the existence of cash at the date of the suit falls to the ground. We must also hold that the house sites, together with the buildings thereon, in the *ex parte* occupation of the plaintiff and the defendants are their respective separate property. The common family house having been long ago burnt down and each of the members having occupied separate sites and created his own building thereon they must be deemed to be separate property of each. The plaintiff will have decree for a one-fifth share in all the family lands with mesne profits except the house, together with the house sites on which they stand and in the outstandings as *per* schedule filed by the plaintiff and the paddy and *ragi* valued at Rs. 880 and the jewel named Thalika Pudelu Danda. The rest of the plaintiff's claim will stand dismissed. The 10th defendant and who had got her share under Exhibit I is not entitled to claim maintenance. Each party will bear his or her own costs throughout.

ABDUR RAHIM, J.—I agree.

This appeal having been posted to be spoken to, and having stood over for consideration till this day the Court (Abdur Rahim, J. and Spencer, J.) made the following

ORDER.—In this appeal which was originally heard by one of us and Mr. Justice Krishnasawmi Iyer and was pronounced by him as judgment of the Court on the 12th January 1911, at the time he pronounced judgment, the learned Vakil for the appellants objected to certain conclusions apparently on the ground that they were not in accordance with the rest of the judgment.

Mr. Justice Krishnasawmi Iyer noted the objection and ordered the case to be sent down for being spoken to when we would next sit together. The matter was not brought up before the same Bench before Krishnasawami Iyer, J., ceased to exercise the office of Judge of this Court.

The objection taken is that the direction in the judgment that there shall be a decree for the plaintiff for 1/5th share in all the family lands except certain houses is not in accordance with the rest of the judgment

but that the lands which stand in the name of the fourth defendant, namely, those mentioned in the third issue should have been excluded, inasmuch as it has been found that there had been a partition of cash, outstandings, moveables, etc., and it is not proved by the plaintiff that the lands in question were bought with the income of such family property as was left undivided. But this is not a case of an obvious mistake or slip which could be corrected at this stage. It is found in clear terms, that the decision of the lower Court on the third issue is correct. It may be that the conclusion on this point is wrong but even if it be so, we do not see how it can be corrected in the present application. The decree must be drawn up in accordance with the judgment.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 117 OF 1910.

November 1[illegible], 1911.

Present:—Mr. Richards, K. C., Chief Justice, and Mr. Justice Banerjee.

ABDUL GHANI—PLAINTIFF—APPELLANT

versus

ABDUL MAJID—DEFENDANT—RESPONDENT.

Interest--Suit by co-sharer against lambardar—*Profits—Interest preceding suit and* pendente lite—*Burden of proof.*

In a suit by a co-sharer against a *lambardar* for profits, the plaintiff would ordinarily be entitled to interest for the period during which the *lambardar* withheld the profits and also for the period the suit was pending. It would be for the *lambardar* to show that special circumstances existed which relieved him of liability for the payment of interest.

First appeal from the decision of the Assistant Collector of Benares, dated the 3rd November 1908.

Mr. *Gokul Prashad*, for the Appellant.

Mr. *M. L. Agarwala*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-appellant for his share of profits for the years 1311, 1312 and 1313 *fasli*. A preliminary objection has been taken to the hearing of the appeal on the ground that it is time-barred. The circumstances under which this objection has been urged are these. The suit was filed in the Court of the Assistant Collector and the amount claimed was a sum of Rs. 6,000. The Assistant Collector made a decree in the plaintiff's favour for Rs. 1,635-7-0. The plaintiff claimed a further sum of about Rs. 1,200, and in respect of this amount he preferred an appeal in the Court of the District Judge. In that Court no objection was taken on behalf of the defendant that an appeal did not lie to that Court. The result was that the appeal was heard by the learned District Judge and he varied the decree of the Court of first instance. Thereupon, an appeal was preferred to this Court, and this Court was of opinion that no appeal lay to the learned Judge, and that as the value of the suit was Rs. 6,000 the appeal should have been preferred to this Court. Accordingly, the memorandum of appeal was ordered to be returned to be presented in the proper Court, and has now been presented in this Court. No doubt, the appeal to this Court is beyond time but the appellant has asked us to exercise our discretion under section 5 of the Limitation Act and to entertain the appeal although it has been filed beyond time. We are of opinion that, in view of all the circumstances, we should exercise our discretion in favour of the appellant. It appears that there were six suits instituted in the Court of first instance for profits against the *lambardar* by the same parties and one was brought by the plaintiff-appellant against the same *lambardar* to recover Rs. 6,000. In all the other suits the amount claimed was below Rs. 5,000. In two of these suits, appeals were filed in the Court of the District Judge; and as the amount claimed by the appellant in his appeal was about Rs. 1,200, his Pleader, through an oversight, filed the appeal in the lower Court whereas it should have been presented in this Court. We think that there was a *bona fide* mistake, which was not very unnatural, and that, under the circumstances, we ought to allow the appeal to be heard. We have accordingly heard the appeal.

Three questions have been raised before us. The *first* is that the Court below made a decree for an amount which was less than the amount due to the plaintiff according to the account filed by the defendant himself in the Court below. In the abstract of accounts which the defendant filed in the lower Court the total amount shown as due to the plaintiff for his share of profits was Rs. 1,754-7-3. The lower Court made a decree for Rs. 1,635-7-0 only so that it awarded a sum of Rs. 119-0-3 less than what according to the defendant

was payable to the plaintiff. Mr. Gokul Prasad on behalf of the appellant admits that in the defendant's account there is a mistake of Rs. 2-15-6. So that the plaintiff ought to get Rs. 116 0-9 more than what the lower Court has awarded to him. Mr. Agarwala on behalf of the respondent contends that the abstract of accounts filed on behalf of the defendant was incorrect and that this is due to the fact that shares held by the plaintiff in different *mahals* were mixed up. He has not shown us in what respects the account is erroneous. The document is at least a clear admission of the amount actually collected by the defendant on account of the plaintiff's share. So that, *prima facie*, the account must be deemed to be correct unless it is shown that it is erroneous in any particular. That has not been attempted to be shown, and we see no reason why he should not be bound by the figures given by himself. Therefore, it is manifest that the plaintiff ought to have got a decree for Rs. 116 0-9 in addition to the amount awarded to him by the lower Court.

The next objection is that the Court below has not allowed for interest the period preceding the institution of the suit and for the period of the pendency of the suit. It cannot be denied that in the judgment of the learned Assistant Collector no reason is assigned for not awarding such interest. Ordinarily, a plaintiff to whom profits are due would be entitled to interest for the period during which the *lambardar* withheld the profits and he would also be entitled to interest for the period of the pendency of the suit. It would lie upon the *lambardar* to show that there were special circumstances which relieved him of liability for the payment of interest. In his written statement the defendant no doubt urged that he offered to render an account of the profits to the plaintiff and that the plaintiff refused to take such an account, but no issue was joined in the Court below on that point. There the parties agreed that two issues should be tried, namely, an issue as to whether the profits should be calculated on the basis of the gross rental or on the basis of actual collections and *second*, what was the amount payable to the plaintiff. From this we infer that the defendant did not adhere to the plea put forward by him in the written statement on the question of interest. There is apparently no reason why the plaintiff should not get interest and we think he is fully entitled to it.

The third point is that the lower Court, although it professed to include in the calculation of profits the income arising from the land known as the holding of Zainab Bibi, did not in fact include those profits in the account. This is manifest from the account prepared by the learned Assistant Collector. In his written statement the defendant did raise an objection as to the profits arising from the land mentioned above, but the objection he put forward was a very technical one, and it was one which, in our opinion, had no foundation for it. The Court of first instance, however, refused to go into that point solely on the ground that the parties had agreed upon the questions which were to be determined and this was not one of the questions so to be determined. From the account prepared by that Court and the foot-note appended to it, it is manifest that the Assistant Collector intended to allow the rent of these lands to be included in the account. The plaintiff is, therefore, entitled to his proportionate share of the profits arising from the holding known as the holding of Zainab Bibi. There is no dispute between the parties as to the figures. They are admitted by the defendant in the account filed by him.

The decree of the Court below should, therefore, be varied by adding to the amount of that decree Rs. 116-0-9 and the plaintiff's share of the profits of Zainab's land, and on the total amount which will be found due to the plaintiff he will be entitled to interest at the rate of 12 *per cent. per annum* up to the date of the institution of the suit, and thereafter at the rate of 6 *per cent. per annum*. We accordingly allow the appeal and vary the decree of the Court below by adding to the amount of that decree the two items mentioned above, the latter of which is to be calculated and specified in the decree and we allow interest as mentioned above. The parties will pay and receive costs in the Court of first instance in proportion to failure and success. In all other Courts they will abide their own costs.

Appeal allowed.

NARSINGH NARAIN SINGH *v.* AJODHYA PROSAD SINGH.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3175 OF 1909.

NOVEMBER 28, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

NARSING NARAIN SINGH—PLAINTIFF—APPELLANT

versus

AJODHYA PROSAD SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Arbitration—Arbitrator, if bound by rules of practice adopted by Courts—Arbitrator not to go beyond precise questions submitted—Right of party in whose favour award is given to impeach its validity—Award if can be filed in part—Civil Procedure Code (Act XIV of 1882), *s.* 525.

An arbitrator is not bound by mere rules of practice which Courts have adopted for general convenience, and he has greater latitude than Courts of law to do complete justice between the parties according to equity and good conscience. But he cannot go beyond the precise questions submitted nor can he determine any claims or demands, though existing between the parties, save only those which they have agreed that he shall decide.

Therefore, where the question submitted to an arbitrator was, whether the plaintiff had a right of way over a specified strip of land; *Held*, that the arbitrator had no authority to lay out a new path on a piece of land over which neither party alleged a right of way.

The party in whose favour an erroneous action of the arbitrator operates, cannot be heard to impeach the validity of the award.

In re Bradshhaw's Arbitration, (1842) 12 Q. B. 562; 76 R. R. 349; 17 L. J. Q. B. 362; 12 Jur. 998; *Moore* v. *Butlin*, (1887) 37 A. & E. 595; 2 N. & P. 436; W. W. & D. 638; 7 L. J. Q. B. 20; *Taylor* v. *Shuttleworth*, (1840) 6 Bing. (N. S.) 277; 8 Scott 565; 8 D. P. C. 280; 9 L. J. C. P. 138, relied upon.

It is not competent to a Court in a proceeding under section 525 of the Code of 1882, to direct that an award be filed in part. An application to file an award which is open to attack in part should be refused.

Dondekar v. *Dondekar*, 6 B. 663; *Mona Vikrama* v. *Mallichery*, 3 M. 68; *Thiruvengada Thiengar* v. *Vaidinatha*, 29 M. 303, *Mustafa* v. *Phulja*, 27 A. 526; A. W. N. (1905) 86; 2 A. L. J. 416, relied on.

Appeal from the decree of the District Judge of Gya, dated July 30th, 1909, confirming that of the Munsif of Gya, dated March 22nd, 1909.

Dr. *Rash Behary Ghose*, Babus *Umakali Mukerjee* and *Ganesh Dutt Singh*, for the Appellant.

Babus *Mohendra Nath Roy* and *Chandra Sekhar Prosad Singh*, for the Respondents.

JUDGMENT.—This appeal is directed against a decree by which the Courts below have concurrently ordered the partial enforcement of a private arbitration award. The parties to the proceeding are related to each other, and had a dispute as to a pathway for passage from the land of the plaintiff and his brother to a village towards the north of the property of the first defendant. There were also disputes between the parties in respect of other matters to which detailed reference is not necessary for our present purpose. On the 16th July 1908, the matters in controversy which were set out in full detail in a registered instrument of submission were referred to the arbitration of a gentleman by name Dilkiswar Singh. He made his award on the 31st August 1908. On the 14th September following, the plaintiff applied under section 525 of the Code of 1882 that the award be filed in Court. The defendants resisted the application on every conceivable ground; they questioned the validity of the submission, imputed misconduct and partiality to the arbitrator, alleged a revocation of the submission before the award was made, and contended that the award had determined a question not included in the submission. The Courts below have overruled all the objections except one, as entirely unfounded and have directed the award to be filed in part. The result has been that a modified decree has been made in favour of the plaintiff. The plaintiff has appealed to this Court, and on his behalf the decree has been assailed in so far as it modifies the award. The arbitrator found in substance that the pathway alleged by the plaintiff and denied by the defendants did, as a matter of fact, exist, but he held that if the thoroughfare was allowed to continue, great inconvenience and injury would be caused to the first defendant. In this view the arbitrator laid out a new pathway in lieu of the disputed thoroughfare. The plaintiff was satisfied with the award in this respect, but the defendants objected that the award was in excess of the authority of the arbitrator, inasmuch as the matter covered by the submission was the existence or otherwise of the disputed pathway, and it was beyond the competence of the arbitrator to substitute in lieu thereof a new pathway. This view has found favour with the Court below, and, as we have already explained, they have declined to direct the award to be filed in so far as the pathway is concerned. The propriety of this decision has been assailed before us on two grounds, namely, *first*, that the award is not beyond the scope of the submission, as

upon a liberal construction thereof, the whole question of a right of way must be taken to have been laid before the arbitrator and, *secondly*, that in any view the defendants were not competent to take exception to the award, as it was essentially in their favour.

In support of the first ground that the submission should be liberally construed so as to enable the arbitrator to do substantial justice, reliance has been placed upon the cases of *Knox* v. *Simmonds* (1); *Prosser* v. *Gorringe* (2); *Delver* v. *Barnes* (3) and *Fuller* v. *Fenwick* (4). It may be conceded that the arbitrator is not bound by mere rules of practice which Courts have adopted for general convenience, and he has greater latitude than Courts of law to do complete justice between the parties according to equity and good conscience. In this view, Courts are never astute to entertain technical objections to awards. In other words, as Lord Halsbury, L. C., said in *Adams* v. *Great North of Scotland Rawilay Company* (5), the Courts will not review awards upon the merits: they will not constitute themselves as Courts of appeal to examine whether or not the conclusion at which the arbitrator arrived was sound, both in point of law and in point of fact. This salutary doctrine, however, is subject to the fundamental rule that an arbitrator cannot go beyond the precise questions submitted: it will not do for him to determine any claims or demands, though existing between the parties to the submission, save only those which they have agreed that he shall decide. This is sound on principle; the submission furnishes the source and prescribes the limits of the authority of the arbitrator. The arbitrator is inflexibly limited to a decision of the particular matters admitted; he cannot take upon himself an authority which the submission does not confer. *Price* v. *Popkin* (6); *Pascoe* v. *Pascoe* (7); *Baillie* v. *Edinburgh Oil Gaslight Company* (8) and *Buccleuch, Duke of* v. *Metropolitan Board of Works* (9). In each case, therefore, where a question arises whether the arbitrator has exceeded his authority and it is urged that the submission should be liberally construed and interpreted, the question really reduces itself to this, whether the circumstances of the case bring it within the scope of the one or the other of the two conflicting principles we have formulated. In the case before us, the terms of the submission are, in our opinion, against the contention of the appellant. The matter in controversy submitted to the arbitrator was not whether the plaintiff should have access to the northern village across the land of the defendants but whether he had a right of way over the specified strip of land. The arbitrator was bound to base his decision upon an investigation of the latter question and he had no authority to lay out a new path on a piece of land over which neither party alleged a right of way. *Walker* v. *Simpson* (10); *Wyman* v. *Hamword* (11) and *Ross* v. *Linder* (12). We are, therefore, not prepared to accept the first contention of the appellant.

In support of the second contention of the appellant it has been argued that if the arbitrator has exceeded his authority, he has done so for the benefit of the defendants and they, at any rate, are not entitled to assail the award which is really in their favour. In our opinion this contention is well-founded and must prevail. It is an elementary principle that only the party prejudiced by the exercise of excessive authority by the arbitrator is entitled to object to the award by reason of it; the party in whose favour the erroneous action of the arbitrator operates, cannot be heard to impeach the validity of the award on this ground. In *Bradshaw's Arbitration* (13), whether an award was assailed by one of the claimants, Lord Denman, C. J., observed that the error assigned was no matter of complaint for him, as it was in his favour and to his advantage. Similarly, in *Moore* v. *Butlin* (14) the learned Chief Justice

(1) (1791) 3 Bro. C. C. 358; 1 Ves. J. 369.
(2) (1811) 3 Taunt 426.
(3) (1807) 1 Taunt 48; 9 R. R. 707.
(4) (1846) 3 C. B. 705; 16 L. J. C. P. 78; 10 Jur. 1057.
(5) (1891) App. Cas. 31.
(6) (1839) 10 A. & E. 139; 2 P. & D. 304; 8 L. J. Q. B. 198; 3 Jur. 433.
(7) (1837) 3 Bing (N. C.) 898; 5 Scott 117; 3 Hadges 188; 6 L. J. C. P. 322.
(8) (1835) Cl. and F. 639.
(9) (1872) L. R. 5 H. L. 418; 5 Exch. 221; 41 L. J. Ex. 137; 27 L. T. 1.
(10) (1888) 80 Maine 143; 13 Attentie 580.
(11) (1868) 55 Maine 534.
(12) (1881) 17 South Car 593.
(13) (1842) 12 Q. B. 562; 76 R. R. 349; 17 L. J. Q. B. 362; 12 Jur. 998.
(14) (1837) 7 A. & E. 595; 2 N. and P. 436, W. W. and D. 638; 7 L. J. Q. B. 20.

observed that the party in whose favour the mistake had been made could not avail himself of it to set aside the award. [See also *Taylor* v. *Shuttleworth* (15)]. Again, in *Lyman* v. *Arnus* (16) a party objected to an award because it made certain deductions from demands presented against him by his adversary and assigned to himself certain goods and merchandise. In answer to the contention that these acts were beyond the authority of the arbitration, the Court said: "He has no right of complaint, it was in his power." [*Galvin* v. *Thomson* (17)]. In the case before us the arbitrator found in substance that the pathway existed as alleged by the plaintiff; in this view he ought to have made a decree accordingly. But as, in his opinion, the existence of a pathway at that particular spot would inconvenience the defendants, he laid out another path for the use of the plaintiffs. This course was adopted for the benefit and convenience of the defendants. It is difficult to appreciate upon what principle the defendants can be allowed to question the award on the ground that the arbitrator exceeded his authority, the position would have been intelligible if the plaintiff had sought to assail the award in so far as it did not allow him a pathway in the precise place alleged by him. The second ground taken by the appellant must, therefore, be allowed.

We may add that it was not competent to the Courts below in a proceeding under section 525 of the Code of 1882, to direct that the award be filed in part; the Court was bound to refuse the application if in its opinion the award was open to attack in part. *Dandekar* v. *Dandekar* (18); *Mana Vikrama* v. *Mallichery* (19); *Thiruvengada Thiengar* v. *Vaidinath* (20); *Mustofa* v. *Phulja* (21). In the view we take, however, the question becomes immaterial.

The result, therefore, is that the appeal must be allowed and the decrees of the Courts below discharged. We direct that the award be filed in its entirety and a decree drawn up in accordance therewith. The plaintiff is entitled to his costs in all Courts from the first defendant.

Appeal allowed.

(15) (1840) 6 Bing. (N. S.) 277: 8 Scott 565; 8 D. P. C. 280; 9 L. J. C. P. 138.
(16) (1827) 5 Pickering 213.
(17) (1836) 13 Maine 367.
(18) 6 B. 663.
(19 3 M. 68.
(20) 29 M. 303.
(21) 27 A. 526; A. W. N. (1905) 86; 2 A. L. J. 416.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No 1466 OF 1909.
August 29, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

IMRIT CHAMAR—PLAINTIFF—APPELLANT

versus

SRIDHAR PANDAY AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), ss. 9, 11, 90, 130—Title-deed—Original not produced by witness on being summoned—Secondary evidence, right to use—Application for issue of warrant—Non-payment of process-fee—Whether right lost—Statement in document as to boundary—Admissibility against stranger—Document 30 years old—Presumption of genuineness—Discretion of Court—Cess Act (IX of 1880 B.C.), s. 95—Absence of name of tenant—Admissibility of Road Cess Return in evidence—Court bound to assign reasons for view as to s. 90, Evidence Act—Erroneous reasons in Law—Second Appeal, interference by High Court.

Under section 130 of the Evidence Act, a witness who is not a party to a suit cannot be compelled to produce his title-deeds to any property. Where, therefore, a person is directed by summons to produce the original of a document, and he does not do so the party who summoned him is entitled to use as secondary evidence a certified copy of the document. Where a party omits to pay the fee for the issue of a warrant against the person holding the original of a document, he does not thereby lose the right of using a copy as secondary evidence.

A statement by the grantor in the schedule to a lease regarding the ownership of certain property situate on the boundary of the land demised can be used in evidence against persons who were not parties to the transaction evidenced by the lease.

Abdulla v. *Kunj Behari Lal*, 12 Ind. Cas. 149; 14 C. L. J. 467, followed.

Brajeshwari v. *Budhanudi*, 6 C. 268; 7 C. L. R. 6 and *Manohar Singh* v. *Sumirta Kuar*, 17 A. 423, distinguished.

Under section 90 of the Evidence Act, it is not obligatory upon a Court to assume that a document is genuine merely because it purports to be 30 years old and is produced from proper custody. The Court has a discretion in the matter which must be judiciously exercised.

Srinath Patra v. *Kuloda Prosad*, 2 C. L. J. 592, referred to.

If it established that there is internal evidence to doubt the genuineness of a document, and if the recitals contained therein are inconsistent with admitted or proved facts the Court may call upon the party to produce evidence of execution.

Shafiqunnissa v. *Shaban Ali Khan*, 26 A. 581 at p. 586 (P. C.); 9 C. W. N. 105, relied upon.

IMRIT CHAMAR v. SRIDHAR PANDAY.

A lower Appellate Court is bound to assign reason for its views at to the applicability of the provision of section 90 of the Evidence Act; and where these reasons are erroneous in law, it is competent to the High Court to interfere in second appeal.

Trailokia v. *Shurno*, 11 C. 539, relied upon.

The absence of recitals in a document may be used in evidence as against a person who is not a party to that document, under sections 9 and 11 of the Evidence Act.

Sagurmull v. *Manraj*, 4 C. W. N. ccvii (short notes), relied upon.

Therefore, the absence of the name of a party from the category of tenants mentioned in the Road Cess Return is evidence against him.

Queen-Empress v. *Grees Chunder*, 10 C. 1024 and *In the matter of Jaggun Lal*, 7 C. L. R. 356, distinguished and not approved.

Appeal from the decree of the Sub-Judge of Shahabad, dated April 21st, 1909, affirming that of the Munsif of Arrah, dated August 27th, 1908.

Babus *Biraj Mohan Majumdar* and *Sarat Chandra Lahiri*, for the Appellant.

Babus *Dwarka Nath Mitter* and *Bijoy Kumar Bhattacharrya*, for the Respondents.

JUDGMENT.—This appeal is directed against a decree of dismissal in a suit for redemption of an alleged usufructuary mortgage. The defendants deny the title of the plaintiff and their contention has found favour with the Courts below. Upon the present appeal, the decree of the Subordinate Judge has been assailed on behalf of the plaintiff, on three grounds; namely, *first*, that a certified copy of a perpetual lease dated the 21st December 1874 was improperly rejected by the Court of first instance; *secondly*, that the first mortgage-deed was improperly excluded from evidence upon a misapprehension of the legal effect of the provisions of section 90 of the Indian Evidence Act; and, *thirdly*, that the Court of first instance ought not to have received in evidence a road-cess return produced by the defendants as evidence in their favour, because it does not show the name of the predecessor of the plaintiff as a tenant of the disputed property.

In so far as the first of the grounds is concerned, it has been argued that the two reasons assigned by the Court below for exclusion of the perpetual lease of the 21st December 1874, are erroneous in law. In our opinion, this contention is well founded. The Subordinate Judge, in agreement with the primary Court, has held that as the plaintiff had failed to put in process-fee for the issue of warrant against the person called upon to produce the original of this lease, he was debarred by reason of his own default from using the certified copy as secondary evidence. The Subordinate Judge has further held that even if the copy was received in evidence, it would not be of any assistance to the plaintiff, because the recitals of the boundaries in the schedule to that document are not admissible in evidence against the plaintiff who was no party to the transaction.

In so far as the first reason is concerned it is not disputed that the plaintiff had caused summonses to be served upon the witness who had custody of the original and was called upon to produce it. The witness, however, did not comply with the order of the Court. The plaintiff subsequently applied for the issue of a warrant against the witness but no process-fee was paid for service of the writ. This does not, in our opinion, amount to default on the part of the plaintiff. As was pointed out by this Court in the case of *Bhagabat Prasad Singh* v. *King Emperor* (1), under section 130 of the Indian Evidence Act, no witness who is not a party to a suit can be compelled to produce his title-deed to any property, or any document in virtue of which he holds any property as pledgee or mortgagee or any document the production of which might tend to incriminate him, unless he has agreed in writing to produce them with the person seeking the production of such deed or some person through whom he claims. It cannot be disputed that the lessee under the perpetual lease of the 21st December 1874 was entitled to urge that the document was his title-deed, and that he was not bound to produce the original except in the event contemplated by section 130 of the Indian Evidence Act. It is not alleged that the lessee had agreed with the plaintiff in writing to produce the original in Court. Consequently, if, after service of summons upon him, he did not produce the original, the plaintiff became entitled to use the certified copy as secondary evidence. The first reason assigned by the Subordinate Judge in support of his order of rejection of the document cannot, therefore, be supported.

In so far as the second reason is concerned,

(1) 14 C. L. J. 120; 11 Ind. Cas. 794.

IMRIT CHAMAR *v.* SRIDHAR PANDAY.

it has been contended by the learned Vakil for the defendants-respondents that as they were not parties to the transaction evidenced by the lease, no recital in that document could be used in evidence against them. In support of this proposition, reliance has been placed upon the cases of *Brajeshwari* v. *Budhanudi* (2) and *Manohar Singh* v. *Sumirta Kuar* (3). These cases, however, are clearly distinguishable, as no question of the admissibility of any document in evidence arose for consideration in either of these cases. What was ruled was that the recital in a document as to the payment of consideration was not binding upon a person other than the executant. [*Bisheswar* v. *Harbans* (4).] If the document was sought to be used against the executant who denied receipt of consideration, the burden, *prima facie*, would lie upon him to explain how he had executed a document containing such recital. In the case before us, no such question arises. The question to be decided is whether the statement by the grantee in the schedule to the lease, that on the boundary of the land demised was the holding of the predecessor of the present plaintiff can be used in evidence against the defendants, although they were not parties to the transaction evidenced by that document; in our opinion the document is admissible in evidence on the principle explained by this Court on the case of *Abdulla* v. *Kunja Behari Lal* (5). In fact, the case before us is stronger than the case then before the Court, because it is alleged here that the statement was made by the landlord of the plaintiff who might be expected to know who was in occupation of the land as his tenant. The case is, therefore, completely covered by the decisions in the cases of *Ningawa* v. *Bharmappa* (6); *Abdul Aziz Molla* v. *Ebrahim Molla* (7) and *Burha Mandari* v. *Megh Nath* (8). The ground assigned by the Subordinate Judge for the rejection of this piece of documentary evidence cannot be upheld. The first ground urged on behalf of the appellant must, therefore, prevail.

(2) 6 C. 268; 7 C. L. R. 6.
(3) 17 A. 428.
(4) 6 C. L. J. 659; 3 M. L. T. 38.
(5) 12 Ind. Cas. 149; 14 C. L. J. 467.
(6) 23 B. 63.
(7) 31 C. 965.
(8) 2 C. L. J. 4 *n*.

In so far as the second ground is concerned, it has been contended that the Subordinate Judge has misapplied the provisions of section 90 of the Indian Evidence Act, in respect of the document alleged to be the first mortgage executed by the predecessor-in-interest of the plaintiff. It cannot be disputed that the Subordinate Judge was bound to assign reasons for the view he took as to the applicability of the provisions of section 90 and if his reasons are erroneous in law, it is competent to this Court to interfere in second appeal [*Trailokia* v. *Shurno* (9)] Under section 90 it is not obligatory upon a Court to assume that the document produced is genuine merely because it purports to be thirty years old and is produced from proper custody. The Court has a discretion in the matter but that discretion must be judiciously exercised in the manner explained by this Court in the case of *Srinath Patra* v. *Kaloda Prosad Banerjee* (10). The Court has first to consider whether, in the circumstances of the particular case, the document has been produced from custody which may be deemed proper. When this is found in favour of the party who has produced the document the question arises whether the Court should, in the exercise of its discretion vested in it, raise the presumption of genuineness with regard to the document. If, to take one instance as pointed out by their Lordships of the Judicial Committee in *Shafiq-un-nissa* v. *Shaban Ali Khan* (11), it is established that there is internal evidence to throw doubt upon the genuineness of the document, and if the recitals therein contained are inconsistent with facts admitted or proved beyond the possibility of dispute, the Court may call upon the party to produce evidence of execution. In the case before us, this procedure does not appear to have been followed. The Subordinate Judge is, moreover, in error when he states that the document has not been produced from proper custody; the case for the plaintiff is that the mortgage has been redeemed. If that story is believed, the document would properly be found in the custody of the mortgagor. We are of opinion, therefore, that the Subordinate Judge has not dealt with this part of the case properly and it is necessary for him

(9) 11 C. 539.
(10) 2 C. L. J. 592.
(11) 26 A. 581 at p. 586; 9 C. W. N. 105.

to re-consider the question in view of the principle explained by this Court in the case of *Srinath Patra* v. *Kolada Prosad Banerjee* (10). He will first consider whether the two elements mentioned in section 90 have been established; if he holds that they have not been proved to his satisfaction, he will call upon the plaintiff to give evidence of execution. The second ground will, therefore, prevail.

In so far as the third ground is concerned, it has been argued that the Road Cess Return is not admissible in evidence under section 95 of the Bengal Cess Act, 1880. That section, however, has no application to the circumstances of the present case. The maker of the document does not seek to use it as evidence in his favour. It is sought to be used in evidence by one stranger against another. The real question is, whether the absence of the name of the predecessors of the plaintiff from the category of tenants mentioned in the Road Cess Return is evidence against him. In support of the contention that it is not evidence, reliance may possibly be placed upon the cases of *Queen-Empress* v. *Grees Chunder Banerjee* (12) and *In the matter of Juggun Lal* (13). These cases, however, if they decide that the absence of a recital in a document is not admissible in evidence at all under any section of the Indian Evidence Act, cannot be accepted as giving a correct exposition of the law. As a matter of fact, in neither of these cases was the question raised in this broad form. What was argued was that section 34 did not make the document admissible for the purposes stated. It was pointed out, however, in the case of *Sagurmull* v. *Manraj* (14) that under sections 9 and 11 of the Indian Evidence Act, the absence of recital in a document may be used in evidence as against the person who is not a party to that document; and the observation of Lord Robertson in the case of *Ram Pershad Singh* v. *Lakhpat Koer* (15) must be taken to be restricted in the same manner. We are of opinion, therefore, that the Road Cess Return was admissible in evidence. What weight ought to be attached to the circumstance, however, is a matter entirely for the Court of first instance to consider. The third ground urged by the appellant must, therefore, be overruled.

The result is, that this appeal is allowed and the decrees of the Courts below discharged. The case will be remanded to the Court of first instance for re-trial. The certified copy of the lease of the 21st December 1874 will be received in evidence and the Court will also consider, with reference to section 90 of the Indian Evidence Act, whether what purports to be a first mortgage-deed in respect of this land by the predecessor of the plaintiff, is or is not genuine. Both the parties will be at liberty to adduce fresh evidence, and all questions which arise upon the pleadings and the issues, will be open for consideration. The costs incurred up to the present stage will abide the result.

Appeal allowed and case remanded.

(12) 10 C. 1024.
(13) 7 C. L. R. 356.
(14) 4 C. W. N. ccvii (short note).
(15) 30 C. 231 at p. 247.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 92 AND 221 OF 1909.

September 1, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

LAKHI CHOWDHURI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

AKLOO JHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Party—Non-joinder—Objection that suit bad for want of necessary plaintiff—If can be taken in appeal for first time—Civil Procedure Code (Act V of 1908), O. I, r. 9—Bengal Estates Partition Act (VIII B. C. of 1876), ss. 23, 25, 29, 45, 46, 119—Declaratory suit that defendant not tenant, if maintainable during partition.

Where a defendant omits to take exception in the first Court to the frame of a suit on the ground that a necessary party has not been joined as plaintiff, it is not open to him at the appellate stage to take such objection. A Court has power to decide questions in controversy under rule 9 of Order I of the Code of Civil Procedure, in so far as the parties before it are concerned.

The plaintiff and the defendant No. 2, in this case, are the joint owners of an estate which is in course of partition under the Estates Partition Act. The defendant No. 1 claimed that he was a tenant. The plaintiff repudiated that position but his objection was overruled by the Revenue authorities. He now sued for a declaration that defendant No. 1 is not a tenant in respect of any land in the estate and it was contended that the suit was not maintainable:

Held, that section 25 of the Estates Partition Act was no bar to the suit.

Appeal from the decree of the District Judge of Darbhanga, dated November 26th,

LAKHI CHOWDHURI *v.* AKLOO JHA.

1908, reversing that of the first Munsif of Darbhanga, dated April 30th, 1903.

Babu *Atul Chandra Datta*, for the Appellants.

Babu *Lakshmi Narayan Singh*, for the Respondents.

JUDGMENT.

S. A. No. 92 OF 1909.

This appeal is directed against a decree of dismissal in a suit for declaration of title to immoveable property and for confirmation of possession. The plaintiff and the 2nd party defendants are the joint owners of an estate which is now in course of partition under the provisions of the Estates Partition Act of 1897. In the partition proceedings the first defendant put forward a claim that he was the tenant in respect of a particular parcel of land. The plaintiffs repudiated that position but their objection was overruled by the Revenue authorities. They thereupon commenced this action for declaration that the first defendant was not a tenant in respect of those lands and that he had, as a matter of fact, been set up fraudulently by the second party defendants. The Court of first instance went into the merits and made a decree in favour of the plaintiffs. Upon appeal two objections appear to have been urged on behalf of the defendants; namely, *first*, that the suit had not been properly constituted, because the son of one of the plaintiffs had not been joined as a party and, *secondly*, that the suit was barred under the provisions of section 25 of the Bengal Estates Partition Act.

In respect of the first objection, the learned Judge held that it was well founded but that the suit ought not to be dismissed on that ground; he stated in fact that if the suit had not been open to any other objection, he would have remanded the case for re-trial. But in so far as the second objection was concerned, the learned Judge allowed it to prevail and dismissed the suit as not maintainable.

The plaintiffs have now appealed to this Court, and on their behalf the view taken by the learned Judge upon both these matters has been called in question. We are of opinion that his conclusion cannot be supported.

In so far as the question of defect of parties is concerned it is clear that this specific objection was not taken in the Court of first instance. One of the plaintiffs went into the witness-box and from his examination it transpired that he had a son who was jointly interested in the subject-matter of the litigation but had not been brought before the Court. It was thereupon open to the defendants to take exception to the frame of the suit. They did not do so, but allowed the suit to proceed as properly constituted. It was, therefore, not open to them at the appellate stage to take a technical objection of this character. It is further clear that it is needless to send back the case to the original Court for re-trial, as the father may well be deemed to represent all the members of the family. In any event, it is open to the Court to decide the questions in controversy under rule 9 of Order I of the Code of Civil Procedure of 1908, in so far as the parties before the Court are concerned.

With regard to the second point, it has been contended on behalf of the appellants, that the suit is not barred under the provisions of section 25 of the Estates Partition Act of 1897. This argument has not been seriously controverted on behalf of the respondent and, in our opinion, there is no answer to the contention of the appellant. Section 25 provides that no suit, instituted in a Civil Court after the lapse of four months after the Collector has made a direction under clause (*a*) or clause (*b*) of section 23, or recorded a proceeding under section 29 by any person claiming right or title in or to a parent estate shall avail to affect or stay the progress of any proceedings which may have been taken under the Act for the partition of the estate. This section obviously has no application to the case before us. In the *first* place, the defendant does not claim any right or title in or to the parent estate. He claims the status of a tenant under the proprietors in respect of a specific parcel of land. In the *second* place, the section does not say that a suit of this description does not lie; it merely provides that a suit instituted after four months does not affect or stay proceedings for partition. In the *third* place, neither section 23 nor section 29 has any application to the facts of this case. It has been argued, however, by the learned Vakil for the respondent that the suit is barred because the partition proceedings have not yet been completed and the matter is still under the considera-

tion of the Revenue authorities. But there are two obvious answers to this contention. In the *first* place, so far as the question sought to be raised is concerned, it has been finally disposed of by the Revenue authorities. In the *second* place, section 119 of the Estates Partition Act specifies the orders of the Revenue authorities which cannot be questioned by a suit in any Civil Court. An order under section 45 or 46 is not one of the orders mentioned in section 119. The reason for the exclusion is obvious. The determination by the Revenue authorities is of a summary character and it cannot be taken to conclude finally a question of title between one of the proprietors and a stranger to the proceeding. The learned Vakil for the respondent has not disputed that if the decision of the Revenue authorities had been adverse to the claimant who set up a tenancy, the latter would have been entitled to maintain a declaratory suit for the establishment of the right alleged by him. The same principle is applicable to the converse case and has been recognised in a series of decisions of this Court amongst which may be mentioned *Khoobun* v. *Woomi Churn Singh* (1), *Kalupnath Singh* v. *Lala Ramdein Lal* (2), *Ananda Kishore Chowdhury* v. *Durga Thakurain* (3) and *Janaki Nath Chowdhury* v. *Kali Narain Roy Chowdhury* (4).

As pointed out in the case of *Zahrun* v. *Gowri Sunkar* (5), the true test to be applied in the solution of questions of this description is, whether the parties who seek relief in the Civil Court really intend to get an adjudication which may affect the Government revenue. If the question which is sought to be raised is of this description, the Civil Court has no jurisdiction It cannot be suggested with any decree of plausibility that the question sought to be raised in this case is of this character.

The result, therefore, is that this appeal is allowed, the decree of the District Judge set aside and the case remanded to him in order that the appeal may be heard on the merits. The costs of this appeal will abide the result.

Under section 13 of the Court Fees Act we direct that the Court-fees paid on the memorandum of appeal to this Court be returned to the appellant.

It is conceded that this judgment will govern the other appeal, in which a similar order will be drawn up.

Appeal allowed,
case remanded.

(1) 3 C. L. R. 453.
(2) 16 C. 117.
(3) 1 Ind. Cas. 549; 36 C. 726; 10 C. L. J. 189.
(4) 7 Ind. Cas. 881; 37 C. 662; 15 C. W. N. 45.
(5) 15 C. 198.

CALCUTTA HIGH COURT.
CIVIL RULE No. 3996 OF 1910.
May 24, 1911.
Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

DEBENDRA NATH SARKAR—DEFENDANT—PETITIONER
versus
BINDHUBALA DASI AND OTHERS—PLAINTIFFS—OPPOSITE PARTY.

Specific Relief Act (I of 1877), s. 9—Persons dispossessed, whether must be co-plaintiffs—Possession, act of—Nature of property—Grazing cattle whether act of possession.

Where a person enters wrongfully upon any land, it is open to any one of the persons dispossessed to maintain an action for his ejectment, and it is no substantial grievance that all the persons dispossessed have not been joined as plaintiffs. He is sufficiently protected if the persons dispossessed are on the record either as plaintiffs or as *pro forma* defendants.

Whether a particular act may be treated as an act of possession, depends upon the nature of the property and the special circumstances of the case.

Rajkrishna v. *Muktaram Das*, 7 Ind. Cas. 700; 12 C. L. J. 605, followed.

The fact that the cattle of a person occasionally grazed on a piece of land is not by itself sufficient to show that the land was in the possession of that person.

Rule against the order of the first Munsif of Bolpur, dated August 4th, 1910.

Babus *Bipin Bihari Ghose* (Junior) and *Provash Chandhra Mitra*, for the Petitioner.

Babus *Joy Gopal Ghosha* and *Biraj Mohan Majumdar*, for the Opposite Party.

JUDGMENT.—In this case we are invited to set aside the decree made under section 9 of the Specific Relief Act The subject-matter of the litigation appears to be a house which was at one time the property of one Mr. Cheap and subsequently appears to have been more or less abandoned. The case for the plaintiffs is that they, along with their co-sharers who are made *pro forma* defendants, were in possession of the disputed property till they were dispossessed by the first defendant on the 6th November 1909. They alleged that

DEBENDRA NATH v. BINDHUBALA DASI.

they could not induce their co-sharers to join with them as plaintiffs and were consequently obliged to place them on the record as *pro forma* defendants. They ask for recovery of possession on the ground that the first defendant ought not to interfere with their possession. The learned Munsif, in an exhaustive judgment, has found that the plaintiffs were in possession as stated by them and that the first defendant was not in possession of the property till he raised the *pagar* on the 6th November 1909. In this view, he has made a decree in favour of the plaintiffs and directed the property to be held by them on their own behalf and on behalf of their co-sharers *pro forma* defendants.

On behalf of the first defendant, this decree has been assailed substantially on two grounds, namely, *first*, that the suit has not been properly framed and, *secondly*, that upon the facts found by the Court below, the plaintiffs have not such judicial possession of the property as would entitle them to ask the Court to restore them to possession. In our opinion there is no substance in either of these contentions.

In so far as the first point is concerned, it is plain that the suit was properly framed. The learned Vakil for the first defendant urges that as the plaintiffs were admittedly not in exclusive possession of the property, but, according to their own case, held joint possession along with their co-sharers, they ought not to be placed in exclusive possession. It is further argued that a suit of this description could not be maintained, unless all the persons in joint possession, who are alleged to have been dispossessed, joined as co-plaintiffs in the institution of the suit. This position is, in our opinion, clearly unsustainable. The policy which underlies section 9 of the Specific Relief Act is to discourage persons from taking the law into their own hands and entering by force upon the property in the possession of other persons. The law will not suffer a person to be his own judge and will not allow him to take possession of the land, unless he has recovered it by legal means. If the first defendant, therefore, is a person who has wrongfully entered upon the land, it is open to any one of the persons dispossessed, to maintain an action to eject him, and it is no substantial grievance that all the persons whom he dispossessed have not been joined as plaintiffs in maintaining the action. He is sufficiently protected if the persons dispossessed by him are on the record either as plaintiffs or as *pro forma* defendants. If the contrary view were maintained, a suit of this description might easily be defeated if the dispossesser could win over one of the persons dispossessed to his side. We must, therefore, overrule the first point urged on behalf of the petitioner.

In so far as the second point is concerned, there is obviously no substance in it. The learned Munsif has found that the plaintiffs and their predecessors have for many years past exercised, with reference to the land, acts which might properly be treated as acts of ownership. He has pointed out that in 1882 the predecessors of the plaintiffs took trees standing on the disputed property, that later on in 1896, they took away cart loads of bricks and also another tree, and in 1903, 1906 and 1908 they sold under-shrubs standing on this piece of land. It is perfectly true that, as pointed out by this Court in the case of *Rajkrishna* v. *Muktaram Das* (1), whether a particular act may be treated as an act of possession depends upon the nature of the property and the special circumstances of the case. In the case before us, in view of the condition of the property, the Munsif was quite right in holding that the acts mentioned were acts of possession. On the other hand, the only act upon which the first defendant can rely is that the cattle of his predecessors grazed occasionally on the disputed property. As the Court below has pointed out, that by itself is not sufficient to show that the defendant or his predecessor was in possession of the property. In this country especially in the villages, persons are often allowed to graze their cattle on the property of others. It would be impossible, in these circumstances, to hold that the plaintiffs were not, and that the defendant was, in possession.

The Rule is, therefore, discharged with costs. We assess the hearing fee at two gold *mohurs*.

Rule discharged.

(1) 7 Ind. Cas. 700; 12 C. L. J. 605.

SITARAM *v.* KALANDI PATRA.

CALCUTTA HIGH COURT.
CIVIL RULE No. 4607 OF 1910.
May 24, 1911.
Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.
SITARAM SWAMI—DEFENDANT—PETITIONER
versus
KALANDI PATRA—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908*), O. V, r.* 17—*Service of summons—Substituted service—Ordinary residence—Leaving temporarily—Due and reasonable diligence to find defendant.*

If a person leaves his place of residence only temporarily, it cannot be said that the house which he occupied is not where he ordinarily resided.

A peon went to serve the defendant with a summons, but could not find the defendant at his place of residence, upon inquiry he was told by the defendant's wife that her husband had gone to *B.* a place in the Madras Presidency. He thereupon affixed a copy of the summons to the outer door of the defendant's house. The defendant returned to his house about three months after this:

Held, that the peon had used all due and reasonable diligence within the meaning of rule 17 of Order V of the Code, and that service of the summons had been properly effected.

Sakina v. *Gauri*, 24 A. 302; *Sakharam* v. *Padmakar*, 30 B. 623; 8 Bom. L. R. 757; *Subramania Pillai* v. *Subramania Ayyar*, 21 M. 419; *Abraham Pillai* v. *Donald Smith*, 29 M 324 and *Bhomshetti* v. *Umabai*, 21 B. 223, distinguished.

Sankaralinga v. *Ratnasabhapati*, 21 M. 324, relied upon.

Rule against the order of the District Judge of Cuttack, dated June 3rd, 1910, dismissing the appeal of the petitioner.

Babu *Shiba Prosonna Bhattacharyya*, for the Petitioner.

Babus *Khetra Mohan Sen*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to discharge an order by which the Court of appeal below, in concurrence with the Court of first instance, has refused to set aside an *ex parte* decree in a contribution suit at the instance of the petitioners who were the second and third defendants. The application was made under rule 13 of Order IX which provides that an *ex parte* decree may be set aside if the defendant satisfies the Court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. The case before us does not fall within the second branch of the rule, because it has been found by the Court below that the petitioners were aware of the suit and did not appear at the hearing. If the petitioners can succeed it can only be on the ground that the summonses were not duly served upon them. Now, upon this part of the case the admitted facts are that the peon, as stated in his return, could not find the petitioners at their residence at Ichapur and on inquiring from their wives learnt that one of them had gone to Vizagapatam and the other to Berhampore, two places in the Madras Presidency, and outside the jurisdiction of the Court. He thereupon attached copies of the summons to the outer door of their residence. As regards one of the petitioners it is stated that he had gone to Vizagapatam in August 1909 and did not return to his usual place of residence till December 1909. Summons was served on the 30th September 1909. Upon these facts, the question arises whether substituted service was properly effected under rule 17 of Order V of the Code. That rule provides that,—we quote only so much of the rule as is applicable to the facts of this case,—where the defendant or his agent refuses to sign the acknowledgment or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain and shall then return the original to the Court from which it was issued. Two questions arise upon this Rule, namely, *first*, whether the summonses were affixed on the outer door of the house in which the defendant ordinarily resided; and, *secondly*, whether, before this was done, the serving officer had used all due and reasonable diligence to find out the defendants. In so far as the first question is concerned, there is no room for dispute that the defendants ordinarily resided in the house on the outer door of which the summonses were affixed. They had left their place of residence only temporarily and, therefore, it cannot be contended that that was not the house in which they ordinarily resided at the time when the service was effected. In so far as the second question is concerned, we have to examine whether the serving officer had used all due and reasonable diligence to find the defendants. His report states that he

could not find the petitioners at their place of residence, and upon inquiry from their wives he learnt that one of them had gone to Berhampore and the other to Vizagapatam. One of the petitioners did not return to his residence till about three months after the date of service. Under these circumstances, we are of opinion that, in so far as this defendant is concerned, the peon had used all due and reasonable diligence within the meaning of the rule. We take it, therefore, that the service was properly effected. The learned Vakil for the petitioner has, however, contended that this view is opposed to the decision in the case of *Sakina* v. *Gauri* (1) which has been accepted as good law in the case of *Sakharam* v. *Padmakar* (2). He has also placed reliance upon the case of *Subramania Pillai* v. *Subramania Ayyar* (3) and *Abraham Pillai* v. *Donald Smith* (4). These cases, as also the decision in the case of *Bhomshetti* v. *Uma Bai* (5), lay down the proposition that merely because the peon is unable to find the defendants at their residence, he is not entitled to effect service in the manner prescribed in rule 17 of Order V of the Code. He must take care to ascertain where the defendants live, and, if practicable try to effect personal service upon them. It is possible that in some of these cases the rule was too broadly stated, and it may be a question whether the decision in every one of these cases can be justified upon the most liberal interpretation of rule 17. The case before us, however, is reasonably free from difficulty. Here one of the defendants had left his residence temporarily. He was absent for several months. It was consequently impossible for the peon to retain the summons in his custody till the return of the defendant, and as the defendant had left the jurisdiction of the Court, it was not possible for the peon to effect service upon him personally outside the jurisdiction. The present case, in our opinion, falls within the principle recognized in the case of *Sankaralinga* v. *Ratna Sobhapati* (6). There the learned Judges observed that as it appeared from the serving officer's report that according to the information given to him there was no prospect of his being able to serve the defendant personally within a reasonable time, he was justified in affixing the summons to the door of the house. In so far, therefore, as the petitioner, who has been examined as a witness in the case, is concerned service was properly effected. In so far as the other petitioner is concerned, he has not been examined and there is nothing on the record to show under what circumstances or for what length of time he was absent. We are unable to say, therefore, that the summons was not duly served, in so far as he is concerned.

The result is that the order of the Court below is affirmed, and this Rule discharged with costs one gold *mohur*.

Rule discharged.

(1) 24 A. 302.
(2) 30 B. 623; 8 Bom. L. R. 757.
(3) 21 M. 419.
(4) 29 M. 324.
(5) 21 B. 223.
(6) 21 M. 324.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2820 OF 1909.
July 7, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

SRI RANG BEHARY LAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

RANCHEYYA LAL—PLAINTIFF—RESPONDENT.

Pleadings—Written statement—Inconsistent defences in alternative, whether allowable—Civil Procedure Code (Act XIV of 1882), s. 112—Civil Procedure Code (Act V of 1908), O. VI, r. 7—Amendment of written statement, when may be allowed.

A defendant may in his written statement raise as many distinct and separate, and, therefore, inconsistent defences as he may think proper, in the alternative.

Alickjan Bibi v. *Rambaran Shah*, 7 Ind. Cas. 166; 12 C. L. J. 357, followed.

Hawkesley v. *Bradshaw*, (1880) 5 Q. B. D. 302, 49 L. J. Q. B. 333, 42 L. T. 285, 28 W. R. 557, 44 J. P. 473 and *Narendra Nath* v. *Abhoy Charan*, 34 C. 51, 4 C. L. J. 437 (F. B), 11 C. W. N. 20, 1 M. L. T. 364, relied upon.

An amendment of the pleadings ought to be allowed whenever this can be done without injustice to the opposite side. For the purpose of raising the real question at issue between the parties such amendment should be allowed, and if the opposite party has incurred expense and been caused delay, it should be compensated therefor.

Australian Steam Navigation Co. v. *W. Howard Smith and sons*, 14 App. Cas. 318, 61 L. T. 134, followed.

Appeal from the decree of the District Judge of Mozaffarpur, dated August 28th, 1909, affirming that of the Sub-Judge of that District, dated June 29th, 1908.

Babus *Jogesh Chandra Roy*, *Akhoy Kumar Banerjee* and *Lakshmi Narain Singh*, for the Appellants.

Babu *Joy Gopal Ghosha*, for the Respondent.

SRI RANG BEHARY LAL *v.* RANCHHAYYA LAL.

JUDGMENT.—This appeal is directed against a decree in favour of the plaintiff in a suit for declaration of title to immoveable property and for recovery of possession thereof. The case for the plaintiff is, that the disputed property belonged to his maternal grandfather, Manyar Singh. Manyar Singh died many years ago and left a widow Rajrani Koer who died in 1867. According to the plaintiff, Manyar Singh also left two daughters, his mother Gangabati and her sister Sham Dasi, Gangabati died in 1886 and Sham Dasi in 1909. On the 8th May 1907, the plaintiff commenced this action for declaration of title and recovery of possession of the dispute property from the appellants who purchased it from Gangabati and Sham Dasi under a conveyance executed on the 15th January 1890. The defendants resisted the claim on the ground that the transfer by Gangabati and Sham Dasi was for legal necessity, and they had consequently acquired an indefeasible title. The written statement in which this plea of legal necessity was urged was filed on the 25th March 1907. The issues were framed on the following day and the parties are called upon to file the documentary evidence. On the 27th June the defendants invited the Court to send for the original of certain records from the Collectorate relating to mutation proceedings in 1847, upon the application of Rajrani Koer. On the 16th July 1907, the defendants applied for leave to amend their written statement. This application was refused on the day following. The suit was subsequently tried out, and the only question in controversy between the parties, was whether there was legal necessity for the alienation in favour of the defendants. The Court found that the defendants had failed to discharge the burden that lay upon them to establish the alleged legal necessity. The result was that a decree was made in favour of the plaintiff. Upon appeal to the District Judge, the defendants conceded that the finding of the original Court upon the question of legal necessity could not be successfully assailed on the evidence. In fact, in view of the circumstance that the transaction had taken place nearly forty years before the trial of the suit, it would be extremely difficult, if not wholly, impracticable for the defence to establish the plea. The defendants, however, urged before the District Judge that they ought to have been allowed to amend their written statement. The District Judge overruled this contention and affirmed the decree of the primary Court. Upon the present appeal the only point which has been urged on behalf of the appellants is that their application for amendment of the written statement was improperly refused. In our opinion, this contention is well-founded and must prevail.

The application of the 16th July 1907, for amendment of the written statement was to this effect: The defendants alleged that they had discovered from the record of the mutation proceedings of 1848 that Rajrani Koer then alleged that upon the death of Manyar Singh he had been succeeded by his son Durga Prosad; and that upon the death of Durga Prosad, about the year 1847, Raj Rani Koer herself had succeeded to the estate as the heiress of his son. It was on this basis that the application was made by Raj Rani Koer in 1848, for mutation of the name of Manyar Singh in the records of the Collectorate. The defendants in the present suit prayed that they might be allowed to amend their written statement and set up an alternative defence, namely, that if it was established that Manyar Singh left a son Durga Prosad upon whose death the properties passed to Raj Rani Koer, upon the death of the latter the estate would pass not to the sisters of Durga Prosad, namely, Gangabati and Sham Dasi, but to his nephew Rachia Lal, the present plaintiff. In this view, the question would arise whether the defendants, although they had professed to buy the property from Gangabati and Sham Dasi, on the assumption that they were the heirs to the estate of Manyar Singh had not acquired a good title by adverse possession and whether the claim of Rachia Lal to succeed to the estate of Durga Prosad was not barred by limitation. No doubt the legal inference which could follow upon the establishment of the fact that Durga Prosad had succeeded to the estate of his father Manyar Singh was not explicitly set out in the application for amendment; but it was plainly unnecessary for them to state the legal inference in detail; they could at best ask for leave to amend the written statement by a recital of the fact which they had discovered. The question, therefore, arises whether the defendants were entitled in justice to have their written statement

SRI RANG BEHARY LAL *v.* RANCHHAYYA LAL.

amended as prayed. The answer to this question depends upon two elements; namely, *first* was it open to the defendants to include in their written statement two inconsistent defences; *secondly*, if it was open to them to do so, whether their application of the 16th July 1907, ought to have been granted so as to enable them to include in the written statement a defence inconsistent with the defence originally taken.

Now, in so far as the first of these points is concerned, there can be no room for controversy that it would have been open to the defendants to include two inconsistent defences in the alternative in their original written statement. In support of this proposition, reference may be made to the decision of a Full Bench of this Court in the case of *Narendranath Barary* v. *Abhoy Charan Chattopadhya* (1) which was applied in *Alickjan Bibi* v. *Rambaran Shah* (2). In the case last mentioned, it was pointed out that a defendant may raise by his written statement as many distinct and separate, and, therefore, inconsistent defences as he may think proper. This is in accord with the rule which prevails in England [*Hawkesley* v. *Bradshaw* (3).]

In so far as the second question is concerned, it is clear that there was nothing in the law as it stood at the time of the decision of the suit in the original Court, which prevented the defendants from amending their written statement. Section 112 of the Code of 1852 provides that the Court may at any time require a written statement or an additional written statement from any of the parties and fix a time for presenting the same. Upon a construction of the corresponding section 122 of Act VIII of 1859, it was ruled by this Court in *Dasimoni Dasi* v. *Srinath Ghose* (4), that on an application by the defendant to be allowed to file an additional written statement, the Court might grant the application even though the additional written statement was inconsistent with the original written statement. Such an order, however, could be made only upon payment of costs by the defendant to the plaintiff. The law, as it now stands, gives a wider discretion to the Court, because rule 7 of Order VI of the Code of 1908 provides that the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties. This rule merely gives effect to what has been the recognised practice, because, as was stated by their Lordships of the Judicial Committee in the case of *Australian Steam Navigation Co.* v. *W. Howard Smith and Sons* (5), their Lordships are strong advocates for amendments, whenever it can be done without injustice to the other side, and even where they have been put to certain expense and delay, yet if they can be compensated for that in any way, an amendment ought to be allowed for the purpose of raising the real question between the parties. The two cardinal elements to be borne in mind are, *first*, whether the application for amendment is made in good faith, and, *secondly*, whether the application is made at such a late stage of the case that if we grant the prayer, the plaintiff may be injured because the defendant would without notice raise a totally different and inconsistent case which the plaintiff has not sufficient opportunity to meet [*Tildesley* v. *Harper* (6); *Charapede* v. *Commercial Union* (7); *Weldon* v. *Neale* (8) and *Laird* v. *Briggs* (9), Bullen and Leake—Precedents of Pleading, 6th Ed., p. 16.] It is obvious, as we have already explained, that the plaintiffs in the case before us would not have been embarrassed in any way if the amendment had been allowed. We are, therefore, of opinion that the course which was pursued by the Court of first instance and has met with the approval of the District Judge, cannot be defended on principle.

The result is that this appeal is allowed, the decrees of the Courts below set aside and the case remanded to the Court of first instance in order that the defendants may have an opportunity to amend their written state-

(1) 34 C. 51; 4 C. L. J. 437; 11 C. W. N. 20; 1 M. L. T. 364.
(2) 12 C. L. J. 357 at p. 360; 7 Ind. Cas. 166.
(3) (1880) 5 Q. B. D. 302; 49 L. J. Q. B. 333; 42 L. T. 285; 28 W. R. 557; 44 J. P. 473.
(4) 3 B. L. R. App. 11.
(5) 14 App. Cas. 318; 61 L. T. 134.
(6) (1778) 10 Ch. D. 393; 39 L. T. 552; 27 W. R. 249; 48 L. J. Ch. 495.
(7) (1884) 32 W. R. 151 at p. 262.
(8) (1887) 19 Q. B. D. 394; 35 W. R. 820; 56 L. J. Q. B. 621.
(9) (1880) 16 Ch. D. 440 at p. 446; 43 L. T. 632; 29 W. R. 197; 50 L. J. Ch. 260.

ment. The defendants are entitled to their costs both in this Court and in the Court of the District Judge. They will also be allowed one gold *mohur* as costs of the hearing of the 16th July 1907 in the Court of first instance. The other costs in the Court of first instance will abide the result.

We may add that, in so far as the question of legal necessity is concerned, it will not be open for further consideration. The only point for examination at the re-trial will be whether Manyar Singh left a son Durga Prasad, and if so, what is the result of that circumstance on the rights of the parties. They will be at liberty to adduce evidence on the questions which require determination.

Appeal allowed: Case remanded.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 456 OF 1911.

November 28, 1911.

Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.

KHAZAN SINGH—PLAINTIFF—APPELLANT

versus

PANNA LAL—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), *O. XLI, r.* 27 —*Further evidence in appeal.*

The provisions of Order XLI, rule 27, of the Civil Procedure Code are not intended to give a party a second opportunity of proving his case but to supply a defect in the existing evidence on the record.

Second appeal from the decision of the District Judge of Meerut, dated the 21st of February 1911.

Mr. *Harendro Krishna Mukerji*, for the Appellant.

Mr. *M. Ishaq*, for the Respondent.

JUDGMENT.

CHAMIER, J.—This was a suit by the appellant on a demand promissory-note for Rs. 718, signed on March 13th, 1907, by Naurang Mal and Murli Dhar, who are now represented by the respondent and others. The appellant stated in the plaint that the maker of the note had borrowed two sums of Rs. 150 and Rs. 170 in April and June 1907 on mortgages and left the money with the appellant's brother Mittar Sen to be paid to the appellant on account of the note but the money had not been paid, therefore, the appellant claimed the whole amount for which the note was given and interest thereon at the rate stated in the note. The respondent's defence was that the appellant and his brother Mittar Sen were joint in estate, that a dispute between the appellant and the makers of the note had been referred to the arbitration of Umrao Singh and Newal Singh with the result that it was decided that the two mortgages mentioned above should be made for sum aggregating Rs. 320, and the balance Rs. 400 should be paid in cash; and that, in pursuance of the award, Rs. 400 was paid to the appellant.

The first Court found that the appellant and his brother were joint and that the promissory-note had been re-placed by the mortgages to the extent of Rs. 320, the payment of the sum of Rs. 400 had not been proved. It gave the appellant a decree for Rs. 512 odd, being the amount due on the note less the amount secured by the two mortgages. The respondent appealed to the District Judge, who was inclined to think that a passage in the mortgage of June 1907, showed that the sum of Rs. 400 had been paid to the appellant as arranged by the arbitrators, but he was puzzled by the fact that the note had remained in the hands of the appellant and no receipt could be shown for the sum of Rs. 400 alleged to have been paid to the appellant. The respondent urged before the learned Judge that Rs. 200 had been paid to Umrao Singh, one of the arbitrators; that Umrao Singh had himself obtained another sum of Rs. 200 on a mortgage and paid both sums to the appellant and got the promissory-note back but the appellant had managed to get it from Umrao's widow after his death. The learned Judge then remitted three issues to the first Court. Neither party having produced any evidence, the first Court returned the record to the District Judge.

What then took place in the lower Appellate Court appears from the following extract from his judgment:—

"When the case came before me on the 30th November the reference to arbitration was not on the file, and though the balance of probability was against the plaintiff I thought a certainty was obtainable. I, therefore, framed three issues dealing with the alleged proceedings of the arbitrator and remanded the case. No evidence was adduced on them.....The

KHAZAM SINGH *v.* PANNA LAL.

reference to arbitration had, however, been brought on the file.

"To-day was fixed for hearing and the appellants' Pleader came in with a compromise which the plaintiff repudiated when it was read to him..... Under Order XLI, rule 27, to enable me to pronounce judgment, I examined Khazan and also Panna Lal and brought the repudiated compromise on the record as a paper, its contents not having been proved, it corroborates the evidence that the parties came to terms and confirms the explanation of failure to bring evidence on the issues remanded. It is clear that Khazan was willing to compromise 2 days ago but to-day is greedy and repudiates his agreement. Khazan's conduct and the reference to Umrao Singh's arbitration give me in fact the certainty that was lacking on the 30th November when the probabilities only were against Khazan. Now, it is certain that Shahzad's claim was wiped out in 1907, by the payment of Rs. 400 to his elder son Khazan and the execution of two mortgages in favour of his younger son."

In the first place, I think that there was no justification for remitting issues to the Court of first instance and giving the respondent a second opportunity of proving his case by producing evidence which he might have produced in the first instance. Next, I think that when the respondent did not avail himself of the opportunity that was given to him the District Judge ought to have gone on to decide the case at once. He says that the admission of further evidence was necessary to enable him to pronounce judgment, but the provisions of Order XLI, rule 27, are not intended to give a party a second opportunity of proving his case [see the remarks in *Kessowji Issur* v. *G. I. P. Railway Company* (1)]. The learned Judge let in the evidence not to supply a defect or lacuna in the existing evidence but because he thought that some further evidence of a different kind was available. As a matter of fact, the Judge did not get the evidence which he expected, the evidence admitted by him does not bear directly upon the issues remitted by him and the learned Judge says so. He has used the evidence admitted by him merely for the purpose of importing prejudice into the case and punishing the appellant for refusing to come to terms; in my opinion, an improper thing to do. I cannot understand how the learned Judge can have considered himself justified in using the inchoate compromise against the appellant as he did. I disregard entirely the evidence admitted by the District Judge. It is quite clear, and the contrary has not been contended here, that the learned Judge agreed with the Munsif that the oral evidence adduced to prove the payment of Rs. 400 is worthless.

There remains the mortgage of June 1907 which is supposed to prove that the sum of Rs. 400 was paid. That mortgage purports to have been made to secure a loan taken "*babat bebaqi ek qita ruqqa kalmi min muqir Naurang Mal waste dene (qarza) Shahzad Rai.*" It appears to me that these words do not necessarily mean that the mortgage was made in full discharge of the amount due on the *ruqqa*. The arrangement was that Rs. 400 should be paid in cash and payment of the balance (Rs. 320) secured by mortgage. The words quoted above do not necessarily mean more than that the mortgage is made on account of, in the sense of towards, the discharge of the sum due on the *ruqqa* or promissory-note. It was contended that the finding of the learned Judge was a finding of fact binding upon this Court in second appeal and could not be challenged because the appellant had not certified that there was no evidence to support the finding. But the finding that the *ruqqa* has been discharged rests upon the construction of the above quoted passage in the mortgage-deed and other evidence and I have found that the other evidence is not admissible. The evidence which remains, namely, the mortgage-deed, did not satisfy the learned Judge that payment had been made, for he called for other evidence. Therefore, upon the evidence properly admitted, there is no finding which can be said to be binding upon this Court in second appeal, upon the question of the construction of the deed, this Court can in second appeal revise the finding of the District Judge. In my opinion, the mortgage-deed of June 1907, does not prove the payment of Rs. 400 to the appellant. It appears to me to show nothing more than that the mortgage was made in pursuance of the award. I would allow the appeal, set aside the decree of the lower Appellate

(1) 31 B. 381 at p. 390; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 2 M. L. T. 435; 9 Bom. L. R. 671; 17 M. L. J. 347.

Court and restore the decree of the Court of first instance.

KARAMAT HUSAIN, J.—I agree.

BY THE COURT.—The order of the Court is that the appeal is allowed that the decree of the lower Appellate Court is set aside, and that the decree of the Court of first instance is restored with costs which in this Court will include fees on the higher scale.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1011 OF 1910.

November 24, 1911.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

GUNNIAH VENCATACHALAPATHY AIYAR—APPELLANT

versus

PERUMAL IYER AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47—Questions relating to execution—Construction of decree and validity of sale are such questions.

The question whether a sale held in execution of a decree is valid or invalid on the ground that it is not warranted by the decree is one relating to the execution of the decree and must be contested under section 47, Civil Procedure Code, 1908.

The question of the construction of a decree is one relating to execution. Therefore, the question whether the actual execution of a decree is in excess of the decree itself relates to execution.

Rani Kattama Nachiar v. *Bothagurusami Thevar*, 6 M. H. C. R. 293, *Biru Mahata* v. *Shyama Charan Khawas*, 22 C. 483 and *Harnam Chunder* v. *Muhammad Yar Khan*, 27 A. 485; 2 A. L. J. 169; A. W. N. (1905) 63, referred to.

Second appeal against the decree of the District Court of Madura, in A. S. No. 792 of of 1909, presented against the decree of the District Munsif of Madura, in O. S. No. 143 of 1908.

Mr. *Sreenivasa Aiyangar*, for the Appellant.

Mr. *Ananthakrishna Iyer*, for the Respondents.

JUDGMENT.—The defendants Nos. 1 to 3 in this suit were the usufructuary mortgagees of certain properties. The first defendant, who was entitled to one-third share of that right, mortgaged his right to one Ponnaiyen and Ponnaiyen mortgaged his right to the plaintiff.

The plaintiff brought a suit on his mortgage and made Ponnaiyen and Ponnaiyen's mortgagor, the first defendants, as well as the second and third defendants, parties to the suit. Certain other persons, to whom it is unnecessary to refer, were also made parties, and a decree was passed in his favour. The construction of this decree is in question in this suit. The plaintiff contends that not only Ponnaiyen's mortgage-right but the 1st defendant's $\frac{1}{3}$rd interest also in the property was directed to be sold by the decree. The defendants contend, on the other hand, that only Ponniyen's right was directed to be sold. After the decree, an order for sale was passed. It is not disputed that this order directed the rights both of Ponniyen and of the first defendant to be sold. Nor is it disputed that they were, as a matter of fact, brought to sale, and that the plaintiff obtained such delivery as a purchaser of one-third share is entitled to get according to the provisions of the Civil Procedure Code.

The present suit is instituted for partition of the one-third share of the first defendant and recovery of that share. The first defendant did not appear to contest the suit. His co-parceners, the defendants Nos. 2 and 3, contend that the plaintiff is not entitled to partition because the decree in the plaintiff's favour was really only for sale of Ponniyen's right. Exhibit III is the decree. It directed the mortgaged property to be sold in case of default. The mortgaged property is described as one-third share of Perumal Ayyer in certain land, and it is stated that Ponniyen's right was mortgaged to one Devendiayen for Rs. 75, and that it was subsequently mortgaged to the plaintiff.

The respondent's contention that it was only the mortgage-right of Ponniyen that was directed to be sold may not be without some foundation on the construction of this decree, the terms of which appear to be doubtful. But, as already stated, it is admitted that what was directed to be sold was the right both of Ponniyen, and Perumaliyen, the first defendant, and it was that right that was actually sold.

It is contended, that although the order for sale was passed after notice to the first defendant, it is not shown that the notice stated that the application was to bring Perumaliyen's right also to sale. Assuming that the *onus* was not on the defendants to show that the notice did not state that Perumaliyen's right could be brought to sale,

the fact still remains that it was brought to sale. Section 244 of the repealed Civil Procedure Code, 1882, corresponding to section 47 of the present Civil Procedure Code, 1908, lays down that "all questions . . . relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit."

The question whether the sale was valid or invalid on the ground that it was not warranted by the decree is one relating to the execution of the decree. The defendants, who were parties to the plaintiff's suit, on his mortgage were, therefore, bound to take steps in execution to impeach the validity of the sale.

It has been repeatedly held that the question whether the actual execution of a decree is in excess of the decree itself one relating to execution. See *Rani Kattamma Nachiar* v. *Bothagurusami Thevar* (1); *Biru Mahata* v. *Shyama Charan Khawas* (2); *Harnam Chander* v. *Muhammad Yar Khan* (3). The defendants not having taken steps to set aside the sale, if they really had any grievance, the plaintiff is entitled to enforce the rights which he obtained under it.

The decrees of the lower Courts are set aside and the suit remanded to the Court of first instance for disposal on the other issues.

The costs of this Court and of the lower Appellate Court will abide the result.

Appeal allowed.

(1) 6 M. H. C. R. 293.
(2) 22 C. 483.
(3) 27 A. 485; 2 A. L. J. 169; A. W. N. (1905) 63.

ALLAHABAD HIGH COURT.
FIRST APPEAL FROM ORDER NO. 33 OF 1911.
December 5, 1911.
Present:—Mr. Justice Tubdall and Mr. Justice Chamier.
ISHAR DAS AND OTHERS—AUCTION-PURCHASERS—APPELLANTS
versus
ASAF ALI KHAN AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Sale of property by judgment-debtor after auction-sale—Right of judgment-debtor or his transferee to make an application for setting aside auction-sale.

If a judgment-debtor sells his immoveable property, after it has been sold by auction, then neither he nor his transferee has a right to make an application under Order XXI, rule 89, of the Code of Civil Procedure, to set aside the auction-sale. *Debi Prashad Pandit* v. *Muhammad Unis Arabi*, 14 O. C. 33; 9 Ind. Cas. 745, referred to.

First appeal from the order of the Subordinate Judge of Aligarh, dated the 23rd January 1911.

Mr. *W. K. Porter* (with him Mr. *Gulzari Lal*), for the Appellants.

Mr. *Abdul Raoof* (with him Mr. *O'Conor*), for the Respondents.

JUDGMENT.

TUDBALL, J.—This appeal arises out of a sale of immoveable property in execution of a decree. The property was sold on 21st August 1910.

On the 20th September 1910, the judgment-debtor, who is the respondent in this appeal, paid into the Treasury the amount which was necessary under Order XXI, rule 89, to enable him to have the sale set aside. On this date the Court was closed and it did not re-open until October 5th, 1910.

It is an admitted fact, that subsequently to the auction-sale and prior to the 20th September 1910, the judgment-debtor transferred by sale all his interests in the property to a third party so that on the later date he could no longer be said to be the owner of the property.

On the 5th October he applied to the Court to set aside the sale under Order XXI, rule 89. To this the auction-purchaser, who was not the decree-holder, objected. Several points were raised by these objections, the chief one being that as the judgment-debtor had parted with his interest in the property by sale to a third party, prior to his application but subsequently to the sale, he was no longer qualified to apply under Order XXI, rule 89. The lower Court decided all the questions in favour of the judgment-debtor, hence this appeal by the auction-purchaser, who raises for decision the same points which were before the lower Court, the chief one being that mentioned above.

In my opinion, the decision of the lower Court on this, the chief point, is wrong: under Order XXI, rule 89 "any person, either owning the property or holding an interest therein by virtue of a title acquired before such sale" may apply to have the sale set aside.

This language clearly precludes the trans-

ISHAR DAS *v.* ASAF ALI KHAN.

feree from the judgment-debtor in the present case from making any such application.

Does the fact that the judgment-debtor has parted by sale, with the whole of his interest, after the auction-sale, also preclude him from making the application? The lower Court has held (and the same argument has been pressed upon us in this Court) that after the auction-sale and until it is set aside, no interest is left to the judgment-debtor capable of transfer and hence the sale by him in this case is virtually a nullity and he, therefore, remains in the same position as on the date of the auction-sale; with this, I cannot agree; until the auction-sale is confirmed, the judgment-debtor has a very substantial interest in the property. He still retains a right either to recover his property under Order XXI, rule 89, or to have the sale set aside on the ground of irregularity or fraud (Order XXI, rule 90), even though the title may vest in the auction-purchaser from the date of the sale when once the sale has become absolute.

The rule in Order XXI is a special indulgence to a judgment-debtor or any person holding an interest in the property at the date of sale. It gives them a last chance of saving the property *for themselves.* It was never intended that the property should be saved for persons to whom the property might be sold privately after the auction-sale had taken place. The language of the rule (which differs considerably from that of section 310 A of the former Code) clearly points to this. It clearly shuts out all persons who purchase or acquire an interest *after the auction sale.* It seems to me that the Legislature has clearly in mind the case of a purchaser at a private sale from the judgment-debtor after the sale in execution, in respect to whose right to apply under section 310A of the old Code there were conflicting rulings [*Haza Ram* v. *Badri Ram* (1); *Appaya Shetti* v. *Kunhati Beiri* (2)].

It is, therefore, incorrect to say that the private sale in the present case was a mere nullity and that the judgment-debtor remained the owner of the property in spite thereof.

To allow the present application would, it seems to me, be to defeat the very object of the rule. The person making the application is, no doubt, the judgment-debtor but the person who will benefit by it is the person who has acquired the ownership (or at least an interest in the property) subsequently to the sale in execution, the very person whom the law now in clear terms precludes from making the application. The ruling in *Debi Prasad Pandit* v. *Mohammad Unis Arabi* (3) is the only direct decision on the point which has been laid before the Court. With that decision I am in full agreement, and would hold that the judgment-debtor, by divesting himself of all his interest by sale to a third party after the sale in execution, is no longer the person owning the property within the meaning of Order XXI, rule 89. In this view it is unnecessary to decide the minor points which arise in the case. I would allow the appeal and set aside the order of the Court below.

CHAMIER, J.—I concur. I think that there can be no doubt that Order XXI, rule 89, was intended to give persons owning or holding interests in immoveable property, the subject of an execution sale, a last chance of saving the property. But the words "*owning such property or holding an interest therein*" evidently refer only to persons who own the property or hold an interest therein at the date of the application and whether the applicant be the owner of or only the holder of an interest in the property he must show that he acquired his title before the execution-sale. As I read the rule, neither the owner nor the holder of an interest, who has parted with his title since the sale, or who has acquired title since the sale, can apply under rule 89. That was the view taken in the Oudh case cited. I agree that the appeal should be allowed.

BY THE COURT.—The appeal is allowed. The order of the Court below is set aside. The sale in favour of the appellants will stand confirmed. The appellants will get their costs in all Courts including in this Court fees on the higher scale.

Appeal allowed.

(1) 1 C. W. N. 279.
(2) 30 M. 214; 17 M. L. J. 127.
(3) 14 O. C. 33; 9 Ind. Cas. 745.

SUKAN SAHU *v.* GANGAJALI.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 183 OF 1911.
August 31, 1911.
Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.
SUKAN SAHU—DEFENDANT—APPELLANT
versus
Musammat GANGAJALI—PLAINTIFF—RESPONDENT.

Hindu Law—Widow—Widowed daughter-in-law—Maintenance—Residence with family of deceased husband—Not to leave husband's house for immoral purpose—Amount of maintenance, how to determine.

Neither a Hindu widow nor a widowed daughter-in-law is bound to reside with the family of her deceased husband in order to entitle her to separate maintenance.

Prithee Singh v. *Raj Koer*, 12 B. L. R. 238; 20 W. R. 21; I. A. Sup. Vol. 203, *Mokhoda Dasee* v. *Nundo Lal Haldar*, 5 C. W. N. 297; *Siddesury Dasee* v. *Jonardan Sarkar*, 5 C. W. N. 549; 29 C. 557, *Kusturbai* v. *Shivjiram*, 3 B. 372, *Gokibai* v. *Lakhmi Das Khimji*, 14 B. 490 and *Surampalli Bongaramma* v. *Surampalli Bramhazee*, 31 M. 338, 3 M. L. T. 266, 18 M. L. J. 254, referred to.

All that is required of a widow or a widowed daughter-in-law is that she is not to leave her husband's house for improper or unchaste purposes, and she is entitled to retain her right to maintenance unless she is guilty of unchastity after she leaves that residence.

The amount of maintenance ought not to be determined with reference to the value of the family properties at the time of the death of the husband of the lady.

Adhibai v. *Cursondas*, 11 B. 199 and *Modhavrav* v. *Gungabai*, 2 B. 639, relied upon.

The amount of maintenance is to depend upon the extent of the property, the position of the family, the nature of the claim alleged, the number of members of the family and other special circumstances of each individual case.

Appeal from the decree of the District Judge of Sarun, dated January 14th, 1911, affirming that of the first Sub-Judge of that District, dated August 10th, 1910.

Babus *Umakali Mukerjee* and *Kulwant Sahay*, for the Appellant.

Babus *Mohendra Nath Roy* and *Moulvi Mahomed Mustofa Khan*, for the Respondent.

JUDGMENT.—This appeal is directed against a decree in a suit for recovery of arrears a maintenance by a Hindu lady against her father-in-law. It is not disputed that the husband of the plaintiff died about the year 1881, while he was a member of a joint *Mitakshara* family composed of his father, himself, his brothers and his grandfather. After the death of her husband, the plaintiff continued to live as a member of the family of her father-in-law. But about the year 1903 disputes broke out by reason of the third marriage of her father-in-law and the introduction of the newly wedded wife into the family circle. The result was, that she was compelled to seek the protection of her brothers. She now claims in the present suit maintenance at the rate of Rs. 25 a month. The Courts below have made a decree in her favour at the rate of Rs. 16 a month and directed that the maintenance should be a charge upon the family property in the hands of the defendant. The learned Vakil for the defendant-appellant has sought to assail that decree on three grounds; namely, *first*, that as the plaintiff is not residing with her father-in-law she is not entitled to claim any separate maintenance at all; *secondly*, that the amount of maintenance ought to be determined with reference to the value of the family properties at the time of the death of the husband of the plaintiff; and *thirdly*, that as the plaintiff has failed to proceed with the suit against members of the family other than the defendant, the charge ought not to be declared upon the entire family property. In our opinion, there is no substance in any of these contentions.

In support of the first ground taken on behalf of the appellant, it has been argued that it is the duty of a widowed daughter-in-law to reside with her father in law, and that if she leaves the house of her father-in-law without any adequate reason, she is not entitled to claim maintenance from him. In support of this view, reliance has been placed upon the decision of a Full Bench of this Court in the case of *Khetramani Das* v. *Kashi Nath Das* (1). In our opinion, the case relied upon is clearly distinguishable. That was a decision under the Bengal School of Hindu Law. Consequently, it is not necessary for us to consider whether even under that school of law the view put forward by the learned Vakil for the appellant can be maintained. In so far as the *Mitakshara* School of Hindu Law is concerned, it is now settled by decisions of the highest authority that neither the widow nor the widowed daughter-in-law is bound to reside with the family of her deceased husband. In support of this proposition, reference may be made to the decision of the Judicial Committee in *Pirthee*

(1) 2 B. L. R. A. C. 15; 10 W. R. (F. B.) 89.

Singh v. *Raj Koer* (2), which was the case of a Hindu widow. Reference may also be made to the cases of *Mokhoda Dasee* v. *Nundo Lal Halder* (3); *Siddesury Dassee* v. *Jonardan Sarkar* (4); *Kastuarbai* v. *Shivaiiram* (5); *Gokibai* v. *Lakhmi Das Khimji* (6) and *Surumpalli Bangarama* v. *Surampalli Bramhazee* (7). It must now be taken as firmly settled that all that is required of a widow or a widowed daughter-in-law is that she is not to leave her husband's house for improper or unchaste purposes, and that she is entitled to retain her right to maintenance unless she is guilty of unchastity after she leaves that residence. Weighty reasons may be assigned, if necessary, in support of this view. Common experience shows that although the family house of her husband's relations is a proper residence for a widow, it is not necessarily the most proper place for her continued residence when she is young and is surrounded by young men, it may even be more prudent and decorous for her to return to her father's care and it may, under many circumstances, be not only a safer but a happier home. The learned Vakil for the appellant has, however, contended that unless the widow has been compelled to leave the house of her husband by reason of the cruelty of her relations she forfeits her right of her maintenance when she ceases to reside there. We are not prepared to accept this position as well founded on principle. The first contention of the appellants consequently fails.

In so far as the second contention is concerned, it has been argued that the amount of maintenance ought to be determined with reference to the state of the family properties at the time of the death of husband of the plaintiff. No authority has been cited in support of this proposition. But it has been suggested that her right ought to be determined on the assumption that a partition had taken place in the life-time of her husband and a separate share allotted to him; she would have been entitled to that share alone by right of inheritance and could not claim any maintenance. This argument is obviously fallacious. No partition, as a matter of fact, did take place in the life-time of the husband of the plaintiff. His interest in the property upon his death passed by survivorship into the hands of the other members of the family and that interest has afforded means to them for addition to the family properties. It is, therefore, impossible to maintain, on principle, the view that the amount of maintenance ought to be determined with reference to the value of the family properties at the time of the death of the husband of the plaintiff. The view we take is supported by two decisions of the Bombay High Court, namely, *Adhibai* v. *Cursandas* (8) and *Madhavrav* v. *Gungabai* (9). That the argument for the appellant is not well-founded on principle also becomes obvious when we remember the firmly settled rule that the amount of maintenance payable to a widow may be varied from time to time, [*Sreeram* v. *Puddomuki* (10); *Ram Kalee* v. *Court of Wards* (11), *Rukka Bai* v. *Ganda Bai* (12), *Nabogopal* v. *Amritmoyee* (13), *Ramchander* v. *Sagunbai* (14), *Narbadabai* v. *Mahadev* (15), *Bhavanamma* v. *Ramasami* (16), *Narsingh* v. *Yadavdas* (17)]. The amount of maintenance, it is now well recognized, is to depend upon the extent of the property, the position of the family, the nature of the claim alleged, the number of members of the family and other special circumstances of each individual case. If, therefore, the amount of maintenance can be varied from time to time, it cannot be contended with reason that the amount should be determined and fixed for all time to come with reference to the value of the family properties at the time of the death of the husband of the plaintiff regardless of changes in the circumstances of the family. The second contention, therefore, fails.

In so far as the third contention is concerned, the question does not really arise in these proceedings. The other members of the family are not parties to this litigation,

(2) 12 B. L. R. 238; 20 W. R. 21; I. A. Sup. Vol. 203.
(3) 5 C. W. N. 297.
(4) 5 C. W. N. 549; 29 C. 557.
(5) 3. B. 372.
(6) 14 B. 490.
(7) 31 M. 338; 3 M. L. T. 266; 18 M. L. J. 254.
(8) 11 B. 199.
(9) 2. B. 639.
(10) 9 W. R. 152.
(11) 18 W. R. 474.
(12) 1 A. 594.
(13) 24 W. R. 428.
(14) (1879) Bom. P. J. 450.
(15) 5 B. 99.
(16) 4 M. 193.
(17) (1882) Bom. P. J. 345.

and whether the decree is binding upon their interest in the family property is a question which can arise for consideration only when the plaintiff seeks to execute her decree against them.

The result is that the decree made by the District Judge must be affirmed and this appeal dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 139 OF 1911.
November 18, 1911.
Present:—Mr. Richards, K. C., Chief Justice, and Mr. Justice Banerji.
RAM SARUP—PLAINTIFF—APPELLANT
versus
Musammat JASODA KUNWAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Promissory-note executed simultaneously with the transaction of lending—Stamp on promissory-note ineffectually cancelled—Note inadmissible in evidence—Whether lender can succeed on other evidence of the loan.

Where a lender is able to prove a loan independently and without the assistance of a promissory-note, which is inadmissible in evidence, his claim for the loan ought to succeed.

The plaintiff lent a sum of money to the defendant. Simultaneously with the transaction of lending a promissory-note was executed, the stamp on which was ineffectually cancelled. The promissory-note being inadmissible in evidence, *held* that the plaintiff could rely on other evidence of the loan. *Farr* v. *Price*, I East. 55; 5 R.R. 515; *Pramatha Nath Sandal* v. *Dwarka Nath Dey*, 23 C. 851, *Krishnaji Narayan Prakhi* v. *Rajmal Manikchand Marwari*, 24 B. 360, *Virbhadrapa* bin *Adrashapa Javli* v. *Bhimaji Balaji*, 28 B. 432, *Banarsi Prasad* v. *Fazal Ahmad*, 28 A. 298; 3 A. L. J. 25; A. W. N. (1906) 9; *Sri Nath Das* v. *Angud Singh*, 7 A. L. J. 459; 6 Ind. Cas. 126, approved of.

Parsotam Narayan Singh v. *Taley Singh*, 26 A. 178, dissented from.

Sheikh Akbar v. *Sheikh Khan*, 7 C. 256, distinguished.

Second appeal from the decision of the District Judge of Moradabad, dated 22nd November 1910.

Mr. *Gokal Prashad*, for the Appellant.

Mr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit in which the plaintiffs sought to recover certain money. A portion of the money was due upon accounts pure and simple for goods sold. Another portion of it the plaintiff claimed as having been advanced by him to the defendant and for which a certain document, alleged to be a promissory-note, was passed. The claim is then made for Rs. 35-11-6, the price of cloth, Rs. 400 principal and Rs. 140-6-0 interest, in all Rs. 540-6-0 in respect of cash debt, in all Rs. 576-1-6 due under account-books, together with the costs of the suit and future interest. It will thus be seen that the plaintiff bases his claim upon his account-books and it is a claim for money lent. When the document to which we have referred was produced, it appears that the stamp was cancelled by means of two lines drawn crosswise upon it.

The Court of first instance decreed the plaintiffs' claim but holding that the stamp was not effectively cancelled allowed other evidence including the account-books to be given as evidence of the loan. The document, which it held to amount to a promissory-note, was excluded from evidence.

The defendants appealed and the lower Appellate Court adopting the view of the Court of first instance that the document was a promissory-note and that the stamp was not effectively cancelled, refused to allow the plaintiff's claim except for the price of the cloth and reduced the decree of the Court of first instance accordingly.

The plaintiff comes here in second appeal. As to whether or not the stamp was effectually cancelled we offer no opinion. The appellant has not raised the question specifically in his memorandum of appeal.

The next point which was discussed was whether the document in question was a promissory-note within the meaning of the Stamp Act of 1899. On the face of it, it is a request for the loan of money with a promise to re-pay the loan with interest. In the view that we take of the case, it does not become necessary to decide whether or not the document is a promissory-note within the meaning of the Act. We shall, therefore, assume for the purposes of our decision, *first*, that the document in question amounted to a promissory-note, *secondly*, that the stamp on it although sufficient was not effectually cancelled; and *thirdly*, that the taking of the loan and the giving of the note were simultaneous transactions. The appellant contends that even on all these assumptions, he is, (provided he can prove that that money was lent without the help of the note), entitled to succeed in his claim not only for the price of the cloth but also for the money

claiming it as he does as money lent. The evidence that the money was in fact lent is overwhelming, and is not disputed in the present appeal. We, therefore, have only to decide whether, on the assumptions that we have made, the plaintiff must fail notwithstanding that the money was in truth and in fact duly lent.

The defendants strongly rely on the case of *Shiekh Akbar* v. *Sheikh Khan* (1). The learned Counsel for the defendants admits that in ordinary cases where, for instance, a plaintiff took a promissory-note for the price of goods sold and delivered, if he failed for any reason on his note, he would be entitled to fall back upon the original consideration, namely, the price of goods so delivered, provided that he was able to prove the delivery of the goods, and that such a claim was open to him upon the pleadings.

In like manner, of course, he concedes that if the money was lent and subsequently a note was given for the amount the plaintiff falling on the note would be entitled to fall back upon a claim for money lent. He, however, contends that where the lending of the money and the taking of the note was a simultaneous transaction and the parties all along contemplated that the loan should be secured by the giving and the receiving of the note the plaintiff must stand or fall by the claim based upon the promissory-note, and that if he is unable to give the note in evidence the whole suit fails. For this purpose he relies, as we have stated above, upon the case of *Sheikh Akbar* v. *Sheikh Khan* (1).

The facts in that case were somewhat peculiar. But there is no doubt that the giving of the note was the consideration for the deposit of a certain sum of money by the plaintiff. Garth, C. J., in holding that the plaintiff must stand or fall by his claim on his promissory-note says as follows (at p. 260 of the report): "But when the original cause of action is the bill or note itself, and does not exist independently of it, as for instance when in consideration of depositing money with *B.*, *B.* contracts by a promissory-note to re-pay it with interest at six months' date, here there is no cause of action for money lent or otherwise than upon the note itself, because the deposit is made upon the terms contained in the note, and no other. In such a case the note is the only contract between the parties and if for want of a proper stamp or some other reason, the note is not admissible in evidence the creditor must lose his money." It is contended that what the learned Chief Justice meant was that wherever a loan and the giving of a note are simultaneous the plaintiff cannot fall back upon his claim for money lent. If this be the view of the learned Chief Justice, we are unable to agree with him. As far back as the year 1800 Lord Kenyon in the case of *Farr* v. *Price* (2), after holding that the plaintiff could not succeed on a promissory-note on the ground of an error in the stamp, observed: "That as there were other general counts in the declaration if the plaintiff could give other evidence of a consideration paid by him to the defendant he would not be concluded from recovering by the fact of the defendants having given this imperfect promissory-note for it." There is a footnote to the report as follows: "Where a promissory-note had been given for money lent but when produced in Court was unstamped, Lord Kenyon, Chief Justice, permitted the plaintiff to recover on a common count for money lent by proving that when the money for which the loan had been given was demanded of the defendant he acknowledged the debt."

The case of *Sheikh Akbar* v. *Sheikh Khan* (1), was considered in *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (3). There, as in the present case, a promissory-note had been given for money lent but the note was insufficiently stamped, and was, therefore, inadmissible in evidence. It was held that the plaintiff had a cause of action independently of the document. Petheram, Chief Justice, says (at p. 853 of the report): "The case which has been relied upon by the defendant is that of *Sheikh Akbar* v. *Sheikh Khan* (1)." The learned Chief Justice then quotes the passage from the judgment of Garth, C. J., which we have mentioned above, and proceeds: "These words, taken alone, may seem to indicate that when a bill or note is taken for a debt the action must be brought upon the bill or note; and that if for any reason the document is excluded the action must fail; but a reference to the earlier portion of the judgment shows that such was not

(1) 7 C. 256.

(2) 1 East 55; 5 R. R. 515.

(3) 23 C. 851.

the meaning of the Chief Justice, and that when he spoke of a deposit he did not mean a loan, as he then says where money is *lent* and a bill or note given for the loan which is not paid at maturity, the creditor may disregard the note and sue on the original consideration."

In the case of *Krishnaji Narayan Parkhi* v. *Rajmal Manikchand Marwari* (4), where the suit was a suit exactly similar in principle to the present case, Jenkins, C. J., also quotes the judgment of Garth, C. J., in *Sheikh Akbar's* case (1), and says at page 363 of the report: "It is apparent from this that the actual *ratio decidendi* was that there was no loan independently of the note so that it does not govern this case if, as I think, there was a loan independently of the note." The Chief Justice was clearly of opinion that where the loan could be proved without having recourse to the note, the plaintiff was entitled to recover. In the same case Candy, J., took the same view, and refers at length to the authorities.

In the case of *Virbhadrapa* bin *Adrashapa Javli* v. *Bhimaji Baloji Saroff* (5), the question arose whether or not the drawing of two parallel lines over a receipt stamp was or was not an effectual cancellation of it. It was held that it was not. The Court then went on to consider whether the plaintiff could be allowed to sue for money lent independently of the promissory-note, and held that the plaintiff could sue.

The same view was taken by a Bench of this Court consisting of Stanley, C. J., and Knox, J., in the case of *Banarsi Prasad* v. *Fazal Ahmad* (6). The learned Chief Justice and Mr. Justice Griffin adhered to the same view in *Sri Nath Das* v. *Angad Singh* (7).

The only case really in point where a contrary view was taken was the case of *Parsotam Narain* v. *Taley Singh* (8). In that case, no doubt, Aikman, J., held that where the parties contemplated at the time of the loan that a note should be taken, the plaintiff must stand or fall by a suit based on the note itself. It is quite clear that the learned Judge relied upon what he supposed was the view of Sir Richard Garth in *Sheikh Akbar's* case (1). We are unable to follow this case in view of our own opinion, and the authorities we have quoted. We consider that where the plaintiff, as in the present case, is able to prove the loan independently and without the assistance of the note, he ought to succeed.

We accordingly allow the appeal, vary the decree of the lower Appellate Court by restoring the decree of the Court of first instance with costs in all Courts including in this Court fees on the higher scale.

Appeal allowed.

(4) 24 B. 360.
(5) 28 B. 432.
(6) 28 A. 298; 3 A. L. J. 25; A. W. N. (1906) 9.
(7) 7 A. L. J. 459; 6 Ind. Cas. 126.
(8) 26 A. 178.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 549 OF 1910.
August 24, 1911.

Present:—Mr. Justice Mookerji and Mr. Justice Carnduff.

Maharaja RAMESWAR SINGH—DECREE-HOLDER—APPELLANT

versus

TIRPIT SINGH—JUDGMENT-DEBTOR—RESPONDENT

Execution of decree—Application for execution—Bar imposed by judgment-debtor—Removal of bar—Subsequent application to be treated as one in continuation of previous application—"Review of judgment"—Limitation Act (XV of 1877), Sch. II, Art. 179 cl. (3)—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 6, cl. (3).

When a decree-holder is unable to proceed with an application for execution by reason of some bar imposed at the instance of the judgment-debtor or any other person, a subsequent application by the decree-holder of the same scope and character may be treated as in continuation of the previous application provided the subsequent application is presented after removal of the bar which interrupted the previous proceeding.

Shaikh Kamaruddin v. *Jawahir Lal*, 1 C. L. J. 381; 27 A. 334; 15 M. L. J. 258; 7 Bom. L. R. 433; 9 C. W. N. 601; 2 A. L. J. 397; *Amulya* v. *Preonath*, 7 Ind. Cas. 886 and *Kedar Nath* v. *Prodyot Kumar*, 11 Ind. Cas. 48; 14 C. L. J. 610, relied upon.

This principle is applicable to cases of applications for execution of rent-decree.

Chandra Pradhan v. *Gopi Mohan Shaha*, 14 C. 385 and *Baikuntha Nath* v. *Aughorenath*, 21 C. 387, relied upon.

A rent-decree was passed on May 23rd, 1904. The judgment-debtor made an application for amendment thereof, which was heard *ex parte*, and on February 25th, 1905, the original decree was materially altered. The decree-holder applied for execution of the

RAMESHWAR SINGH *v.* TIRPIT SINGH.

original decree on August 26th, 1905, upon which the judgment-debtor objected that the decree could not be executed. The application for execution was then dismissed and the decree-holder applied for a review of the order for amendment. On June 30th, 1906, the review was granted and the original decree was restored. The present application for execution was then made on January 20th, 1909:

Held, that the application was not barred; *first*, because the application of January 20th, 1909, may be treated as one in continuation of the application of August 26th, 1905; and *secondly*, because under clause (3) of Article 6 of Schedule III of the Bengal Tenancy Act, time ought to run from June 30th, 1906, when the decree-holder's application for review was granted.

Appeal from the order of the District Judge of Darbhanga, dated August 4th, 1910, reversing that of the first Munsif of Modhabani, dated October 1st, 1909.

Babus *Ram Charan Mitra*, Senior Government Pleader, and *Jogendra Nath Mukerjee*, for the Appellant.

Babus *Baldeo Narain Singh*, for the Respondent.

JUDGMENT.—This appeal is directed against an order by which the Court of appeal below, in reversal of the order of the original Court, has refused an application for execution of a decree as barred by limitation under Article 6 of Schedule III of theBengal Tenancy Act. The decree was for rent, for a sum less than Rs. 500, and was made on the 23rd May 1904. The first application for execution was made on the 7th October 1904, and was dismissed for default on the 9th March1905. The judgment-debtor had, in fact, on the 3rd October 1904 applied for amendment of the decree. This application was heard *ex parte* and allowed on the 25th February 1905. The result was that the decree as originally drawn up was materially altered. On the 26th August 1905, the decree-holder, not aware, that the decree had been varied in this manner without notice to him, made the second application for execution of the original decree. The judgment-debtor forthwith objected that the decree whereof execution was sought had ceased to exist, and that the only decree of which the decree-holder could possibly take out execution at that stage was the decree as amended on the 25th February 1905. The result was that the decree-holder found it impossible to carry on the execution proceeding and the application was dismissed. The decree-holder, thus apprised of the fact that the decree had been amended, applied on the 29th January 1906 for a review of the order for amendment. On the 30th June 1906 the review was granted and the original decree was restored. The present application for execution was made on the 20th January 1909. Exception was taken by the judgment-debtor on the ground that as more than three years had elapsed from the 23rd May, 1904, it was not competent to the decree-holder to execute the decree. The Courts below have taken divergent views upon this question and the District Judge has given effect to the objection of the judgment-debtor.

On behalf of the decree-holder, it has been argued by the learned Government Pleader that the application is not barred from two distinct points of view; namely, *first* that the application made on the 20th January 1909 may be treated in substance as an application in continuation of the application of the 26th August 1905, the proceedings on which were suspended by the objection of the judgment-debtor that the decree of which execution was sought had been varied and was no longer capable of execution; *secondly*, that under clause (3) of Article 6 of Schedule III of the Bengal Tenancy Act time ought to run from the 30th June 1906 when his application for review was granted.

In support of the first contention our attention has been drawn to the decision of the Judicial Committee in the case of *Shaikh Kamaruddin* v. *Jawahir Lal* (1) where the principle is recognised that when a decree-holder has found himself unable to proceed with an application for execution by reason of some bar imposed at the instance of the judgment-debtor or any other person a subsequent application by the decree-holder of the same scope and character may be treated as one in continuation of the previous application if such subsequent application has been presented after the bar which interrupted the previous proceeding has been removed. [*Amulya* v. *Preonath* (2) and *Kedarnath* v. *Prodyot Kumar* (3)]. It cannot be disputed that this principle is applicable to cases of applications for execution of decrees under the rent law. [*Chandra Pradhan* v. *Gopi Mohun* (4) and *Baikanta Nath* v. *Aughore Nath* (5)]. No doubt, inspite of the application of this doctrine a question may arise, as in the

(1) 1 C. L. J. 381; 27 A. 334; 15 M. L. J. 258; 9 C. W. N. 601; 2 A. L. J. 397; 7 Bom. L. R. 433.
(2) 7 Ind. Cas. 886.
(3) 11 Ind. Cas. 48; 14 C. L. J. 610.
(4) 14 C. 385.
(5) 21 C. 387.

cases of *Raghunandun Pershad* v. *Bhugoo Lall* (6) and *Sarup Ganjan Singh* v. *Robert Watson & Co.*, (7), whether there was, as a matter of fact, such a bar as made it impossible for the decree-holder to proceed with earlier application. In the case before us, however, upon the facts stated, there is no room for controversy that proceedings on the application of the 26th August 1905 were arrested by reason of the objection of the judgment-debtor that the decree of which execution was sought had been materially varied. This made it obligatory upon the decree-holder, if he desired to proceed on the basis of his application, to have the bar removed. He speedily took steps to have the order reviewed which had been made in his absence. His application was successful and the previous order was re-called on the 30th June 1906. Consequently, the present application may well be treated as one made in continuation of the application of the 26th August 1905. In cases of this description, we must look to the substance rather than to the form of the proceedings, and no weight can be attached to the circumstance that the present application does not on the face of it purport to be one in continuation of the previous application. From this point of view, the order of the Court below cannot be supported.

In support of the second contention reference has been made to the case of *Kali Prosanna Bose* v. *Lal Mohan Guha* (8), where it was ruled that a narrow construction should not be placed upon the expression "review of judgment" in clause (3) of Article 179 of the second Schedule of the Indian Limitation Act of 1877. In fact, the learned Judges held that an amendment of a decree in a material particular might well be treated as a review of the decree which expression is treated in the Code of Civil Procedure as interchangeable with the expression "review of judgment." If this principle is adopted, there is no room for controversy that time ought to run from the 30th June 1906. The application made by the judgment-debtor on the 3rd October 1904 might well be treated as an application for review of the decree and the order of the 25th February 1905 by which the amendment was allowed might be treated as equivalent to grant of an application for a review of the original decree. Subsequently, there was a genuine application for review of judgment by the decree-holder on the 26th January 1906. The application was granted on the 30th June 1906. Consequently, without unduly stretching the language used in clause (3) of Article 6 of Schedule III of the Bengal Tenancy Act, it may be said that there has been a review of judgment and that time consequently runs from the date of the decision passed on the review. We are not unmindful that the decision in *Kali Prosanna Basu* v. *Lal Mohan Guha* (8) has sometimes been questioned [*Ahsanullah* v. *Dukhini Din* (9) and *Rakhaldas Majumdar* v. *Jogendra Narayan Majumdar* (10)]. But, notwithstanding the doubt sometimes expressed as to the correctness of that decision, it is clear that in the case before us there was real application for a review of judgment, and that clause 3 of Article 6 of Schedule III does not limit the case to an application for review of judgment by a judgment-debtor any more than decree-holder; where, therefore, as here, there has been a review of judgment, the case may well be treated as governed by that Article. From the second point of view also, it is thus clear that the order cannot be supported.

The result is that this appeal is allowed, the order of the District Judge discharged and that of the Court of first instance restored. This order will carry costs both in this Court and in the Court of Appeal below. We assess the hearing fee in this Court at two gold *mohurs*.

Appeal allowed.

(6) 17 C. 268.
(7) 6 C. W. N. 735.
(8) 2 C. W. N. 219; 25 C. 258.
(9) 27 A. 575.
(10) 3 Ind. Cas. 391, 10 C. L. J. 467.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 235 OF 1910.
November 27, 1911.

Present:—Mr. Richards, K. C., Chief Justice, and Mr. Justice Banerji.

BADRI DAS AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAM RIKH AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage-deed—Recital as to an antecedent debt in the deed, weight of—Evidence.

BADRI DAS *v.* RAM RIKH.

Generally speaking, the recital of an antecedent debt in a mortgage-deed is not of much weight by itself.

First appeal from the decision of the Additional District Judge of Meerut, dated the 21st of April, 1910.

Mr. *Ahmed Kareem* (with him Mr. *Ghulam Mujtaba*), for the Appellant.

Mr. *Harendra Krishna*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit on foot of a mortgage-bond dated the 1st June 1897 said to have been executed by Mir Singh and Ram Rikh. Mir Singh and Ram Rikh were brothers, members of a joint Hindu family, and both of them had issue. The sons were made parties to the suit on the express ground that the property was ancestral property and that the debt was binding upon the family. The mortgage-bond was not forthcoming. This fact was stated in the plaint and a copy of the bond was produced but not the original. Written statements were put in by Ram Rikh, Mir Singh and Jaimal, son of Mir Singh, the main defence being that the bond had been paid off, and that the allegation of its loss was false. While the suit was pending Mir Singh died, and his son, who was already on the record as a member of the joint family, was placed on the record as the representative of his father Mir Singh. A written statement on his behalf was filed on the 4th of March 1910, the written statement on behalf of Mir Singh having been filed on the 21st of August 1909, and that on behalf of Ram Rikh on the 10th of December 1909. It would appear that the issues were framed and the evidence commenced on the same day as that on which the written statement was filed on behalf of Jai Mal, the son of Mir Singh, namely, on the 4th of March 1910. It is quite clear from the perusal of the judgment of the learned Judge that the main question considered and discussed before him was that of the loss of the bond and the issue as to payment. The learned Judge says: "I do not believe that the bond was lost at all. The defence evidence as to payment is certainly such that it would be impossible to accept it in ordinary circumstances, but, as matters stand there may be something in it; what, I find is that, although complete satisfaction is not credible, some substantial portion of the loan had probably been satisfied and hence the suppression of the original bond." Since this decision was given it has been made abundantly clear that the bond was not in fact suppressed. A bond has since been found and produced in this Court with an affidavit satisfactorily explaining its loss and recovery. The document which is produced bears the date of the alleged bond. It bears a certificate of the Registrar, and there is nothing suspicious about it. We say nothing more as to its genuineness, because the document must at least be formally proved as against the minor defendants who deny all knowledge of it. The finding of the bond disposes altogether of the finding of the learned Judge that the bond was satisfied. It bears no endorsement of any payment having been made. There was, however, before the Court another issue, namely, the fourth issue, which was in the following terms:—Was the loan incurred for legal necessity, and, if not, had the defendant executant power to transfer any portion of the hypothecated property? The learned Judge found this issue against the plaintiffs. He says "plaintiffs should, in my opinion, have put in their books and proved the existence of a *bona fide* debt." In our opinion the attention of the parties was hardly drawn to this question. We have already pointed out that the written statement of the minor Jai Mal was only put in the very day the evidence commenced. There was nothing in the written statement of Ram Rikh or Mir Singh to put in issue the question whether the bond had been made for an antecedent debt. The minors were already parties, but they had filed no separate written statement, and there was no denial that the bond was in fact for an antecedent debt. We think that, speaking generally, a recital in the bond of an antecedent debt is not of much weight by itself. But we think that in the present case it was evidence not only against Mir Singh and Ram Rikh but also against other members of the same joint family the manager of which was Mir Singh. Assuming that this was evidence for the plaintiffs, there was no evidence of any kind to contradict it. The bond contained a recital that Rs. 390 was due on foot of account-books. This recital was verified by Mir Singh and Ram Rikh who admitted before the Registrar the receipt of Rs. 390 "in accordance with the statement in the bond." Ram Rikh was examined and he said that Mir Singh used

to manage all the business, and he never attempted to deny that there was an antecedent debt. Not a word was asked the plaintiffs as to the non-production of their account-books. We think that the case could not be decided on the evidence as it stands, against the plaintiffs, on the question of the existence or non-existence of an antecedent debt; under the circumstances we think that the proper course to adopt is to send the case back for re-trial under the altered circumstances which we have set forth above. Unless the bond is now admitted by the minor defendants it must be proved. The Court will then consider the question as to whether or not the bond has been discharged in whole or in part. It will also consider whether or not there was an antecedent debt, and if so, how much? If the bond was given in part only for an antecedent debt, the Court will further consider whether there was any legal necessity for the balance of the money. We accordingly allow the appeal, set aside the decree of the lower Court and remand the case with directions to that Court to proceed to hear and determine the case according to law, bearing in mind the observations which we have made above. The bond which has been produced before us will be sent to the Court below. Costs here and heretofore will abide the event. Costs in this Court will include fees on the higher scale.

Appeal allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2000 OF 1909.

August 7, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

JOG NARAIN SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

BADRI DAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), *s.* 310 *A*—*Mortgage-decree—Tenure—Subsequent rent-decree—Tenure sold in execution—Mortgage decree-holder paying money under section* 310—*Suit for money against mortgagor—Bengal Tenancy Act (VIII of* 1885), *section* 161—*Incumbrance—Contract Act (IX of* 1872), *sections* 69, 70.

The plaintiff obtained a mortgage-decree against the defendant on January 29th, 1901. The superior landlord of the mortgaged tenure obtained a decree against the registered tenant on December 7th, 1901. The landlord in execution of his rent-decree sold the tenure and the plaintiff thereupon deposited money under section 310A of the Code of 1882 and the sale was set aside. The plaintiff then sued the defendant for the money he had deposited:

Held, that, if the plaintiff had not obtained the mortgage-decree, he would have been entitled to have the sale set aside.

Paresh Nath v. *Nabo Gopal*, 29 C. 1, relied upon.

The fact that he had obtained a decree does not in any way alter his position.

A mortgage created by a tenant, is a lien on his tenure and is consequently an incumbrance within the meaning of section 161 of the Bengal Tenancy Act. If the mortgagee obtains a decree, his lien on the tenure does not cease, and his interest even after the decree continues to be an incumbrance.

Bibijan Bibi v. *Sachi Bewa*, 31 C. 863, *Surjiram Marwari* v. *Barhamdeo*, 2 C. L. J. 202, *Bhowani Koer* v. *Mathura Prasod*, 7 C. L. J. 1 and *Drake* v. *Mitchell*, 3 East 251, 7 R. R. 449, relied upon.

Maharanee Dasya v. *Harendra Lal Roy*, 1 C. W. N. 458 and *Manindra Chunder* v. *Jawahir Kumari*, 9 C. W. N. 670, distinguished.

A payment made under section 310A of the Code of 1882 is a valid payment for the purpose of section 70 of the Indian Contract Act.

Mahendra Ghoshal v. *Bhuban Mardana*, 6 Ind. Cas. 810, 38 C. 1, 12 C. L. J. 566, 14 C. W. N. 945, relied upon.

Hari Das v. *Panchkowri*, 9 Ind. Cas. 615, referred to.

Yogambal Boyee v. *Naina Pillai*, 33 M. 15, 3 Ind. Cas. 110, 6 M. L. T. 162, 19 M. L. J. 489, not approved.

Therefore, the payment in the present case by the plaintiff was made lawfully and the case is completely covered by section 70 of the Contract Act.

Appeal from the decree of the District Judge of Gaya, dated June 1st, 1909, affirming that of the Munsif of that place, dated January 19th, 1909.

Babus *Jogesh Chandra Dey*, for the Appellants.

Babu *Surendra Krishna Dutt*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the defendants in an action commenced by the plaintiffs for recovery of a sum of money alleged to have been paid by them under section 310A of the Code of Civil Procedure of 1882, to set aside a sale in execution of a decree for arrears of rent. It appears that the plaintiffs were mortgagees of the properties in respect of which the landlord obtained a decree for arrears of rent. The plaintiffs sued to enforce their securities and obtained decree on the 29th January 1901 and the 8th February 1904. Meau-

while the mortgagors, now appellants before us, defaulted to pay rent to the superior landlord who obtained a decree against the registered tenant on the 7th December 1901. On the 16th July 1903 and the 11th April 1904, two sums were paid by some of the judgment-debtors towards partial satisfaction of the rent-decree but as the debt was not satisfied in its entirety the landlord decree-holder proceeded to sell the tenure on the 21st December 1904. The plaintiffs thereupon deposited on the 20th January 1905 a sum sufficient under section 310 A of the Code of 1882, for the reversal of the sale. The sale was accordingly set aside on the 11th February 1905. On the 20th January 1908, they commenced the present action for recovery of the money they had deposited together with interest and costs.

The Courts below have concurrently decreed the suit. In the present appeal, that decree has been assailed on the ground that the payment was voluntary and the plaintiffs are not entitled to ask for restitution from the defendants. In our opinion, there is no substance in this contention. The learned Vakil for the appellants has argued that, inasmuch as the plaintiffs had obtained decrees on the footing of their securities, they were not liable to have their interest affected by the sale in execution of the rent-decree, and that in substance they had no interest to protect. It has not been disputed and, in view of the decision of a Full Bench of this Court in the case of *Paresh Nath Singha* v. *Nobo Gopal Chattopadhaya*(1), it cannot be disputed, that if the plaintiffs had not obtained a decree on the basis of their mortgage, they would have been entitled to have the sale set aside under section 310A The question, therefore, arises whether the fact that they had obtained decrees, in any way altered their position.

Section 159 of the Bengal Tenancy Act provides that where a tenure or holding is sold in execution of a decree for arrears due in respect thereof the purchaser shall take subject to the interests defined in Chapter XIV, as "protected interest" but with power to annul the interests defined in that Chapter as "encumbrances." Section 161 then lays down that the term "encumbrance" used with reference to tenancy means any lien, sub-tenancy, easement or other right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein, and not being a protected interest as defined in section 160. It cannot be disputed that a mortgage created by a tenant is a lien on his tenure or holding and is, consequently, an encumbrance within the meaning of section 161. It has been suggested, however, that as soon as mortgagee obtains a decree, he ceases to have any lien on the tenure or holding, in other words, that his interest is no longer an encumbrance on the tenure within the meaning of section 161, This contention is obviously unfounded. It was pointed out by this Court in the case of *Bibijan Bibi* v. *Sachi Bewa* (2) that the security is not extinguished till the sale has taken place in execution of the mortgage-decree and the proceeds have been distributed in satisfaction of the sum due to the mortgagee. This principle was applied in the case of *Surjiram Marwari* v. *Barhamdeo* (3) and *Bhawani Koer* v. *Mathura Prasad* (4) and is in fact supported by the decision of Lord Ellenborough in *Drake* v. *Mitchell* (5), that a judgment recovered in any form of action is still but a security for the original cause of action until it be made productive in satisfaction to the party. If we were to give effect to the contention of the appellant, the result would be that as soon as a mortgagee obtains a decree on his security, his position becomes worse than what it was when he was a mortgagee, pure and simple. It has not been disputed, as we have already observed, that as mortgagee he would have encumbrance liable to be annulled by the purchaser at the sale for arrears of rent. It cannot also be disputed that if he purchased the property in execution of his own decree, his interest would be equally liable to be annulled by the purchaser at the sale in execution of the decree for arrears of rent, although such decree was obtained against the registered tenant. But, it is suggested, that his intermediate position is different; that is, after the decree has been obtained, he would have no lien at all on the property. We are not able, for the reasons stated,

(1) 29 C. 1.

(2) 31 C. 863.
(3) 2 C. L. J. 202.
(4) 7 C. L. J. 1.
(5) 3 East 251; 7 R. R. 449.

to give effect to this contention as well-founded on principle.

But it has been contended that the view which may thus be defended on principle is opposed to the decision of this Court in *Moharanee Dasya* v. *Harindra Lal Roy* (6) and *Manindra Chunder Nundy* v. *Jawaher Kumari Bibi* (7). These cases, however, are clearly distinguishable. There the purchaser at the sale in execution of the mortgage-decree acquired the property subject to pre-existing rent charges. When, therefore, after his purchase as full owner he paid the rent charge, he could not claim to recover that sum from the judgment-debtor whose interest he had purchased. This conclusion is based on the principle that the purchaser at the sale in execution of the decree of the mortgagee acquired the property subject to the rent charge, and consequently when he discharged that rent charge, he simply fulfilled his own obligation. The *dictum* in *Akhoy Kumar* v. *Bejoy Chand* (8) cannot be taken to involve a final decision upon the point. Our attention has also been invited to the decisions in *Bepin Behary Sarnokar* v. *Kali Dass Chatterjee* (9) and *Baikunta Nath Dev* v. *Udoy Chand Maiti* (10). These were cases in which the person who made the payment to have the sale set aside was a person whose interest had not been affected by the sale which he sought to get reversed. In the first of these cases, the decree for rent had been obtained with respect to non-agricultural land and the purchaser of a sale in execution of such a decree does not acquire the property free from encumbrances. In the second case, the sale sought to be set aside was a sale under the Public Demands Recovery Act which passes to the purchaser merely the right, title and interest of the judgment-debtor. On the other hand, there are cases in the reports which undoubtedly militate against the contention of the appellant, and amongst these may be mentioned *Smith* v. *Dinonath* (11); *Jugdeo Narain Singh* v. *Raja Singh* (12); *Abdul Wahid Khan* v. *Shaluka Bibi* (13); *Bindu Bashini Dassi* v. *Harendra Lal Roy* (14) and *Upendra Chandra Mitter* v. *Tara Prosanna Mukerjee* (15).

The learned Vakil for the appellant has finally contended that the present case is clearly beyond the operation of the provisions of sections 69 and 70 of the Indian Contract Act. In so far as section 69 is concerned, it may be conceded that it has no application, because it provides that a person who is interested in the payment of money which another is bound by law to pay, and who, therefore, pays it, is entitled to be re-imbursed by the other. It may be assumed that the present defendants as judgment-debtors under the rent-decree were not bound by law to make a payment under section 310A to have the sale of the property set aside. But, when we examine section 70, its terms appear to be comprehensive enough to cover the case. That section provides as follows:—"Where a person lawfully does any thing for another person or delivers any thing to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect thereof, or to restore the thing so done or delivered." It cannot be disputed that the payment in the present case was made lawfully. The money which was deposited by the plaintiffs was such as they were entitled to deposit under section 310A of the Code of 1882. The deposit was made in the presence of the present defendants who, as judgment-debtors, were parties to the execution proceedings in the course of which the sale had taken place. The payment was further accepted by the Court. Under these circumstances it cannot be suggested that the payment was not made lawfully. But it has been suggested that the defendants are not the persons who have enjoyed the benefit thereof. In support of this proposition reliance has been placed upon the decision of the Madras High Court in *Yogambal Boyee* v. *Naina Pillai* (16). In that case, it appears to have been laid down that section 70 has no application where the payment is made under such circumstances as to make it impossible for the person who is benefited thereby to refuse to accept the benefit conferred upon

(6) 1 C. W. N. 458.
(7) 9 C. W. N. 670.
(8) 29 C. 813 at p. 818.
(9) 6 C. W. N. 336.
(10) 2 C. L. J. 311.
(11) 12 C. 213.
(12) 15 C. 656.
(13) 21 C. 496; 21 I. A. 26.
(14) 25 C. 305; 2 C. W. N. 150.
(15) 30 C. 794.
(16) 33 M. 15; 3 Ind. Cas. 110; 6 M. L. T. 162; 19 M. L. J. 489.

him. The learned Judges pointed out that the section appears to have been modelled on the principle recognised in the cases of *Lampleigh* v. *Brathwait* (17) and that, interpreted in the light of that decision, the term "enjoys" ought to be construed to mean "accepts and enjoys." We are not prepared to adopt this narrow construction of the section. The effect of it would be to exclude the operation of the section in all cases where statutory payments are made for the protection of a property by a person who, but for such payment, might be seriously prejudiced. We may further point out that the interpretation which has been suggested is opposed to the decision of this Court in the case of *Mahendra Ghoshal* v. *Bhuban Mardana* (18), where a payment made under section 310A of the Code of 1882, was treated as a valid payment for the purposes of section 70 of the Indian Contract Act. Reference has also been made to the case of *Hari Das* v. *Panchkowri* (19), which, however, does not really militate against the view we propose to take. The decision in *Yogambal Boyee* v. *Naina Pillai* (16) was cited before Mr. Justice Coxe, but, as we read his judgment, he did not express his approval of the interpretation put upon section 70. On the other hand, he rests his judgment upon the perfectly intelligible ground that as the person who made the payment had, as a matter of fact, no interest to protect, he could not claim to be re-imbursed. We are, therefore, of opinion that the present case is completely covered by section 70.

It has finally been suggested that the decree ought to have determined the separate liability of each of the several defendants. In our opinion, there is on substance in this contention. This is not a suit for contribution the nature of which was fully explained in *Matichand* v. *Bajrang Sahai* (20). The plaintiffs were not bound to bear any portion of the burden upon the failure of the defendants to pay rent which under the law they were bound to pay to the superior landlord. The plaintiffs are entitled to a joint decree against all the defendants. When they realise their dues by execution, if necessary, it will be open to the defendants to settle their liability *inter se*; the plaintiffs are obviously interested in no way in the determination of that question.

The result is, that the decree of the Court below is affirmed, and this appeal dismissed with costs to the plaintiffs-respondents.

Appeal dismissed.

(17) 1 Smith L. C. 11th Ed. 160.
(18) 12 C. L. J. 566; 6 Ind. Cas. 810; 38 C. 1; 14 C. W. N. 945.
(19) 9 Ind. Cas. 615.
(20) S. A. No. 1878 of 1909.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 296 OF 1911.

November 23, 1911.

Present:—Sir George Knox, Kt., Judge, and Mr. Justice Griffin.

KUAR RADHKA RAMAN PARSHAD AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

Musammat GULZARI KUAR—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1903), s. 104 (2), O. XLIII, r. 1 (j), O. XXI, rr. 90, 92—Order setting aside sale—Second appeal.

No second appeal lies from an appellate order setting aside a sale under Order XXI, rule 90. But the High Court may entertain an appeal as a revision, if the case calls for further consideration.

Execution second appeal from the decision of the District Judge of Ghazipur, dated 23rd December 1910.

Mr. *Muhammad Ishaq*, for the Appellants.

Mr. *Govind Prashad*, for the Respondent.

JUDGMENT.—A preliminary objection is taken to the hearing of this appeal; and the objection is to the effect that no appeal lies. The application before the Subordinate Judge of Ghazipur was an application on the part of the judgment-debtor praying that the sale of certain property which had been held by the Court might be set aside. The Court considered the application and, in our opinion, dealt with it under powers which it believed it had under Order XXI rule 90. It passed an order setting aside the sale and the ground on which it set aside the sale was that the Court had before it no decree and no certificate such as is required in the case of decrees sent from a foreign Court for execution to another Court. Order XLIII, rule 1 (*j*) grants an appeal from orders setting aside a sale. Section 104 of the Code exacts that no appeal shall lie from any order passed in appeal in such a case. This objection is fatal. We dismiss this appeal with costs.

But, inasmuch as the case is one which calls for further consideration, we proceed to take it up in revision and we direct that notice be sent to the opposite side.

Appeal dismissed.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL No. 554 OF 1909.

July 26, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

MATHURA PROSAD—DEFENDANT—APPELLANT

versus

RUKMINI KOER—PLAINTIFF—RESPONDENT.

Maintenance grant—Grant to two ladies and half the amount to son of one after death of both ladies—Construction—Survivorship—Succession Certificate Act (VII of 1889), s. 4—Grant silent as to interest—Interest whether may be decreed.

K. executed an *ekrarnamah*, in favour of two ladies *R.* and *P.* providing that they were to receive Rs. 650 as maintenance, and that after the death of both, one-half of the amount was to be continued as maintenance to the son of *P.* should she have a son:

Held, upon a construction of the document, that the grant was to the two ladies as if they constituted one grantee with right of survivorship *inter se* that so long as the two ladies lived they would be jointly entitled to Rs. 650 and upon the death of either, the other as survivor would be entitled to the whole sum of Rs. 650, and that upon the death of both, the allowance would be reduced, namely, Rs. 325 would be continued in favour of the son of *P.*, if any.

Held, further, that on the death of *P.* the sum which had accrued due to her would be treated as property in respect whereof the survivor would be entitled to succeed by survivorship and not by inheritance, and that, therefore, no succession certificate was necessary to be taken out by the survivor in order to entitle her to a decree.

Beejraj v. *Bhyropersaud*, 23 C. 912, referred to.

Held, also, that, although the *ekrarnamah* does not provide for payment of interest upon default, it is open to the Court to award interest in the shape of damages for unlawful detention of money.

Chajmal Das v. *Brij Bhukan*, 22 I. A. 199; 17 A. 511, *Gudri Koer* v. *Bhubaneswari*, 19 C. 19; *Moti* v. *Ramohari*, 24 C. 699; 1 C. W. N. 437, *Jogeshur* v. *Ghanasham*, 5 C. W. N. 356 and *Mansab Ali* v. *Gulab Chand*, 10 A. 85, relied upon.

Appeal from the decree of the Sub-Judge of Darbhanga, dated June 22nd, 1909.

Babus *Mohendra Nath Roy* and *Joy Gopal Ghosha*, for the Appellant.

Babus *Umkali Mukherjee*, *Jogesh Chandra Dey* and *Chandra Sekhar Banerjee*, for the Respondent.

JUDGMENT.—This appeal is directed against the decree in a suit by a Hindu lady to enforce her right of maintenance under an *ekrarnamah* executed in her favour by her brother-in-law on the 27th May 1865. It appears that one Sobhan Lal left three sons, Kishen Bullabh, Gopi Bullabh and Joi Bullabh. Joi Bullah left a widow Rukmini Koer and a daughter Prasan Bibi. Gopi Ballabh died childless. Kishen Ballabh left a son Brij Bhukan. After the death of Joi Bullabh disputes broke out between his widow and his brother Kishan Bullabh, and on the 27th May 1865, Kishen Bullabh executed an *ekrarnamah*, on the strength of which Rukmini Koer now seeks to enforce her right of maintenance. Kishen Bullabh died many years ago and the suit has been brought against the grandsons of Brij Bhukhan by his daughter Maharani Bibi. The Court below has held that the plaintiff is entitled to receive maintenance at the rate of Rs. 650 per year for the whole period in suit, that is, from the beginning of *Joit* 1308 to the end of *Choit* 1314. That decree has been assailed on behalf of the defendant in the present appeal on four grounds, namely, *first* that upon a true construction of the *ekrarnamah*, it ought to have been held that upon the death of Parson Bibi the right to receive maintenance completely lapsed, *secondly* that in any event, the plaintiff is not entitled to claim maintenance at a rate higher than half the sum named in the *ekrarnamah*; *thirdly*, that the plaintiff is not entitled to obtain a decree for the maintenance which accrued due before the death of Parsan Bibi, that is, maintenance for the period between the 4th May 1901 and the 24th February 1902; and, *fourthly*, that as the *ekrarnamah* does not provide for the payment of the interest on arrears of maintenance, no interest ought to have been allowed in the decree.

In support of the first contention the learned Vakil for the appellant has invited our attention to the terms of the *ekrarnamah*. The clause which is material for the purpose of the disposal of the present question is in these terms: "The said *Musammat*" (that is Rukmini Koer) "made a proposal to me" (that is the grantor Kissen Bullabh) "that a sum of Rs. 650 be settled on her as her maintenance allowance during her life-time and that of her daughter Prasan Bibi, that in case any male child be born of the womb of

Musammat Parsan, the said son shall after the death of the said *Musammats* get half of the said amount, *i. e.*, Rs. 325 a year. Whereas it is incumbent on me to grant maintenance allowance to the said *Musammats* and to have regard for the son of *Musammat* Parson Bibi, and whereas I should in consideration of the claim, as a relation of the said *Musammat* on me, to make concession and should have kind and compassionate regard for them, I, the declarant, accepted the proposal mentioned above and I do declare that I will without objection pay the said annual allowance to the said *Musammats* during their lile-time as per instalments given below, and that in the event of *Musammat* Parsan Bibi giving birth to a male issue I will pay to him after the death of the said *Musammats* half the annual allowance, *i. e.*, Rs. 325." The learned Vakil for the appellant has invited us to construe this clause as indicating that the grant was in favour of the two ladies and that the intention of the grantor was, that upon the death of either of them, the maintenance should completely lapse. In our opinion there is no foundation for this contention. It is the duty of the Court, in cases of this description, to ascertain the true intention of the grantor as expressed by the language used by him. The object of the grantor in the case before us, undoubtedly, was to provide for the maintenance of both the ladies. He could not have intended that upon the death of one, the other should be left without any provision for maintenance. It has not been seriously suggested that the death of either could render unnecessary the support of the other. It may also be added that if the contention of the appellant were to prevail, the result would be that upon the death of one of the ladies, the maintenance would be discontinued or remain in suspense till the death of the survivor, when it would be revived in favour of the son of Parsan Bibi to the extent of Rs. 325. This would be an obviously unreasonable intention to impute the grantor. The first contention, therefore, is overruled as wholly untenable.

In support of the second contention the learned Vakil for the appellant has argued that the object of the grantor was to provide for the maintenance of both the ladies, and that he intended that upon the death of either the maintenance payable to the other should be one-half of the original amount. No doubt, when a grant is made for maintenance in favour of two persons, *prima facie* it may be contended that upon the death of either the other would be entitled to only a proportionate amount. [*Jogeswar Narain* v. *Ram Chundra* (1)], But in the case before us there are ample indications of an intention to the contrary. The grantor provided that the two ladies were to receive Rs. 650, and that after the death of both, one-half of that amount was to be continued as maintenance to the son of Parsan Bibi, should she have a son born of her womb. According to the contention of the learned Vakil for the appellant, the intention of the grantor was substantially to make a separate grant in favour of each for the sum of Rs. 325. But no words are used in the document from which such an inference may legitimately be drawn. Upon a construction of the whole document, therefore, we are of opinion that the grant was to the two ladies as if they constituted one grantee with right of survivorship *inter se*. In this view, so long as the two ladies lived, they would be jointly entitled to Rs. 650, and upon the death of either, the other as survivor would be entitled to the whole sum of Rs. 650, and upon the death of both the maintenance allowance would be reduced, namely, Rs. 325 would be continued in favour of the son of Parsan Bibi, if any. The second ground taken for the appellant cannot, therefore, be supported.

In so far as the third ground is concerned, it may be conceded that it seems at first sight plausible. The learned Vakil for the appellant has argued that the amount of maintenance which accrued due up to the time of the death of Parsan Bibi constitutes a debt due to her from the representatives of the grantor and that, consequently, under section 4 of the Succession Certificate Act, it is obligatory upon the plaintiff to obtain a succession certificate before a decree can be made in her favour. We are of opinion that this contention is not well-founded. As we have already explained, the nature of the right to maintenance was such that each of the grantees was entitled to take by survivorship to the other and the nature of the right would be impressed upon the arrears of maintenance, if any; consequently, the sum which had accrued due before the death of

(1) 23 C. 670; 23 I. A. 37.

Parsan Bibi would rightly be treated as property in respect whereof the survivor would be entitled to succeed by survivorship and not by inheritance. We may add that if the contention of the appellant were accepted the result would be that the amount of the debt would have to be specified in the application under section 6 of the Succession Certificate Act and the process amount would also have to be set out in the certificate under section 8. But what was the precise amount of the maintenance which had accrued due in favour of Parsan Bibi at the time of her death. It cannot be suggested for a moment that it was the whole sum at the rate of Rs. 650, nor can it be maintained that it was half of that sum, for that involves the erroneous assumption already negatived that the grant was to the two ladies to the extent of one-half share in favour of each. It is clear, therefore, that this is not a debt within the meaning of section 4 of the Succession Certificate Act. Reference may, in this connection, be usefully made to the analogy furnished by the class of cases where it has been held that a succession certificate is not needed where one member of a joint *Mitakshara* family succeeds by survivorship to a debt payable to another member. *Beejraj* v. *Bhyropersaud* (2). The third contention of the appellant consequently fails.

In so far as the fourth contention is concerned, there is plainly no substance in it. It is true that the *ekrarnamah* does not provide for payment of interest upon default made by the grantor or his representatives. But it is open to the Court to award interest in the shape of damages for unlawful detention of many [*Chajmal Das* v. *Brij Bhukan* (3); *Gudri Kore* v. *Bhubneswari* (4); *Moti* v. *Ramohari* (5); *Jageshari* v. *Ghanasham Dass* (6); *Mansab Ali* v. *Gulab Chand* (7)] and we are of opinion that, in view of the conduct of the defendant, which is hardly calculated to create any sympathy in his favour the decree for interest has been justly made.

The result is, that the decree made by the Subordinate Judge is affirmed and this appeal dismissed with costs. We assess the hearing fee at Rs. 25.

Appeal dismissed.

(2) 23 C. 912.
(3) 17 A. 511; 22 I. A. 199.
(4) 19 C. 19.
(5) 24 C. 699; 1 C. W. N. 437.
(6) 5 C. W. N. 356.
(7) 10 A. 85.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 147 OF 1910.
December 4, 1911.
Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.

MUHAMMAD HUSAIN—PLAINTIFF—APPELLANT

versus

AMIR HAIDAR—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 193 (g)—Suit for arrears of rent—Set-off claimed by defendant in respect of a sum wrongfully collected by plaintiff—Proof of payment—Receipt lost—Proof by other evidence.

In a suit by a lessor against his lessee for arrears of rent, the lessee is not entitled to claim a set-off in respect of a sum which had been wrongfully collected by the lessor as rent.

If a receipt granted in lieu of certain payments is lost, the party alleging the payments is not bound to prove the loss of the receipt, but may prove payments by other evidence.

First Appeal from the decision of the Assistant Collector first Class, Muzaffarnagar, dated 25th of February, 1910.

Mr. *B. E. O'Conor* (with him Dr. *Tej Bahadur Sapru*), for the Appellant.

Hon'ble Dr. *Sunder Lal* (with him Mr. *S. A. Haider*), for the Respondent.

JUDGMENT.—This was a suit by the appellant for Rs. 5,707, arrears of rent and interest thereon, due on a lease granted by him to the respondent on September 13th, 1906. The claim is in respect of the years 1314 and 1315 *F.* and the *kharif* instalment of 1316*F.* It was a term of the lease that if the rents stated in the papers handed over to the respondent were found to be less than the actual rents payable by the tenants of the villages the amount payable to the appellant would be reduced accordingly. In his plaint the appellant admitted that the rent should be reduced by a sum of Rs. 55-5-6 per annum. At the hearing, this figure was altered to Rs. 88-7-3 per annum. The respondent claimed a further deduction of Rs. 88 8-9 on this account of which the Court below has allowed Rs. 78.

The respondent also claimed to be entitled to set-off a sum of Rs. 524-10-9 which amount

he said had been collected by the appellant on account of the rents for years preceding 1314*F*. which had been assigned to the respondent. The Court below has allowed a set-off of Rs. 516 under this head. The respondent pleaded further that he had paid Rs. 3,955 in addition to the sums the receipt of which was admitted by the appellant. The Court below has allowed this plea.

In the result, the Court below found that nothing was due from the appellant and accordingly dismissed the suit. There were other points in dispute but they have not been brought before us in appeal.

The only questions raised in the arguments before us were, whether the respondent is entitled to set-off the sum of Rs. 516 against the appellants' claim, and whether payment of the whole or any part of the sum of Rs. 3,955 by the respondent has been proved.

On the question of the set-off we think that section 193 (*g*) of the Tenancy Act is conclusive. It provides expressly that not set-off shall be allowed in any suit under the Act except a sum due to the defendant on an unsatisfied decree under this Act or under any enactment thereby repealed. On the question of the payments made to the appellant, it is necessary to refer to several documents before noticing the oral evidence adduced by the respondent.

With his plaint, which was filed on May 21st, 1909, the appellant presented a petition in which he prayed that the respondent might be ordered to make an affidavit of documents. It is said that he did this because the respondent had in November 1908 sent the appellant an account for 1314 and 1315 *F* in which it was stated that respondent had receipts for sums aggregating Rs. 5,325 and a further account in March 1909, for the *kharif* of 1316 *F*. also a money-order for Rs. 126 on March 19th, 1909, as the balance then due by him. On the appellant's petition the Court issued notice for the 9th June. The respondent filed a list of his documents on the 2nd June but the appellant, who was not satisfied with that, applied again on June 2nd, that the documents should be produced and the Court ordered the respondent to produce all his documents on the 7th. On the 5th the respondent asked for time till the 9th and even on the 9th did not produce his documents. When he did produce them ultimately he said that he had lost three receipts for sums aggregating Rs. 3,955. He made no attempt to prove this allegation, but he proved that, on May 11th, 1909, he had reported to the Police that he had lost eight receipts for sums aggregating Rs. 1,400 and he produced a witness, named Ibrahim Hossain, who said that respondent had told him at the beginning of May 1909 that he had lost several receipts and suspected that his brother Khairati had carried them off.

It is impossible to hold that the respondent has proved the loss of the three receipts for sums aggregating Rs. 3,955, but the respondent is not bound to prove the loss of the receipts; he is entitled to prove the payments by other evidence if he can. The Court below has held that the payment of several sums not admitted by the appellant has been proved by the evidence of witnesses produced by the respondent. The appellant's Counsel have not troubled themselves to challenge all the items the payment of which has been found to be proved by the Court below. They have confined their arguments to eight items, namely :—

(1) Rupees 1,500, said to have been paid on 25th June 1908.

(2) Rupees 1,350, said to have been paid on 6th April 1907.

(3) Rupees 1,050, said to have been paid on 21st June 1907.

(4) Rupees 150, said to have been paid on 18th August 1907.

(5) Rupees 4,000, said to have been paid on 16th March 1908.

(6) Rupees 100, said to have been paid on 4th May 1907.

(7) Rupees 200, said to have been paid on 3rd May 1907.

(8) Rupees 200, said to have been paid on 4th December 1907.

Two witnesses, Budhu Mal and Behari Lal, were called to prove payment of the first item. Two others, Abul Hasan and Sajjad, were called to prove payment of the fifth item. The payment of the 4th, 6th, 7th and 8th items is supported by one witness in each case and there appears to be no evidence to prove the payment of the 3rd item. It is easy to produce witnesses in this way, and exceedingly difficult to contradict them. We do not propose to examine the statements of the witnesses in

GOVINDA PILLAY v. MEENATCHI ACHI.

detail. There are several circumstances which tend to throw great suspicion on the alleged payments. In the letter which the respondent sent to the appellant with the account of November 1908, it is stated that Rs. 5,325 were paid to the appellant for which receipts were obtained and all the eight items enumerated above are among those which were said to make up the sum of Rs. 5,325. Yet, not a single receipt has been produced for these items. As already stated, there is evidence that the respondent reported to the Police that he had lost eight receipts for sums aggregating Rs. 1,400, but the respondent had not explained what items are included in that amount. Stranger still, the respondent on June 2nd, 1909, stated in his petition of that date that he had in his possession receipts signed by the appellant for the first three items in the above list, yet he did not produce them with his other documents and at trial said that they had been lost. No evidence whatever has been given that any documents were lost after June 2nd.

To crown all this, the respondent abstained from giving evidence himself. He put the appellant into the box but did not ask him a word about the alleged receipts nor did he put any question to appellant's son who was examined as a witness for the respondent. After all the evidence had been taken, the respondent put in a petition in which he stated that he had said nothing about the loss of the receipts for the first three items in his report to the Police because he was assured by the witness Ibrahim Husain that they would be returned. Ibrahim Husain did not say this when under examination. The only answer to all this which has been given by the respondent is that he sent full accounts to the appellant in November 1908 and March 1909 and the latter did not give him any reply or dispute the accuracy of the accounts. The appellant contends that he was under no obligation to take any notice of the accounts and that, as a matter of fact, he refused to accept the money-order for Rs. 6-2-3 sent at the time of the first account on the ground that he would not accept payment of part only of what was due to him and refused the money-order sent in March 1909, because the amount due for past years had not been paid. The money-order coupons have been produced bearing the endorsements made by the appellant. It is clear that the appellant gave the respondent full notice that he did not accept the respondent's accounts. He was not under any obligation to do more. In view of the extraordinary conduct of the respondent with reference to the receipts, we should be disinclined to accept any but the strongest oral evidence of the payments which are disputed. The oral evidence which has been given entirely fails to satisfy us that the disputed payments were made.

For the above reasons, we hold that the respondent is not entitled to set-off against the appellant's claim the sum of Rs. 516 or any other sums on account of collection made by the appellant for years preceding 1314*F.* and that the respondent has failed to prove the payment of the eight items in the list given above.

As it is impossible to follow the accounts made up by the Court below, the case must go back to that Court for a fresh finding as to what is due to the appellant.

The Court below will make out a proper account after hearing the parties and submit it to this Court as soon as possible. Further evidence will not be admitted. On return of the finding, ten days will be allowed for objections.

Case remanded.

MADRAS HIGH COURT.

APPEAL AGAINST ORDERS NOS. 150 AND 151 OF 1910.

October 4, 1911.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

GOVINDA PILLAY—PLAINTIFF—APPELLANT

versus

MEENATCHI ACHI AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 60 cl. (n) —Right to future maintenance—Crops on land granted to a widow for maintenance—Liability for attachment—Will, construction of—Devise to daughter on death of two widows.

Where land is granted to a widow to be enjoyed by her during her life in lieu of maintenance, what is acquired under the grant is not a right to maintenance, but to retain property or rather the usufruct of that property. The produce of that land, as it accrues, becomes her property and is not exempt from attachment under the provisions of clause (*n*) of section 60, Civil Procedure Code, 1908.

GOVINDA PILLAY *v.* MEENATCHI ACHI.

The produce cannot be treated as standing on the same footing as a right to maintenance. The crops are the widow's property and available to answer her debts.

What is interdicted by clause (*n*) is the attachment of a mere right to future maintenance, and not of a debtor's property or any interest in property though such property or interest might have been granted to the debtor for maintenance.

Munisami Naidu v. *Ammani Ammal*, 15 M. L. J. 7 and *Diwali* v. *Adaji Ganesh*, 10 B. 342, distinguished.

Where land is devised by a Will to two widows of the testator and, on their death to his daughter, the land given to each widow would on her death pass to the daughter.

Appeal against the orders of the Subordinate Judge of Negapatm, in E. P. Nos. 80 and 81 of 1910, in O. S. No. 92 of 1900.

Messrs. *K. Srinivasa Aiyangar* and *C. Krishnamachariar*, for the Appellant.

Mr. *T. R. Venkotrama Sastri*, for the Respondent.

JUDGMENT.—The first question argued is whether the crops growing on one veli of the land which, under the terms of the Will, the second defendant, one of the two widows of the testator, is to enjoy for her maintenance, are liable to be attached in execution of the plaintiff's decree. The Subordinate Judge is of opinion that the crops in question are precluded from attachment by virtue of the provisions of section 60, Civil Procedure Code, which by clause (*n*), exempts a right to future maintenance from seizure in execution of a decree. We shall assume, for the purpose of this argument that the clause would apply whether the right to maintenance is derived under the general Hindu or Muhammadan Law or under an instrument in the nature of deed or Will. But it seems to us that the Subordinate Judge is quite wrong in his view that what is attached in this case can be said to be a right to future maintenance. It may be well that the second defendant is given the land to be enjoyed by her during life in lieu of the maintenance to which she would be entitled as a Hindu widow, but what she acquires under her grant is not a right to maintenance but to certain property or rather the usufruct of that property. The produce of the land, as it accrued, becomes at once her property, and the learned Vakil for the respondents rightly contends that the second defendant might dispose of it in any way she chose. That being so, it cannot be treated as standing on the same footing as a right to maintenance. The crops are her property, and, as such, must be available to answer her debts. What is interdicted by the Legislature is attachment of a mere right to future maintenance and not of a debtor's property or any interest in property though such property or interest might have been granted to him or her for maintenance. The Subordinate Judge relies upon a case of *Munisami Naidu* v. *Ammani Ammal* (1), which follows a decision of the Bombay High Court in *Diwali* v. *Apaji Ganesh* (2), in support of his view. No doubt there are words in the judgments in the two cases which might be taken to lend some countenance to the proposition accepted by the Subordinate Judge, but, it seems to us; that both the decisions really proceed upon the particular provisions of the instruments with which the learned Judges were concerned.

However that may be, we have no hesitation in holding that clause (*n*) of section 60 has no application to the present case.

The second question relates to the proper construction on the paragraph of the Will in which the testator provides, that on the death of the two widows the land granted to them would go to his daughter. The Will is not very clearly worded, but, on the whole, we are of opinion, that the intention of the testator was that, on the death of each widow as it happens, the land given to her would pass to the daughter. The Pleader for the appellant does not press his case as regards the land which originally fell to his daughter under the Will, as the decree, in execution of which application is made for attachment, is not against the daughter.

The result is that the Appeal No. 150 will be allowed with costs, and Appeal No. 151 will be dismissed with costs.

Appeal No. 150 *allowed.*
Appeal No. 151 *dismissed.*

(1) 15 M. L. J. 7.
(2) 10 B. 342.

BANDEY ALI v. GOKUL MISIR.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 87 OF 1910.

November 25, 1911.

Present:—Mr. Richards, K. C., Chief Justice, and Mr. Justice Banerji.

Mirza BANDEY ALI—PLAINTIFF—APPELLANT

versus

GOKUL MISIR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 43—Former suit for injunction dismissed on ground that plaintiff was not in possession—Second suit for possession whether barred.

Plaintiff sued defendant, seeking a permanent injunction restraining defendant from interfering with his possession. This suit was dismissed on the ground that the plaintiff was not in possession. The plaintiff then brought a second suit for possession:

Held, that the second suit for possession was not barred by section 43 of the Civil Procedure Code, 1882.

Darbo v. *Kesho Rai*, 2 A. 356, *Sarsuti* v. *Kunj Behari Lal*, 5 A. 345, *Mohan Lal* v. *Bilaso*, 14 A. 512, *Jibunti Nath Khan* v. *Shib Nath Chukerbutty*, 8 C. 819, 10 C. L. R. 537, referred to.

Letters Patent Appeal from a decision of Mr. Justice Karamat Husain, in Second Appeal No. 715 of 1909, dated 21st of May 1909.

Mr. *Muhammad Ishaq*, for the Appellant.

Mr. *Surendro Nath Sen*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit in which the plaintiff claimed joint possession of a certain share in a grove. The defence was that the suit was barred by section 43 of Act XIV of 1882 having regard to previous litigation between the parties. The previous litigation consisted of a suit in which the plaintiff sued the defendants for a permanent injunction restraining them from interfering with his possession and appropriating the fruits of the grove. There was also a claim for damages. This last mentioned suit was dismissed on the ground that the plaintiff was not in possession and that neither injunction nor damage could, therefore, be claimed. The Court of first instance dismissed the present suit. The Court of first appeal reversed the order of Court of first instance and held that the suit was not barred by section 43 The learned Judge of this Court, in a very careful and elaborate judgment, reversed the Court of first appeal and restored the decree of the Court of first instance. The plaintiff comes now in appeal under the Letters Patent. Section 43 of Act XIV of 1882, is as follows:—"Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action but a plaintiff may relinquish any portion of his claim in order to bring the suit within jurisdiction of any Court. If a plaintiff omit to sue in respect of, or intentionally relinquish, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished." If we had to decide the question in the absence of authority, we might have some difficulty in dissenting from the view taken by our learned brother. We think, however, that the authorities show that for a long time it has been accepted in this Court and in other High Courts that the dismissal of suits of this nature on the ground that the plaintiff is not in or has not proved that he is in possession, is no bar to a subsequent suit for possession. As early as the year 1879, a Full Bench of this Court in the case of *Darbo* v. *Kesho Rai* (1) decided that the dismissal of a suit for declaration of title on the ground that the plaintiff was not in possession was no bar to a subsequent suit for possession. It is true that the decision in that case was under section 7 of Act VIII of 1859, and it is also true that the judgment in that case is a very short one. The same question arose in *Sarsuti* v. *Kunj Behari Lal* (2). In that case the majority of a Court, consisting of Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr Justice Tyrell, decided the same way, namely, that the suit was not barred.

That also was a decision under section 7 of Act VIII of 1859 In this case Sir Robert Stewart, C. J., who was a party to the decision in *Darbo* v. *Kesho Rai* (1) dissented. Again, in the case of *Mohan Lal* v. *Bilaso* (3) a Bench of this Court composing of Edge, C.J., and Blair, J., decided that the dismissal of a suit for a declaration of title on the ground that the plaintiff was not in possession was no bar to a subsequent suit for possession. The learned Judges followed *Jibunti Nath Khan* v. *Shib Nath Chukerbutty* (4). The decision of this Court in *Darbo* v. *Kesho Rai* (1) does not appear to have been cited to the Court in

(1) 2 A. 356.
(2) 5 A. 345.
(3) 14 A. 512.
(4) 8 C. 819; 10 C. L. R. 537.

that case. These cases clearly show that it has been the established practice of this Court not to dismiss a suit for possession merely on the ground that a previous suit had been brought for a declaration of title and dismissed on the ground of the plaintiff not being in possession. In the present case, the previous suit was a suit for an injunction, and it was dismissed on the ground that the plaintiff was not in possession. In our opinion, no distinction in principle can be drawn between the dismissal of a suit for a declaration of title on the ground that the plaintiff was not in possession and the dismissal of a suit for an injunction on the same grounds. Following the rulings and established practice of this Court, we think that the appeal ought to be allowed. We accordingly allow the appeal, set aside the decree of this Court, and restore the decree of the lower Appellate Court with costs in this Court.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 180 OF 1910.

November 15, 1911.

Present:—Mr. Richards, K. C., Chief Justice, and Mr. Justice Banerji.

Nawab NURULLAH KHAN—PLAINTIFF APPELLANT

versus

Musammat HAYATUNNISSA AND OTHERS—DEFENDANTS—RESPONDENTS.

Jagir—*Grant—Succession*—"Aulad wa ahfad", *meaning of.*

A grant was made in favour of one *K.* for life and after him to his *'aulad wa ahfad,'* that is, to his issues and descendants:

Held, that the grant was not limited to the grantee's male descendants only.

First appeal from the decision of the Subordinate Judge of Gorakhpur, dated the 15th of February 1910.

The Hon'ble Dr. *Sunder Lal* (with him Mr. *Iswar Saran*), for the Appellant.

Mr. *Abdul Raoof* (with him Mr. *Ghulam Mujtaba*), for the Respondents.

JUDGMENT.—The suit which has given rise to this appeal was brought by the plaintiff-appellant for possession of certain immoveable property. This property forms part of a *jagir* granted in the year 1819 by the British Government to a Pindari Chief of the name of Karim Khan. He died about the year 1827 leaving two sons, Shamsher Bahadur Khan and Shahamut Khan. After his death the *jagir* was divided between these sons, the former getting a 7-annas share and the latter of 9-annas share. The plaintiff Nurullah Khan is the son of Shamsher Bahadur Khan and in the suit out of which this appeal has arisen he claims certain property which is now in the possession of the descendants of Mariambai, one of the daughters of Shamsher Bahadur Khan by a wife who was not the mother of Nurullah Khan. The plaintiff's contention is that, under the terms of the grant, and also in accordance with a family custom, the property which originally belonged to Karim Khan was to go to his male descendants and not to his female descendants such as the defendants to this suit. The grant, which is dated the 13th of August, 1819 is in favour of Karim Khan for life and after him to his *'aulad wa ahfad,'* that is, to his issue and descendants. There is nothing in the grant itself to limit it to his male descendants Subsequently, disputes arose in regard to the *jagir* granted to Karim Khan, and in one of the letters to which reference has been made on behalf of the appellant, namely a letter from the Officiating Secretary to the Sudder Board of Revenue, North-Western Provinces, to Secretary to the Government, North-Western Provinces, dated the 12th of May 1846, it was distinctly stated that the property was given to the Pindari Chief Karim Khan rent-free for his life and to his heirs on a quit-rent of Rs. 6,000 per annum. In the year 1862 there was litigation between the plaintiff's mother and one of the widows of Shamsher Bahadur Khan. To this suit the two daughters of Shamsher Bahadur Khan, by that widow were made defendants. That case was referred to arbitration and an award was made which contains this provisions:—"After the death of the *Musammat* the *jagir*, estate, will continue to appertain to the family of Nawab Shamsher Bahadur Khan alone." In accordance with this award, two of the daughters of Shamsher Bahadur Khan subsequently obtained a decree for their share. The present plaintiff on attaining majority brought a suit to have the award set aside and to have it declared that he alone was entitled to the property in question.

That suit was dismissed by the High Court on the 17th of March 1873 on the ground that under the grant made in 1819 the *jagir* was not limited only to the male descendants of Karim Khan and that no family custom had been established which excluded his female descendants from inheritance. In the decree in that case it was provided that the status created by the award to which we have referred above should not be disturbed. It is contended on behalf of the plaintiff that under the award he alone is entitled to the estate upon the death of Mariambai. We are unable to accept this contention as the word therein used is "family," and not male descendants of Shamsher Bahadur. The defendants are certainly members of the family of Shamsher Bahadur, being his granddaughters. The award, therefore, does not hold the plaintiff's claim. As we have already stated, and as was held by the Court in 1873, the grant itself does not limit the right of succession to the male descendants of Karim Khan, and the evidence which in the present case is the same as that adduced in the former suit decided by this Court manifestly does not establish a family custom excluding females. The decision of the Court below is, in our judgment, correct and this appeal must fail. We accordingly dismiss it with costs including fees on the higher scale.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 44 OF 1910.

November 23, 1911.

Present:—Mr. Justice Banerji and Mr. Justice Tudball.

BIHARI LAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

DURGA DAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Usufructuary mortgage—Liability of mortgagor and mortgagee—Part of mortgaged property taken out of mortgagee's possession—Mortgagee remaining in possession of the rest for a long time, effect of—Interest—Redemption.

A. executed an usufructuary mortgage in favour of *B.* in 1880. At the time of the mortgage a suit was pending in respect of a prior mortgage of 1874, by virtue of which a portion of the mortgage property passed out of *B.*'s hand in 1886. *B.* remained in possession of the remaining property for over 24 years without taking any steps in respect of the portion which had gone out of his possession under the prior mortgage. In 1910 the mortgagor brought a suit for redemption:

Held, (1) that under the circumstances, mortgagee was not entitled to claim the loss of interest which he had sustained owing to a part of the mortgaged property having gone out of his possession in 1886 under the prior mortgage;

Partab Bahadur Singh v. *Gajadhar Bakhsh Singh*, 24 A. 521; 29 I. A. 148; *Khuda Bakhsh* v. *Alimunnissa*, 27 A. 313, referred to.

(2) that the mortgagor was not entitled to claim a proportionate reduction of the principal money, because the mortgagee was not in a position to deliver to him the entire mortgaged property at the time of redemption.

First appeal from the decision of the Officiating Additional Judge of Aligarh, dated the 20th November, 1909.

The Hon'ble Dr. *Sunder Lal*, (with him Dr. *S. C. Banerji*), for the Appellants.

Mr. *G. L. Agarwala*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for the redemption of a usufructuary mortgage made on the 12th of November 1880, by three persons, namely, Mukh Ram Singh, Kanhai Singh and Durjan Singh, in favour of Ram Dayal, Behari Lal and Kishori Lal, the predecessor-in-title of the defendants-appellants. The property comprised in the mortgage was a 10-*biswas*, 13¼-*biswansis*, share in the village of Mukimpur. In this property the share of Mukh Ram was 8 *biswas* and the remainder belonged to the other two mortgagors. The amount secured by the mortgage was Rs. 8,500 and the term of the mortgage was ten years. The plaintiffs are the assignees of the interests of some of the mortgagors. It is common ground that in execution of a decree obtained upon a prior mortgage of 1874 the shares of Kanhai Singh and Durjan Singh, namely, 2 *biswas* 13¼ *biswansis* was sold by auction and passed out of the possession of the mortgagees in 1886. The mortgage-deed in suit provides that the rate of interest was 12 annas per cent. per mensem, *i.e.*, Rs. 9 per cent. per annum, that the usufruct was to be taken in lieu of interest, and that the mortgagees were not to claim interest on the mortgage-money, nor were the mortgagors to claim profits of the mortgaged property so long as the mortgage subsisted. A partition took place about the year 1890 and under that partition the property remaining in the possession of the mortgagees was formed into an eight-*biswa mahal*. The plaintiffs claimed possession of the whole of the mortgaged property and

BEHARI LAL *v.* DURGA DAS.

made parties to the suit the persons who had purchased the 2 *biswas* 13¼ *biswansis* share mentioned above in execution of the decree passed on the earlier mortgage of 1874. They offered to pay to the defendants Rs. 8,500 the principal amount, of the mortgage. The defendants contended that in addition to that amount they were entitled to be recouped the loss of interest sustained by them by reason of the 2 *biswas*, 13¼ *biswansis* share having passed out of their possession. They further contended that as the revenue of the mortgaged property had been enhanced after the mortgage they were entitled under the terms of the mortgage to the difference between the revenue which existed on the date of the mortgage and the enhanced revenue which they subsequently had to pay. They also claimed the costs of the construction of certain indigo vats and the costs of partition proceedings. The fourth item which they claimed was arrears of rent due by tenants up to time when the plaintiffs sought to redeem the mortgage and this item they said they were entitled to, under the terms of the mortgage-deed. The Court below has made a decree in the plaintiff's favour for possession of the 8 *biswas* share which remained with the mortgagees after the sale of the remainder of the mortgaged property. It has awarded to the defendants the costs of building two vats and arrears of rent for one year only and it has disallowed the other items claimed by the mortgagees-defendants. This appeal has been preferred by the defendants-mortgagees, and the plaintiffs have put forward objections under Order XLI, rule 22 of the Code of Civil Procedure. We will deal, first of all, with the appeal of the defendants. The first item which they claim in the appeal is the item of loss of interest to which we have referred above. As to this, the contention on their behalf is that the amount of the usufruct of the whole of the mortgaged property was equivalent to interest at the rate of 9 per cent. per annum as mentioned in the mortgage-deed; that they have not received and enjoyed the usufruct of the whole of the mortgaged property by reason of a part of it having passed out of their possession in satisfaction of the earlier mortgage of 1874, that they have thus received a smaller amount of usufruct than that which they would have obtained had they been in possession of the whole of the mortgaged property, and that the difference should be made good to them by the plaintiffs who now represent the mortgagors. It appears that a suit on the earlier mortgage of 1874 was pending at the time when the mortgage in favour of the ancestors of the defendants was executed. It is, therefore, clear that they took their mortgage, with full knowledge to the prior mortgage and subject to the result of the litigation then pending. They were thus taking a mortgage of property in regard to which there was considerable risk of its passing out of their possession and of which they were in fact deprived in the year 1886. They have remained content with the usufruct of the remainder of the property for so a long period as 24 years. It is, therefore, reasonable to assume that when they took the mortgage it was understood that the interest on the money advanced by them would be the usufruct of so much of the mortgaged property as would remain in their possession. Had this not been so, the mortgage-deed would have contained a clear and specific provision for the payment of loss in interest. That such was the intention of the parties appears from the fact that when the appellants were deprived of 2 *biswas*, 13¼ *biswansis* they acquiesced in the loss of that portion of their security and were content to enjoy the usufruct of the remainder of the property in lieu of the interest payable to them. They are, therefore, not entitled to claim the difference of interest after the lapse of such a long period. This case is very similar to the case of *Partab Bahadur Singh* v. *Gajadar Bakhsh Singh* (1) and the case of *Khuda Bakhsh* v. *Alim-un-nissa* (2). The principle of those rulings, in our opinion, fully applies to the present case. The Court below was, therefore, right in not allowing this part of the appellants' claim.

The next item claimed by them in this appeal is the amount of enhanced revenue. The provision in the mortgage-deed relating to revenue is as follows: "If at a future Settlement, the Government revenue or cesses due to Government be assessed at a higher rate and profits be thereby reduced, we shall pay the amount enhanced along with the mortgage-money at the time

(1) 24 A. 521; 29 I. A. 48.
(2) 27 A. 313.

of redeeming the mortgage. From this clause it is manifest that the mortgagors would be liable at the time of redemption to pay the enhanced revenue only if by reason of such enhancement the profits arising from the property were diminished. It was, therefore, for the defendants to prove that there was reduction in the profits. The Court below was of opinion that they had failed to adduce sufficient evidence to establish a reduction of profits. We think that in this respect also the Court below is right. No doubt, the rent-roll kept up by the Patwari shows that a smaller amount of rent is realized from the property. But at the time of Settlement the Settlement Officer found that the rent-roll was incorrect, and although it showed Rs. 1,165 as the income arising from the whole village in 1288 *Fasli*, it was in reality something like Rs. 1,815. The learned Additional Judge has given other reasons for the conclusion that the rent-roll is incorrect and that the accounts produced by the defendants cannot be relied on. Had the income arising from the village been so low as appears from the rent-roll and the accounts, it is highly improbable that the appellants would have continued in possession and would not have, shortly after the enhancement of revenue, sought to recover the money due to them. We think that the appellants have failed to establish their allegation that there was a reduction in profits and they have certainly failed to satisfy us that the decision of the Court below on this point is erroneous.

The next item claimed by the appellants is the item of arrears of rent. The mortgage deed provides that at the time of redemption the mortgagors should pay arrears of rent due by the tenants in the village. The Court below has allowed arrears of rent for one year only. In this respect we think the learned Judge has committed an error: under the terms of the mortgage the mortgagees would be entitled at the time of redemption not only to arrears for the year preceding the date of redemption but to such arrears as could at that time be lawfully recovered from tenants. The object apparently was that at the time of redemption such arrears should be paid by the mortgagors and that they should after redemption recoup themselves by realizing the amount so paid from the tenants from whom it was due. The appellants are, therefore, entitled to arrears for three years. As to the amount of such arrears we have before us the evidence of the defendant Jugal Kishore who after referring to his account-books stated that the total amount due by tenants for the years 1314, 1315 and 1316 *Fasli* was Rs. 1,338-3-1, out of this sum the Court below has awarded to the defendants Rs. 863-11 1 namely the arrears for 1316 *Fasli*. In this respect it has accepted the correctness of the accounts of the defendants. There is nothing to show that the statement of Jugal Kishore, corroborated as it is by the entries in his account-books, is incorrect. Therefore, in our opinion, the defendants-appellants are entitled to a further sum of Rs. 474-8-0, namely the difference between the sum of Rs. 1,338-3-1 and Rs. 863 11-1 mentioned above. To the extent of this additional sum of Rs. 474-3 the appellants' appeal must succeed. The appellants also claim interest for the period of the pendency of the suit. This certainly cannot be allowed to them, as they were in possession before the decree was passed. These are the only items which have been claimed in this appeal in the argument before us. As to the objections preferred on behalf of the respondents, the first item is the item of Rs. 1,372-12 6 which the Court below has allowed to the defendants on account of the construction of indigo vats. It is admitted that these vats have been built on a piece of land 3 *bighas*, 2 *biswas* in extent, of which a perpetual lease was granted to the mortgagees. This piece of land was excluded from the mortgage, as is manifest from the *qabuliat* executed by Shib Singh and others to whom a lease of the mortgaged property was granted on the date of the mortgage. As this piece of land is not a part of the mortgaged property, and as the mortgagees are in possession of it, not in their capacity of mortgagees but as lessees under a perpetual lease, they are not entitled under the terms of the mortgage to the costs incurred by them in constructing indigo vats on this land. No doubt, under the terms of the mortgage they would have been entitled to the costs of building vats upon land which formed part of the mortgaged property. But the

land on which the vats in question were built not being included in the mortgage the mortgagee's claim in respect of the costs of building these vats ought not to have been allowed. The decision of the Court below on this point must be set aside.

It is further contended on behalf of the plaintiffs-respondents that as they have not been awarded possession of the whole of the mortgaged property, there should be a proportionate reduction in the amount of the mortgage money. This contention is wholly without force. The mortgagees were entitled to recover the whole of the mortgage-money from every part of the mortgaged property which was security for their mortgage. If, by reason of the existence of a prior mortgage, which the mortgagors did not discharge a part of the mortgaged property has passed out of the hands of the mortgagees for no fault of their own and if, in consequence of their own default, the mortgagors are not entitled to get back that part of the property, they cannot claim reduction of any part of the mortgage-money which they have appropriated, and for which the remainder of the mortgaged property is, undoubtedly, mortgagee's security. This objection of the respondent must fail. The result is that the defendants-appellants are entitled to a sum of Rs. 474-8-0 on account of arrears of rent and out of the amount allowed to them must be deducted the sum of Rs. 1,372-12-6 awarded to them for the costs of building vats. If the former amount be set off against the latter there will be a sum of Rs. 898-4-6 by which the amount declared to be due to the defendants-mortgagees by the Court below must be reduced. In substance, therefore, the appeal fails. It is accordingly dismissed with costs including in this Court fees on the higher scale.

The objections of the plaintiffs-respondents are to this extent allowed that the amount decreed to the defendants mortgagees is reduced by Rs. 898 4-6. Having regard to the circumstances of the case, we make no order as to the costs of the objections put forward on behalf of the respondents.

We extend the time for payment of the mortgage-money for six months from this date. For the period antecedent to the date on which the plaintiffs will get actual possession, the profits of the property in the possession of the defendants will be regarded as equivalent to the interest due to them.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1032 OF 1910.

November 28, 1911.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

CHIDRIE KRISTAPPA—APPELLANT

versus

SIDDAMSETTI YAMANAPPA—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 31—Suit for a sum due on account—Omission of prayer as to defendant's accountability to plaintiff—Suit of small cause nature—Second appeal.

Where the claim in a Court of first instance was for recovery of Rs. 500 due as per dealings between plaintiff and one *M.* and there was no prayer that any of the defendants should be made accountable to the plaintiff:

Held, that the suit was of a small cause nature and that no second appeal lay from the decree passed therein.

Article 31 of Schedule II of the Provincial Small Cause Courts Act applies to cases where the relationship of the parties is such that one of them is bound to render accounts to the other.

Konduru Ranga Reddi v. *Subbiah Setty*, 28 M. 394, referred to.

Second appeal against the decree of the Subordinate Judge of Bellary, in Appeal Suit No. 14 of 1908, presented against the decree of the District Munsif of Hospet, in O. S. No. 88 of 1907.

Mr. *R. Kuppusawmy Aiyar*, for the appellant.

Mr. *K. Y. N. Adiga*, for the Respondent.

JUDGMENT.—A preliminary objection is taken that no second appeal lies in this case, as the suit is of a small cause nature and the amount sought to be recovered in the Court of first instance was less than Rs. 500. This objection must be upheld. The appellant contends that the suit might be treated as one for an account. But we find that it cannot be on a reference to the plaint. The plaint states that Mukamma had money dealings with the plaintiff for the benefit, expenses and trade of the family. These are to be found in the account-books properly maintained by the plaintiff and the prayer is that a decree be passed for the amount due. The plaintiff does not ask that any of the

defendants should be made to account to the plaintiff. The suit is not, therefore, one for an account. Article 31 of the second Schedule of the Provincial Small Cause Courts Act applies to cases where the relationship of the parties is such that one of them is bound to render accounts to the other. This is substantially what is laid down in *Konduru Ranga Reddi* v. *Subbiah Setty* (1), Mr. Kuppuswamy Aiyar, the learned Vakil for the appellants, argues that the defendants, had meddled with the estate of the deceased Mukamma, and that, therefore, they were bound to account to the plaintiff for the properties taken possession of by them. But there is no allegation in the plaint that the defendants had put themselves in such a position that they were bound to account to the plaintiff for the estate of Mukamma. There is no allegation that they became administrators *de son tort* so as to become liable to account and, as already stated, there is no prayer for an account.

The second appeal is dismissed with costs.

Appeal dismissed.

(1) 28 M. 394.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 24 OF 1911.

November 29, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Abdur Rahim.

PARRY AND CO., BY THEIR AGENT C. H. CARDOZO—APPELLANT

versus

VADIVELU PILLAY—RESPONDENT.

Execution—Application for execution—Order directing attachment of immoveables and dismissing petition otherwise—Subsequent application after lapse of three years—Limitation.

Appellant decree-holder applied in 1900, in execution for attachment and sale of the judgment-debtor's property. The order passed on the application was, "immoveables attached; strike off petition, but the attachment will continue." On a subsequent date he applied for sale of the attached property, but the application was dismissed for non-payment of *batta* in 1901. In 1909, the present application for execution was made:

Held, that the application was not in continuance of the proceedings of 1900 and was barred.

Cholawadi Kotiah v. *Polori Alamelamah*, 31 M. 71; 3 M. L. T. 328; 18 M. L. J. 46; *Madhabmoni Dasi* v. *Pamila Lambert*, 37 C. 796; 6 Ind. Cas. 537 and *Kamaruddin Ahmed* v. *Jawahir Lal*, 27 A. 334; 1 C. L. J. 381; 15 M. L. J. 258; 9 C. W. N. 601; 2 A. L. J. 397; 7 Bom. L. R. 433, distinguished.

Appeal against the order of the District Court of South Arcot, dated 18th September 1910, in Appeal Suit No. 37 of 1910, presented against the order of the District Munsif of Villupuram, dated 22nd October 1909, in E. P. No. 3 (E. P. R. No. 1421 of 1909) in O. S. No 623 of 1900.

Mr. *T. R. Vencatrama Sastri*, for the Appellants.

Mr. *V. Masilamony Pillai*, for the Respondent.

JUDGMENT.—We think the view of the lower Courts is right on the question of limitation. In 1900, the decree-holder made an application in which he asked for attachment and sale of the judgment-debtor's property. The order passed on the application was "immoveables attached. Strike off petition, but the attachment will continue." Then, on a subsequent application made for sale of the property attached notice was issued, but the *batta* not being paid, the second application was struck off in 1901. The present application is made in 1909. The argument on behalf of the appellant is that the application of 1900 is still pending. But we cannot accept that contention. What was apparently intended was that the prayer for attachment should be granted and, in other respects, the application should be refused. If that be the correct meaning of the order in question, as we think it is, there is no force in the contention that the present application is in continuance of the proceedings of 1900, because, in fact, those proceedings had come to an end. In this view of the facts, the rulings reported in *Cholawadi Kotiah* v. *Polori Alamelamah* (1); *Madhabmoni Dasi* v. *Pamila Lambert* (2) and *Kamaruddin Ahmed* v. *Jawahir Lal* (3) have no application.

The appeal is dismissed with costs.

Appeal dismissed.

(1) 31 M. 71; 3 M. L. T. 328; 18 M. L. J. 46.

(2) 37 C. 796; 6 Ind. Cas. 537.

(3) 27 A. 334; 1 C. L. J. 381; 7 Bom. L. R. 433; 15 M. L. J. 258; 9 C. W. N. 601; 2 A. L. J. 397.

MANINDRA NATH *v.* MOHANUNDA ROY.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 329 OF 1909.

June 8, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

MANINDRA NATH MANDAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MOHANUNDA ROY AND OTHERS—PLAINTIFFS—RESPONDENTS

Arbitration—Award—Insertion of name as arbitrator without knowledge of one party—Submission to proceedings by that party—Whether party can object subsequently—Arbitrator not deciding certain matter—Matter ought to have been brought to arbitrator's notice—Blanks and omissions in award—Rules for calculation given without giving result—Arbitrator—Judicial acts to be jointly done—Ministerial act—Reception of written statement—One arbitrator receiving written statement, whether irregular—Arbitrator refusing to take evidence—Evidence ought to be distinctly tendered—Award not signed at same time and place, whether void—Umpire—Appointment of umpire when difference of opinion among arbitrators—No provision as to umpire—Whether award bad—Death of party, effect of.

The defendants became aware that the name of one *K.* had been fraudulently entered in an instrument of submission to arbitration, without their knowledge but, they made no protest and accepted the position that he was a validly appointed arbitrator:

Held, that, they were not entitled to repudiate the position they deliberately took up before the arbitrators.

Sheo Nath v. *Ramnath*, 10 M. I. A. 413 at p. 426; 5 W. R. (P. C.) 21; 1 Ind. Jur. (N. S.) 161, relied upon.

The award of an arbitrator which determines all questions brought before his notice cannot be objected to, notwithstanding there are other matters within the scope of the submission to which his attention has not been drawn. In order to invalidate an award because a particular question was not decided, it must be established that the point was specifically stated and brought to the notice of the arbitrator.

Rees v. *Waters*, (1847) 16 M. and W. 263; 4 D. & L. 567, relied upon.

Where an arbitrator states rules for calculating the amount of money to be paid, without giving the result of such calculation, the award is sufficiently certain, on the principle that that is sufficiently certain which can be made certain.

Beale v. *Beale*, (1635) Cro. Car 383, and *Strong* v. *Strong*, (1872 9 Cushing 560, relied upon.

An award, therefore, which purports to divide property between two persons by prescribing a rule of division, may well be final though the property in question be not actually divided.

Judicial acts, in order that they may be valid must be jointly performed by all the arbitrators.

Sreenath v. *Raj Chunder*, 8 W. R. 171, *Khelut Chunder* v. *Tara Chand*, 6 W. R. 269, *Nandram* v. *Fakir Chand*, 7 A. 523, *Thammiraju* v. *Bapiraju*, 12 M. 113 and *Harvey* v. *Shelton*, 7 Beav. 455 at p. 462; 13 L. J. Ch. 466, relied upon.

The mere reception of a written statement by one of the arbitrators is not a judicial act.

Harvey v. *Shelton*, 7 Beav. 455 at p. 462; 13 L. J. Ch. 466, distinguished and explained.

The reception by one arbitrator of the written statement of the defendants in the absence of his colleague and the plaintiffs is not a grave irregularity on his part which of itself would invalidate the entire proceedings.

In order to make out a case entitling a party to impeach an award on the ground that the arbitrators improperly refused to take the evidence of an important witness, the witness must be distinctly tendered to the arbitrators.

Craven v. *Craven*, 7 Taunt 644: 1 Moor. 403; 18 R. R. 623 and *Grazebrook* v. *Davis*, 5 B. & C. 534; 4 L. J. (o. s.) K. B. 321; 8 D. & R. 295, relied upon.

An award is not void even if it is not signed by the arbitrators at the same time and place.

Wade v. *Dowling*, 4 El. & Bl. 44; 2 C. L. R. 1642; 23 L. J. Q. B. 302; 18 Jur. 728; 2 W. R. 567, not followed.

Bhobosundari v. *Makhan Lal*, 8 B. L. R. 128 and *Muthukutti Nayakan* v. *Acha Nayakan*, 18 M. 22, relied upon.

Jai Mangal Singh In re, 11 W. R. 433; 3 B. L. R. A. C. 82; *Joy Mangal Singh* v. *Mohan Ram Marwari*, 12 W. R. 397; 8 B. L. R. 319*n*. and *Benode Lal Pakrashi* v. *Pran Chanda Pakrashi*, 11 Ind. Cas. 898; 14 C. L. J. 143, referred to.

A submission to arbitration is not bad, because it omits to provide for the appointment of an umpire in the event of a difference of opinion between the arbitrators.

Gour Chunder v. *Sodoy Chunder*, 17 W. R. 30, relied upon.

Futteh Singh v. *Gango*, 4 W. R. 4 and *Haradhan* v. *Radhanath*, 10 W. R. 398; 2 B. L. R. (S. N.) 14, explained.

If the intention of the parties to an arbitration is to bind themselves and their representatives-in-interest by the decision of the arbitrators, the reference does not stand revoked merely by the death of one of the parties.

Ranji Ram v. *Salig Ram*, 11 Ind. Cas. 481; 14 C. L. J. 188, relied upon.

If before the hearing has concluded one of the parties dies his representatives should be brought on the record and made parties to the submission. But where the hearing has terminated before such death and nothing remains for the arbitrators to do but to deliver their award, the award delivered after the death is binding upon the parties and their representatives.

Appeal from the order of the Sub-Judge of Bankura, dated May 25th, 1909.

Babu *Satish Chandra Mukerjee*, for the Appellants.

Babus *Umakali Mukherjee* and *Joy Gopal Ghosha*, for the Respondents.

MANINDRA NATH *v.* MOHANUNDA ROY.

JUDGMENT.—This is an appeal under section 104 of the Code of Civil Procedure of 1908, against an order made under clause 3 of the second Schedule of the Code. It appears that the parties to this proceeding made a submission to arbitration on the 2nd August 1907. The arbitrators gave their award on the 21st March 1908. On the 15th May following, the respondents before us applied to the Court under clause 20 of the second Schedule of the Code to file the award. Objections were taken by the appellants, and were of all conceivable descriptions. The Subordinate Judge has considered these in detail and overruled every one of them. The defendants have now appealed to this Court, and on their behalf the decision of the Subordinate Judge has been assailed substantially on eight grounds; namely, *first*, that there was no valid submission to arbitration, because by the fraud of the respondents, the name of Babu Kuloda Prosad Mukerjee was inserted in the submission, whereas it had been agreed upon between the parties that the matters in difference between them should be referred to the arbitration of one gentleman only; *secondly*, that the arbitrators had decided matters not included in the submission; *thirdly*, that the award is vague and uncertain and also defective, because the arbitrators had left undecided matters included in the submission; *fourthly*, that the arbitrators were guilty of misconduct, inasmuch as one of them received a document in the absence of his colleague and of the opposite party; *fifthly*, that the arbitrators have improperly refused to take important evidence; *sixthly*, that the award was void, because it was not signed by both the arbitrators at the same time and place; *seventhly*, that the reference to arbitration was void, because there was no provision made therein for the appointment of an umpire, and *eighthly*, that the award was void, because it had been made after the death of one of the parties to the submission.

In support of the first ground, it has been contended that the agreement between the parties was that the matters in difference between them should be referred to the arbitration of one person only, namely, Babu Benode Behary Mondal, and that after this had been settled, the plaintiffs-respondents fraudulently inserted in the instrument of submission without the knowledge of the appellants, the name of Babu Kuloda Prosad Mukerjee. The Subordinate Judge has examined the evidence on this part of the case, and has come to the conclusion that the allegation of the appellants has not been established. He has relied upon one very material circumstance; namely, that the appellants, without any objection, submitted to the arbitration of both the gentlemen named. This circumstance shows conclusively that the allegation of the plaintiffs is not true. The conduct of the appellant further shows that if there was any fraud on the part of the respondent, the appellant waived all objections on this ground even after they had been apprised of what had happened. The explanation submitted by the learned Vakil for the appellants is that after the defendants became aware that the name of Babu Kuloda Prosad Mukerjee had been entered in the deed of submission, they did not think it wise to make any protest and accepted the position that he was a validly appointed arbitrator. In our opinion, if the facts are such as stated by the learned Vakil for the appellants, it is no longer open to them to repudiate the position they deliberately took up before the arbitrator [*Sheonath* v. *Ramnath* (1).] The first ground is, therefore, unsustainable.

In so far as the second objection taken by the appellants is concerned, it is in fact contradictory in part to the third objection urged on their behalf. It has been argued that the parties agreed to refer to the arbitrators the question of the disputes in respect of certain conveyances and it was never their intention to submit to the arbitrators all disputes between them relating to the estate of Kartik Prosad and Krishna Prosad. The terms of the submission, however, negative this contention. The document of submission states clearly that the arbitrators were appointed to settle the dispute between the parties regarding the properties left by Kartik Prosad and Krishna Prosad, and, in the schedule to the instrument, the whole of the properties left by these two persons is described as the subject-matter of the arbitration. There is no substance, therefore, in the second objection.

In so far as the third objection is concerned, the argument is divisible into two

(1) 10 M. I. A. 413 at p. 426; 5 W. R. (P. C.) 21; 1 Ind. Jur. (N. S.) 161.

branches. It has been contended, in the first place, that the award is defective, because the arbitrators have omitted to decide the matter in controversy between the parties in respect of the three specified properties. In so far as one of these properties is concerned, namely, the homestead and the adjacent lands, the matter has been decided by the arbitrators, but apparently in respect of the other two properties, namely Baymora and some *jungle* lands, the matter has not been expressly decided by the arbitrators. On this footing it has been argued by the learned Vakil for the appellants, that the award is bad in its entirety, because the arbitrators have left undecided the question relating to a portion of the matters in difference. But, it must be observed in this connection that it does not appear to have been brought to the notice of the arbitrators that there was any dispute between the parties with regard to these properties. The objection, undoubtedly, was not taken before the Subordinate Judge in the Court below, when the award was assailed on numerous other grounds. Consequently, the principle laid down in the cases of *Middleton* v. *Weeks* (2) and *Elson* v. *Rolfe* (3) is applicable. That principle is that no objection can be made to the award if the arbitrator determines allegations brought before his notice, though there are other matters within the scope of the submission to which his attention has not been drawn. In other words, as stated in the case of *Rees* v. *Waters* (4), in order to invalidate an award for not deciding a particular question, it must be established that the point was specifically stated and brought to the notice of the arbitrators. The first branch of the third contention, therefore, fails.

In so far as the second branch of the third contention is concerned, our attention has been invited to the fact that there are blanks in two places in the award. It has also been pointed out that in two other places the arbitrators have decided that certain lands are to be held under tenancy right, in respect whereof the rent is left unascertained. Finally, it has been observed that, in another instance, the rent is assessed at one rupee; but it is not specifically stated to whom that rent is payable. It may be conceded that, at first sight, it does appear that the award is open to the objection of vagueness and uncertainty by reason of the defects mentioned. But upon closer examination, it appears that there is no substance in any of these alleged defects.

With regard to the first item, the arbitrators have laid down the principle upon which the sum payable has to be ascertained. The arbitrators have overruled the contention that the *darputnidars* under the document executed by Brahmomoyee and Umamoyee on the 2nd September 1902 had made payment of the rent alleged by them. The amount of rent payable by the *darputnidar* to the *zemindar* can be ascertained without any difficulty from the *durputni* lease. The arbitrators have also laid down in detail the principle upon which the particular set off has to be allowed, though they have not made out the actual calculation and have left a blank where a particular figure ought to have been inserted in their award. Under such circumstances, we are not prepared to hold that there is any real uncertainty in the award [*Higgins* v. *Willes* (5); *Hopcraft* v. *Hickman* (6) and *Beale* v. *Beale* (7).] The principle is that if the arbitrator has given rules for calculating the amount of money to be paid, without stating the result of such calculation, the award is sufficiently certain, on the principle that that is sufficiently certain which can be made certain [Broom on Legal Maxims, 1911, page 478]. As an illustration of this rule, reference may be made to the case of *Beale* v. *Beale* (7), in which an award was made that one party should pay to the other all such money as he had expended in the prosecution of a suit. The award was held to be sufficiently certain, because the amount could be ascertained from the attorney's bill. The principle applicable to cases of this description was lucidly stated by Mr. Justice Cushing in the case of *Strong* v. *Strong* (8): "Where it is laid down as a principle of law that an award should be final, the meaning is not that nothing shall remain to be done to complete the execution of the award, but that the thing to be done shall have been determined and defined to a reasonable certainty." The division in that case was

(2) (1613) Cro. Jac. 200.
(3) (1805) 2 Smith 459.
(4) (1847) 16 M. & W. 263; 4 D. & L. 567.
(5) (1828) 3 M. & R. 382.
(6) (1824) 2 S. & S. 130; 3 L. J. Ch. (o. s.) 43.
(7) (1635) Cro. Car. 383.
(8) (1852) 9 Cushing 560.

to be of certain chattels, the property of a partnership, and the learned Judge in applying the above view of the law observed as follows: "It is true that the arbitrators did not themselves actually sever the things to be divided, whether hay, grain, utensils or the like. There is nothing in the submission which requires them to effect such actual severance and mechanical distribution of those things. They adjudged in the award that the things should be divided and they decided in what proportion. In many cases, no more is possible to be done, as in an award for the division of partnership effects, which may happen at the time to be abroad or otherwise not in the personal possession of either party, and of which the quantity or value is not known; or, as in the case of an award concerning objects not in their nature presently divisible or susceptible of division, such as the yet immature crop or fruit of trees; or, as in the case of joint interests not in their nature capable at any time of a material severance, like the property in a ship. All these and many other examples, which readily suggest themselves, would seem to show that an award which purports to divide a property between two persons by prescribing a rule of division may well be final, though the property in question be not actually divided, nay, though it be incapable of division, if the award gives a definite and certain rule for the division, there is no want of power in the laws to apply the rule and enforce its application. Though possible doubt may attach to the doctrine by reason of the *dicta* in some English cases, yet on the whole, it is admitted in those very cases that if the arbitrator makes "some regulation upon matters of difference," to use the words of Baron Parke or "gives direction" as to what is to be done, according to the language of Lord Abinger, "it is decisive in favour of the award." Again, in the case of *Thorp* v. *Cole* (9) reference to extrinsic documents was allowed for the purpose of explaining or determining an amount not named or ascertained in the award otherwise than by reference to such document. The award was that the defendant should pay to the plaintiff's Attorney a certain sum which was paid by him: the bill included charges relating to the plaintiff as well as to another man; the award was sufficiently certain, though it had not determined specifically the plaintiff's share of the bill, for since it was stated that the bill had already been delivered, it could be ascertained by a reference to it.

In so far as the second item is concerned, it has been pointed out that the amount of rent has not been assessed in respect of two properties. It is manifest, however, that the substantial point in controversy between the parties was, whether those lands were to be allowed to be held under tenancy right. The question of the assessment of rent was of a wholly subordinate character and the arbitrators very properly left the amount of rent to be adjusted hereinafter by a proper tribunal.

In so far as the third item is concerned, namely, the party to whom the rent of one rupee was payable, it is clear that the intention of the arbitrators was that the amount should be paid to the holder of the superior interest, that is, the representative of Kartik Prosad and Krishna Prosad. It follows, consequently, that the second branch of the third contention must fail.

In support of the fourth ground urged by the appellants, our attention has been drawn to the circumstance that one of the arbitrators received the written statement of the defendants, now appellants before us, at a time when his colleague and the plaintiffs-respondents were absent. It has been suggested that this was a grave irregularity on the part of the arbitrators, sufficient by itself to invalidate the entire proceeding. In support of this contention, reliance has been placed upon the cases of *Khelut Chunder Ghose* v. *Tara Chand Koondoo* (10); *Nandram* v. *Fakir Chand* (11) and *Thammiraju* v. *Bapiraju* (12). Reference has also been made to the observations in the case of *Harvey* v. *Shelton* (13). The cases relied upon are clearly distinguishable and are of no assistance to the appellants. They lay down the proposition that judicial acts, in order that, they may be valid, must be jointly performed [*Sreenath* v. *Raj Chunder* (14)]. But the question remains whether the mere execution of a written statement by one of the arbitrators is a judicial act within the meaning of this

(9) 2 C. M. & R. 367; 4 Daul. 437; 5 L. J. Ex. 24.

(10) 6 W. R. 269.
(11) 7 A. 523.
(12) 12 M. 113.
(13) 7 Beav. 455 at p. 462; 13 L. J. Ch. 466.
(14) 8 W. R. 171.

rule. There can be no question, as pointed out by this Court in the case of *Moti Lal Ghosh* v. *Girish Chandra Ghosh* (15), that arbitrators have power to do singly acts of a ministerial nature. In the case before us, it is difficult to see how it can be seriously contended that the mere reception of a written statement by one of the arbitrators was a judicial act. The case of *Harvey* v. *Shelton* (13), upon which reliance has been placed, was obviously of an entirely different character. In that case, one of the parties to the reference interviewed one of the arbitrators, and discussed the matters in difference between him and his opponents, and the ultimate result of the interview was that the arbitrator in question altered the view he had previously expressed. This was manifestly an improper act on the part of the arbitrator and was by itself sufficient to invalidate the proceeding. The present case is of an entirely different description. In our opinion, there is no substance in the fourth objection taken by the appellants.

In support of the fifth ground, it has been contended that the arbitrators improperly refused to take important evidence. Our intention has been invited to a statement by the arbitrators themselves that they declined to examine Brahmomoyee, although it was suggested by both the parties that she should be examined as a witness. It is clear, however, upon the evidence that the witness in question was not tendered for examination. The arbitrators were invited to go to the house where Brahmomoyee resided and to examine her. In our opinion, they very properly declined to examine the *parda-nashin* lady as a witness under these conditions. The principle applicable to a case of this description is perfectly well settled. In order to make out a case entitling a party to impeach the award, the witness must be distinctly tendered to the arbitrators. It is not enough to put an abstract proposition to an arbitrator and upon his answer, to decline to give evidence or prefer a claim. The party should tender a specific case and specific evidence [*Craven* v. *Craven* (16) and *Grazebrook* v. *Davis* (17)]. There is no substance, therefore, in the fifth ground urged by the appellants.

(15) 12 C. L. J. 346; 6 Ind. Cas. 109.
(16) 7 Taunt 644; 1 Moor. 403; 18 R. R. 623.
(17) 5 B. & C. 534; 4 L. J. (o. s.) K. B. 321; 8 D. & R. 295.

In support of the sixth ground, which is of a highly technical character, it has been argued that the award is void, because it was not signed by the arbitrators at the same time and place. In support of this argument, it has been contended that the signing of an award is a judicial act and like other judicial acts it must be performed jointly by the arbitrators concerned; and reference has been made to the cases of *Wade* v. *Dowling* (18); *Wright* v. *Graham* (19); *Anning* v. *Hartley* (20); *In re Jai Mangal Singh* (21); *Jai Mangal Singh* v. *Mohanram Marwari* (22) and *Benode Lal Pakrashi* v. *Pran Chandra Pakrashi* (23). In so far as the case of *Wade* v. *Dowling* (18) is concerned, no doubt, it supports the contention of the appellants. But we observe that, so far back as 1871, Mr. Justice Phear, in the case of *Bhobosundari* v. *Makhun Lal Dey* (24), declined to adopt the English rule on the subject, as not founded upon principles of justice, equity and good conscience. The view taken in the case last mentioned has been adopted by the Madras High Court in *Muthukutti Nayakan* v. *Acha Nayakan* (25). The case of *In re Jai Mangal Singh* (21), the head-note to the report whereof is misleading, is really not an authority in support of the contention of the appellant; while, so far as the decision in *Jai Mangal Singh* v. *Mohan Ram Marwari* (22) is concerned, the learned Judges were upon this point equally divided in opinion. With regard to the case of *Benode Lal Pakrarhi* v. *Pran Chandra Pakrashi* (23) it is sufficient to observe that the award there was invalidated on the ground that one of the arbitrators had not attended all the sittings and had subsequently signed blank papers upon which the award was drawn up and written out by his colleagues. The position, therefore, is, so far as this Court is concerned, that the opinion expressed by Mr. Justice Norman in *Jai Mangal Singh* v. *Mohan Ram Marwari* (22) is in favour of the appellants, whereas the opinion expressed by Mr. Justice Jackson in the same case and the

(18) 4 Ellis. & Bl. 44; 2 C. L. R. 1642; 23 L. J. Q. B. 302; 18 Jur. 728; 2 W. R. 567.
(19) 3 Exch. 131; 18 L. R. Ex. 29.
(20) 27 L. J. Ex. 145.
(21) 11 W. R. 433; 3 B. L. R. A. C. 82.
(22) 12 W. R. 397; 8 B. L. R. 319 *n.*
(23) 14 C. L. J. 143; 11 Ind. Cas. 898.
(24) 8 B. L. R. 128.
(25) 18 M. 22.

view adopted by Mr. Justice Phear in *Bhobosundari Dasi* v. *Makhun Lal Dey* (24) is opposed to their contention. [*Ardesar* v. *Secretary of State* (26)]. Under these circumstances, we are free to decide the matter as one of principle and we are clearly of opinion that the rule laid down in *Wade* v. *Dowling* (18), ought not to be adopted in this country. We may add that even in England the contrary view has some times been maintained. See, for instance, the cases of *Little* v. *Newton* (27) and *In re Hopper* (28). We may further observe that the English rule [*Stalworth* v. *Inns* (29), *Eads* v. *Williams* (30)] has not been adopted in the American Courts, on the ground that it is of a highly technical character and not conducive to the ends of justice [*Maynard* v. *Fredrich* (31)]. It has rightly been remarked that the rule that an award is invalid unless it has been signed by all the arbitrators at the same sitting, is certainly a rule carried to a point beyond what reason would seem to require, and it is more than probable that so rigid a doctrine would throw out many awards which justice would require should be upheld. In the case before us, it is conclusively established that the actual decision is the joint adjudication of all the arbitrators. That decision was subsequently engrossed by one of the clerks and the document in its final form was signed by the different arbitrators on different occasions. That, in our opinion, does not invalidate the award. The sixth ground, therefore, completely fails.

In support of the seventh ground, it has been contended that the submission to arbitration was bad, because no provision had been made therein for the appointment of an umpire in the event of difference of opinion between the arbitrators. In support of this view, reliance has been placed upon the cases of *Futteh Singh* v. *Gango* (32); *Haradhan Dutt* v. *Radhanath Shaha* (33). The learned Vakil for the appellant has, however, conceded that the contrary view was adopted by this Court in the case of *Gour Ohunder Buttacharjee* v. *Sodoy Ohunder Nundee* (34). The first two cases, it may be mentioned, were decided under the Code of 1859 and related to references to arbitration by Courts. In this connection, it is worthy of note that, under section 509 of the Code of 1882, it was expressly provided that in cases of reference to arbitration in pending suits, provision had to be made for the appointment of an umpire in the event of a difference of opinion between the arbitrators. There was, however, no such legislative provision in respect of private submissions by parties. We are unable to hold nor can we discover any intelligible principle upon which we may be reasonably invited to hold that the award is void, though there has been no difference of opinion between the arbitrators, merely because no provision was made for a contingency which has not actually happened. The seventh ground cannot be supported.

With reference to the eighth and last objection taken by the appellant, it has been argued that as one of the parties died before the arbitrators delivered their award, their authority terminated, and the award subsequently delivered was void and inoperative in law. In our opinion, there is no foundation for this contention. The cases of *Harakrishna Mitter* v *Ram Gopal Mitter* (35) and *Perumalla Satyanarayana* v. *Perumalla Venkata* (36) show that the principle of *nunc pro tunc* is applicable to proceedings before arbitrators. The learned Vakil for the appellant has, however, contended that these cases are distinguishable, because in each of them, the reference to arbitration had been filed in Court, whereas in the case before us the whole of the proceedings before the arbitrator was upon a private submission. But, clearly, there is no substantial difference in principle between the cases mentioned and the cases before us. As pointed out by the learned Judge of the Madras High Court in *Perumalla Satya Narayana* v. *Perumulla Venkata* (36), the rule of the English Common law that a submission to arbitration stands revoked by the death of one of the parties, is

(26) 9 B. H. C. R. 177.
(27) 9 Dowling 437; 10 L. J. C. P. 88; 5 Jur. 246; 2 Man. & G. 351; 2 Scott. N. R. 165.
(28) 2 Q. B. 367 at p. 376; 36 L. J. Q. B. 97; 8 B. & S. 100; 15 L. T. 566; 15 W. R. 443.
(29) 13 M. & W. 466; 2 D. & L. 428; 14 L. J. Ex. 81; 9 Jur. 285.
(30) 24 L. J. Ch. 531; 4 De G. M. & G. 674; 1 Jur. (N. S.) 193; 5 W. R. 98.
(31) (1851) 7 Cushing 247.
(32) 4 W. R. 4.
(33) 10 W. R. 398; 2 B. L. R. (S. N.) 14.
(34) 17 W. R. 30.
(35) 6 Ind. Cas. 170; 14 C. W. N. 759.
(36) 27 M. 112.

not applicable to this country. The test to be applied here is what is the true nature of the submission? Were the matters in difference personal questions in respect whereof it was not intended that the succession in interest of the parties should be affected by the decision of the arbitrators? If the intention of the parties was that not merely themselves but their representatives-in-interest should be bound by the decision of the arbitrators, the reference plainly does not stand revoked merely by the death of one of the parties. [*Ramji Ram* v. *Salig Ram* (37)]. If this view is maintained, the only other question that arises, is, whether after the death of one of the parties, any judicial act, such as the hearing of the case, was undertaken by the arbitrators. If the hearing had not been completed it would have been necessary to bring the representatives of the deceased party on the record and to make them parties to the submission. Here, however, the hearing had terminated and nothing remained for the arbitrators to do but to deliver their award. We are of opinion, that the award so delivered is binding upon the parties and their representatives-in-interest. There is no substance, therefore, in the eighth ground urged by the appellant.

The result is, that all the grounds upon which the decision of the Subordinate Judge has been assailed fail, and must be overruled, The appeal is, therefore, dismissed with costs. We assess the hearing fee at ten gold *mohurs*.

Appeal dismissed.

(37) 14 C. L. J. 188; 11 Ind. Cas. 481.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1348 OF 1911.

December 9, 1911.

Present:—Mr. Justice Shah Din.

JIWA—PLAINTIFF—APPELLANT

versus

BUTA AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (II of 1905*), ss.* 3, 5—*Agricultural land—Urban immoveable property—Character of land to be looked at as on the date of sale and not as before or after sale.*

A piece of land was entered in the last Settlement as *bara* (*ghair mumkin*) and no Revenue was assessed on it. After the Settlement, however, it was brought under cultivation and was occupied for agricultural purpose for about 15 years. At the date of its sale it was still occupied for these purposes though it was situate in the direction of the recent extension of a town and on the main road connecting the town with its Railway Station:

Held, that, for the purposes of pre-emption, the land was agricultural land and not urban immoveable property.

In determining whether or not piece of land is for pre-emption purposes agricultural land the time to be looked at is the time when the sale was made. The fact that at one time it was *ghair mumkin* and not assessed to Revenue, that since the date of sale it has been built upon by the vendee or that it lies in the direction of recent extensions of a town and on the main road connecting the town with its Railway Station, is insufficient to alter its character.

Second appeal from the order of the Divisional Judge, Ambala, dated the 18th November 1908, confirming that of the Munsif, 1st Class, Ludhiana, dated the 1st August 1908, dismissing plaintiff's claim.

Dr. *Muhammad Iqbal*, for the Appellant.

Mr. *Vishnu Singh*, for the Respondents.

JUDGMENT.—The facts of this case, so far as they are material to the decision of this appeal, are as follows:—By a registered deed dated the 5th of July 1907, defendants Nos. 1 to 4 sold the land in suit measuring 3 *biswas*, which is situate in *Mauza* Agwar Gujran a suburb of the town of Jagraon, to defendant No. 5 for Rs. 75. The plaintiff, Jiwa, who is a proprietor in the village in question, brought a suit for pre-emption in respect of the land sold alleging, *inter alia*, that the vendee being a non-proprietor in the village, the plaintiff had a superior right of pre-emption. In answer to the plaintiff's claim the vendee raised several pleas, but, for the purposes of this appeal, it is only necessary to notice one of them, namely, that the land in suit was not agricultural land, that it formed part of the extension of the town of Jagraon, and that, therefore, the plaintiff had no right of pre-emption in respect of it. On the pleadings of the parties, the Court of first instance framed, among others, the following two issues:—

(1) Is the land in suit agricultural land and situate in the village of Agwar Gujran?

(2) Has plaintiff got a preferential right of pre-emption?

On the above issues the Court found in the negative, and, without going into the other issues raised between the parties, dismissed the suit. The following is a summary of the conclusions recorded by the Court in the

concluding portion of its judgment on the two issues as set forth above:—

"(1) That *abadi* Agwar Gujran is part of the town of Jagraon and not a separate village;

"(2) that since the market has been built, the Agwar Gujran portion of the town is being extended as far as the market and the Railway Station, and a *bazar* is in the course of formation on the station road;

"(3) that a shop for the sale of milk has been built on the land in suit by the vendee, and

"(4) that the land is the site of an old fort and no Revenue is assessed on it."

In an earlier part of the judgment, the Court says that the statement of Milkhi Ram, *patwari*, shows that the land in suit is situated in the *mahal* Agwar Gujran and is entered in the Revenue papers as an agricultural land.

This part of the *patwari's* statement has, as we shall presently see, an important bearing on the question whether the plaintiff has a right of pre-emption in respect of the land in dispute, but the Court has not given due weight to it with reference to the provisions of the Punjab Pre-emption Act, probably on the ground that the land is not assessed to Revenue and because it forms part of the alleged extension of the town of Jagraon.

On appeal, the Divisional Judge agreed with the first Court in holding that the plaintiff had no right of pre-emption regarding the land in suit. The question which the learned Judge propounded to himself was, whether the property in suit could fairly be described as "urban immoveable property" and he answered that question in the affirmative. His reasoning can best be described in his own words: "Jagraon town", says the Divisional Judge, "is enclosed by an ancient wall round which lie several *Agwars* or suburbs, themselves within Municipal limits, though their lands are outside those limits and form separate Revenue estates. At a distance of a mile or two from the town lies the *tahsil*, and recently the Railway Station has been built in that direction. The property in suit lies on the main road connecting the town and the station and, appellant tells me, it is nearer the town than the station. The town has for years shown a tendency to extend northwards towards the *tahsil* and the Ludhiana-Ferozepore road. This tendency will doubtless be increased by the construction of the Railway. The land in dispute is no longer part of the agricultural land of a village but lies in the suburb of a raising town and has now been built upon by defendant."

It seems to me, that in coming to the conclusion that the land in suit is urban immoveable property and, therefore, not subject to the right of pre-emption, the Divisional Judge has overlooked both the statement of the *patwari* in this case and the provisions of the Punjab Pre-emption Act which bear on the question under consideration. Under section 5 of the said Act, a right of pre-emption always exists in respect of "agricultural land," though it is subject to all the provisions and limitations contained in the Act; and the question for decision in this case is not whether the land in dispute is situate in a village or in a town, but whether it is "agricultural land" within the meaning of section 3 (1) of the said Act. According to section 3, "agricultural land" means land as defined in the Punjab Alienation of Land Act, 1900, and in that Act the expression "land" means "land which is not occupied as the site of any building in a town or village and is occupied or let for agricultural purposes or for purposes subservient to agriculture or for pasture, and includes * * * * *" (here follow 5 clauses which it is unnecessary to set out in this place). In sub-section (3) of section 3 aforesaid, "urban immoveable property" is defined as meaning immoveable property within the limits of a town *other than agricultural land.*" With reference to the above definitions it is clear that if the land in suit is agricultural land it is not "urban immoveable property" within the meaning of the Punjab Pre-emption Act, no matter whether it is situate in a town or in a village and the whole discussion in this case as to the recent extensions of the town of Jagraon, or as to the probability of its future extension towards the *tahsil* and the Railway Station is perfectly irrelevant. It is equally clear that if the laud in question was, at the date of sale and for sometime prior thereto, occupied or let for agricultural purposes or for purposes subservient to agriculture and was not occupied as the site of any building in a town or village, it was agricultural land within the meaning of the Pre-emption Act and was, therefore, subject to pre-emption under section 5 thereof.

JIWA *v.* BUTA.

On this point the *patwari's* statement is quite explicit. He says that the land has been cultivated since 1892-1893, and is entered in the Revenue papers as *chahi mazrua*. The *fard* attached to the plaint shows that at the last Settlement that land was entered as *bara* (*ghair mumkin*) and no Revenue was assessed on it. Since the date of the Settlement, however, the land has been brought under the plough; and it is not disputed that it lies outside the Municipal limits of the town of Jagraon and forms part of the Revenue paying estate of Agwar Gujran which contains a large area of agricultural land, part of which is now being sold and utilised as building sites. If then, the land in suit has been occupied for agricultural purposes for no less than 15 years before suit, and if at the date of sale it was still occupied for the same purpose, it is incorrect to say that, for the purposes of the present litigation, it is urban immoveable property, simply, because at one time it was *ghair mumkin* and is not assessed to land Revenue or because it lies in the direction of the recent extension of the town of Jagraon and on the main road connecting the town and the Railway Station. The fact that since the date of sale it has been built upon by the vendee is not sufficient to alter its character so as to affect the plaintiff's right of pre-emption; for in a case of this kind in determining whether the subject-matter of suit is agricultural land or not the time to be looked at is the time when the sale was made and not when the suit was instituted. Unless and until it is shown that at the date of sale the land in question had ceased to be agricultural land, as defined by section 3 (1) of the Pre-emption Act, the plaintiff must be held to have a right of pre-emption in respect of it, though obviously he can only exercise it subject to the provisions and limitations contained in the said Act.

It now only remains to point out that the decisions cited in the judgment of the Court of first instance have no bearing whatever on the question under consideration. *Kadir Bakhsh* v. *Ghulam* (1); *Ram Narain Singh* v. *Sewak Ram* (2); *Haider* v. *Iswar Das* (3); *Ishwar Das* v. *Duni Chand* (4); *Haryallu Mal* v. *Nathu Ram* (5) were all cases decided under sections 9, 10 and 11 of the Punjab Laws Act, which have been repealed by the Punjab Pre-emption Act; and they are, therefore, irrelevant to the present inquiry. Here, there is no question of whether Agwar Gujran is a village or a town, which would have been a question of great importance if section 10 of the Punjab Laws Act had governed the case; the sole question which requires decision in this case with reference to the provisions of the new Act, is whether the land in suit is agricultural land or not, and on that question the decisions cited by the first Court throw no light at all.

Before me the Counsel for the vendee also relied on *Muhammad Din* v. *Shah Din* (6) but that decision is wholly inapplicable to the facts of the present case, inasmuch as there it was admitted that at the time of the sale the land in respect of which the plaintiff had preferred his claim was not agricultural land within the meaning of the Punjab Tenancy Act, 1887. In fact, in that case it was held proved that during the last 17 or 18 years the land had been gradually built upon and that at the date of sale there were some 200 buildings standing on it. Besides in that case also, pre-emption was claimed under the provisions of the Punjab Laws Act, and the claim was adjudicated upon with reference to sections 10, 11 and 12 of the said Act.

For the above reasons, I hold that the land in suit was agricultural land at the date of sale and that the plaintiff has a right of pre-emption in respect of it. I, therefore, accept this appeal and remand the case under Order XLI, rule 23, Civil Procedure Code, to the Court of first instance for decision on the merits. Stamp on this appeal will be refunded and the other costs will be costs in the cause.

Appeal accepted; Case remanded.

(1) 74 P. R. 1897.
(2) 21 P. R. 1906; 110 P. L. R. 1906.
(3) 22 P. R 1906; 115 P. L. R. 1906.
(4) 27 P. R. 1907.
(5) 51 P. R. 1907; 38 P. L. R. 19 07
(6) 90 P. R. 1907.

PRAYAG NARAIN SINGH *v.* SUKDEO NARAIN SINGH.

CALCUTTA HIGH COURT.
MISCELLANEOUS CIVIL APPEAL NO. 449 OF 1910.
July 24, 1911.
Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

PRAYAG NARA N SINGH— DECREE-HOLDER—APPELLANT
versus
SUKDEO NARAIN SINGH—JUDGMENT-DEBTOR—RESPONDENT.

Appeal Interlocutory order—Order intermediate between preliminary and final decrees, appeal from, whether competent—Civil Procedure Code (Act V of 1908), s. 47—Appellate Court—Jurisdiction if can be given by consent of parties.

An agreement between two litigating parties as to the mode of determining the questions in controversy between them, different from the mode prescribed by the Legislature, may be binding upon them. But their mutual consent cannot create a right of appeal where none is allowed by statute, for a right of appeal is a creature of statute.

Pisani v. *Attorney General for Gibralter*, L. R. 5 P. C. App. 516 at p. 522; 30 L. T. 729; 22 W. R. 900; *Sadasiva Pillai*, v. *Ramalinga Pillai*, 15 B. L. R. 383; 24 W. R. 193; 2 I. A. 219, *Lane* v. *Esdaile*, (1891) A. C. 210; 60 L. J. Ch. 644; 64 L. T. 666; 40 W. R. 65; *Minakshi* v. *Subramanya*, 14 I. A. 160; 11 M. 26 and *Golab Sao* v. *Chowdhury Madho Lal*, 2 C. L. J. 384; 9 C. W. N. 956, relied upon.

A preliminary decree was made in a partition suit on the basis of an award of arbitrators. It directed that certain properties should be divided in execution proceedings. On two previous occasions appeals were preferred against orders made in the proceedings on the basis that they fell within the scope of section 47 of the Code and no objection was taken to the competency of the appeals. Another appeal has been preferred against an order made in the execution proceedings, and it is objected that no appeal lies:

Held, that interlocutory orders intermediate between the preliminary and the final decrees, are not appealable and that it is open to the respondents to take exception to the competency of the appeal, notwithstanding the direction given in the preliminary decree and notwithstanding their omission to take exception to the validity of the appeals filed against the previous orders in the so-called execution proceedings.

Appeal from the order of the Sub-Judge of Gaya, dated August 5th, 8th and 9th, 1910.

Babu *Umakali Mukherjee* and Maulvi *Mahomed Mustofa Khan*, for the Appellant.

Dr. *Rash Behary Ghose* and Babu *Ganesh Dutt Singh*, for the Respondent.

JUDGMENT.—This appeal is directed against three orders which purport to have been made in course of proceedings in execution of a decree in a suit for partition of joint properties. A preliminary objection has been taken to the competency of the appeal.

It appears that the dispute between the parties was referred to arbitration and on the 21st December 1906, a decree was made on the basis of the award of the arbitrators. The arbitrators appear to have suggested that the properties should be divided in proceedings in execution of the decree except one property which they themselves had divided. The Sub-Judge accepted this suggestion and the result was that the preliminary decree which was drawn up directed that the properties which remained undivided be divided in execution proceedings. Protracted investigations have taken place in the execution proceedings and, on two previous occasions appeals were preferred to this Court against orders made in the proceedings on the basis that the orders fall within the scope of section 244 of the Code of Civil Procedure, 1882, and were appealable as decrees. On those occasions, no objection appears to have been taken to the competency of the appeals. On the present occasion, however, an objection has been urged that the orders sought to be assailed are not appealable as they are interlocutory orders intermediate between the preliminary decree and the final decree which has not yet been made. The learned Vakil for the respondents has contended that these orders cannot be regarded as decrees; *first*, because, although they purport to have been made under section 47 of the Code of Civil Procedure, 1908, they could not have been made under that section, and *secondly*, because, even if they are treated as properly made under section 47, they do not decide any question relating to the rights of the parties and, therefore, do not embody any adjudication which can be challenged by way of appeal. The learned Vakil for the appellant has contended, on the other hand, that it is not open to the respondents to take any objection to the competency of the appeal, because it was by consent of parties that the preliminary decree directed the investigation of all these matters in the course of execution proceedings. In our opinion, the preliminary objection is obviously well-founded, and it is open to the respondents to take exception to the competency of the appeal, notwithstanding the direction given in the preliminary decree and notwithstanding their omission to take exception to the validity of

KARIMAN v. MASITI.

the appeals filed against the previous orders in the so-called execution proceedings.

There is no room for controversy that the order embodied in the preliminary decree was irregular, at least to this extent that the parties agreed to have a determination of questions in execution proceedings which ought to have been tried in the course of a pending suit. It does not follow, however, that such an agreement is invalid in law. In fact, the decisions of the Judicial Committee in the cases of *Pisani* v *Attorney-General for Gibraltar* (1) and *Sadasiva Pillai* v. *Ramalinga Pillai* (2) show that an agreement between two litigant parties as to the mode of the determination of the questions in controversy between them, different from the mode prescribed by the Legislature, may be binding upon them. But it does not follow that the parties can by mutual consent create a right of appeal where none is allowed by statute. Authority is scarcely needed in support of the elementary proposition that a right of appeal is a creature of statute [*Lane* v. *Esdaile* (3); *Minakshi* v. *Subramanya* (4)] and, if no right of appeal has been allowed by the Legislature, the parties cannot by agreement take matters in controversy to the Appellate Court. This proposition is amply supported by the observations of the Judicial Committee in the case of *Pisani* v. *Attorney-General for Gibralter* (1): "It is true that there was a deviation from the *cursus curiæ* but the Court had jurisdiction over the subject, and the assumption of the duty of another tribunal is not involved in the questions. Departures from ordinary practice by consent are of every day occurrence, but unless there is an attempt to give the Court a jurisdiction which it does not possess or something occurs which is such a violent strain upon its procedure that it puts it entirely out of its course, so that a Court of Appeal cannot properly review the decision, such departures have never been held to deprive either of the parties to the right of appeal." Here, in so far as the parties agreed that the partition was to take place in the course of execution proceedings, they may be held bound by their agreement, but when they invite this Court to hear an appeal which this Court is not competent to hear because no appeal is allowed by law, the conclusion becomes self evident that the agreement does not avail either of the parties. By consent of parties we cannot acquire appellate jurisdiction where none has been created by the statute [*Golab Bao* v. *Chowdhury Madho Lal* (5)]. The position, therefore, is incontestable that it is open to the respondents to urge that the appeal is incompetent. But, even if the respondents were not at liberty to take the objection, it would be the duty of the Court to dismiss the appeal which, it cannot be seriously disputed, is incompetent. The result, therefore, is that this appeal is dismissed but there will be no order as to costs.

It will now be open to either of the parties to invite the Sub-Judge to draw up the final decree in the partition suit and, when that decree has been drawn up, it will be open to either of them who may be aggrieved by the result, to prefer an appeal to this Court, and to challenge the propriety of interlocutory orders.

We may add that the matter is not one of form but of substance. In order that a partition decree may be drawn up, the parties have to pay stamp-duty as prescribed by the Legislature. There are obvious advantages also to the parties if a final decree is drawn up because, by reference to the decree, their rights as determined by the partition may be ascertained without any difficulty or likelihood of dispute. On the other hand, if matters are allowed to stand, as they do in the case before us, it would be extremely difficult, if not impracticable, for both the parties to ascertain their precise rights, from the numerous orders recorded in the order-sheet of the Subordinate Judge.

(1) L. R. 5 P. C. App. 516 at p. 522; 30 L. T. 729; 22 W. R. 900

(2) 2 I. A. 219; 15 B. L. R. 383; 24 W. R. 193.

(3) (1891) A. C. 210; 60 L. J. Ch. 644; 64 L. T. 666; 40 W. R. 65.

(4) 14 I. A. 160; 11 M. 26.

(5) 2 C. L. J. 384; 9 C. W. N. 956.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL NO. 150 OF 1911.

December 18, 1911.

Present:—Mr. Justice Johnstone.

Musammat KARIMAN—PLAINTIFF—APPELLANT

versus

Musammat MASITI AND OTHERS—DEFENDANTS—RESPONDENTS.

Probate and Administration Act (*V of* 1881), *s.* 19—*Will*

MUHAMMAD *v.* IMAM KHATUN.

—Probate—Letters of Administration—Legatee's right to administer estate when some executors willing to act—Fitness of executors—Applications for Probate—Parties—Legatee impugning executor's good faith should be made party.

A legatee cannot be allowed to administer the estate of a testator unless all the executors refuse to act. The Court should not consider whether the executors who are willing to act are fit and proper persons for the grant of Probate.

Hara Coomar Sircar v. *Doorga Moni Dasi*, 21 C. 195, relied upon.

Although a legatee has no title to administer the property, he should be brought on the record of a Probate case as an interested person to safeguard his interests where he impugns the good faith of the executors.

Khettra Moni Dasi v. *Shyama Churn*, 21 C. 539, followed.

Miscellaneous first appeal from the order of the District Judge of Delhi, dated 27th January 1911, striking out the name of *Musammat* Kariman from among the petitioners for grant of Letters of Administration of the Will of *Musammat* Fahiman Jan, dated 23rd July 1910.

Mr. *Lakshmi Narain* and *Lala Sangam Lal*, for the Appellant.

Khwaja *Kamal-ud din*, for the Respondent.

JUDGMENT.—In this case four persons applied for Letters of Administration of the Will of the deceased *Musammat* Fahiman Jan. The District Judge observed that out of these four, one was *Musammat* Kariman who is simply a legatee and not an executor, and the three others were out of the 14 executors appointed by the Will. He, therefore, directed that *Musammat* Kriman's name be struck out, that the names of the remaining executors be added, and that the petition be amended so as to make it an application for Probate and not for Letters of Administration. Against this order *Musammat* Kariman has filed an appeal, in which she says that she is entitled to Letters of Administration. When this case was before me on 23rd February 1911, Mr. Sangam Lal added this to his prayer, namely, that at least his client should remain a party to the proceedings.

I have now heard both sides. Mr. Sangam Lal refers me to section 19, Act V of 1881, under which Letters of Administration may be given to a legatee in the case of a Will by which no executor was appointed or if the executors appointed refused to act, but this section has no application in the present case, for several of the executors are willing to act. The decision of the Court below is, therefore, correct to the extent that *Musammat* Karimn cannot be allowed to administer this estate unless all the executors refuse to act. Mr. Sangam Lal suggests that the Court should consider whether the executors who are willing to act are fit and proper persons, but this suggestion is contrary to law, *Cf. Hara Coomar Sircar* v. *Doorga Moni Dasi* (1).

On the other hand, I think that *Musammat* Kariman's name should have remained on the record as a party. She is an interested person and she expresses doubts as to the good faith of the executors. In accordance with *Khettra Moni Dasi* v. *Shyama Churn* (2) I, therefore, direct *Musammat* Kariman's name to be added to the record as a respondent so that she may be able to safeguard her interests, it being understood worthless that she has no title to administer the property.

As appellant's claim has been for the most part rejected, I think she should pay Rs. 10 costs to the opposite party. The appeal is accepted to the above extent.

Appeal partially accepted.

(1) 21 C. 195.
(2) 21 C. 539.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 567 OF 1910.

November 30, 1911.

Present:—Mr. Justice Kensington.

MUHAMMAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat IMAM KHATUN—DEFENDANT—RESPONDENT.

Res judicata—*Civil Procedure Code (Act XIV of 1882), s. 158—Dismissal of suit under this section, effect of—Gift of land out of holding to absentee relation—Whether* shamilat *included—Intention of parties—Status of full proprietor.*

The dismissal of a suit under section 158 of the old Civil Procedure Code operates as *res judicata* in respect of the right of the plaintiff to recover by any subsequent suit the property sued for in the first suit.

The ancestors of plaintiffs and defendants originally owned a joint holding in equal shares. The plaintiffs' branch, however, remained absentees for a long time. Their suit to recover their half share of the holding and of *shamilat* was dismissed in 1891. In 1897 defendants voluntarily gifted about 29 *bighas* to the plaintiffs out of the original holding. This area constituted about 1/5th share of the whole holding.

MUHAMMAD *v.* IMAM KHATUN.

On a subsequent partition of the *shamilat* land the area falling to the share of the holding was allotted to defendants without giving plaintiffs any share. Plaintiffs thereupon sued for possession of one-half share, of the *shamilat* area allotted to defendants:

Held, (1) that plaintiffs were not entitled to one-half share, as their suit for the *shamilat* was dismissed in 1891;

(2) that in considering whether the gift to plaintiffs in 1897 included the corresponding share of *shamilat*, what the Court had to look to was the intention of the parties and as the mutation proceedings showed that plaintiffs were restored to the position of full proprietors in respect of 1/5th share in the holding, they were entitled to 1/5th share in the *shamilat* allotted to the holding.

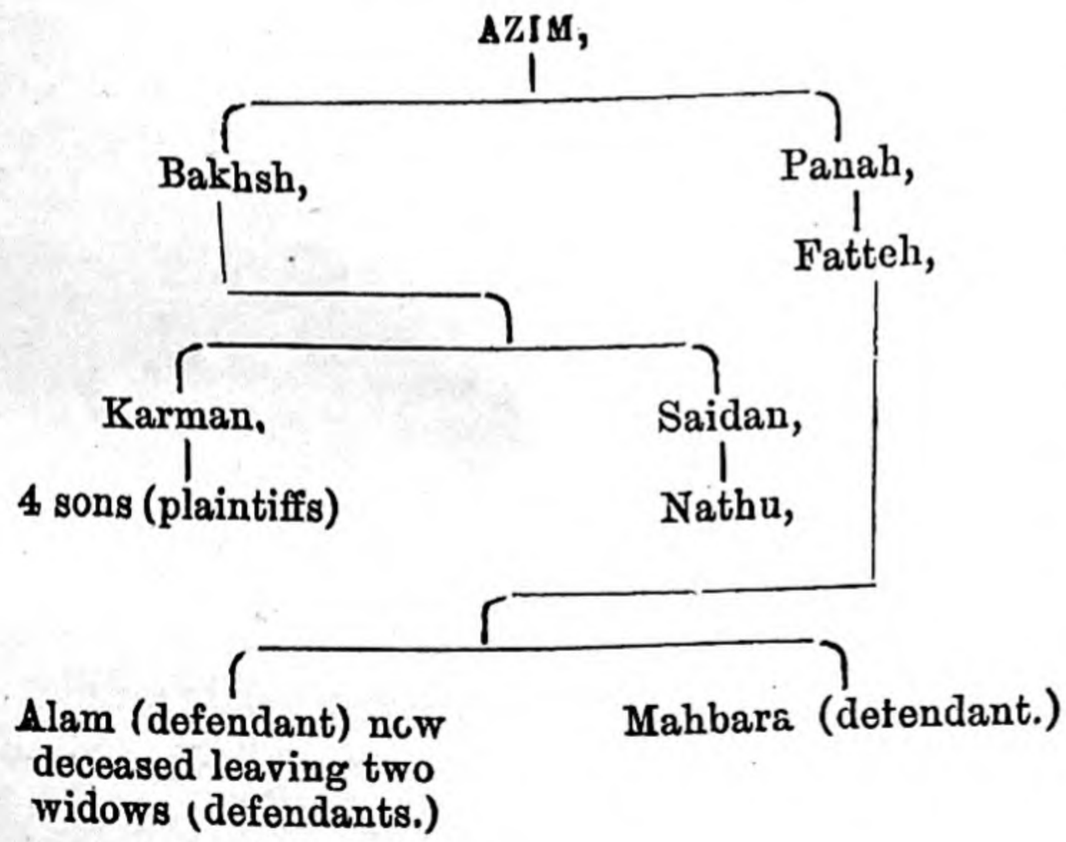
Ram Das v. *Amir Shah*, 113 P. R. 1901, distinguished.

Second appeal from the order of the Additional Divisional Judge, Shahpur Division, dated 14th July 1909, confirming that of the Munsif, 1st Class, Shahpur, dated the 31st May 1909, dismissing plaintiffs' claim.

Mr. *Harris*, for the Appellants.

Mr. *Nanak Chand*, for the Respondent.

JUDGMENT.—The parties to this case are related as follows:



The original joint holding of the family was about 146 *bighas* of which plaintiffs were by pedigree entitled to a half share. Their branch, however, had long been absent from the village and settled some 20 *kos* away. In 1891 the plaintiffs' branch sued Fatteh for one-half of the holding together with rights in *shamilat* and this suit was dismissed on the 16th June 1891, under section 158 of the old Civil Procedure Code.

For the time being, this decree disposed of the plaintiffs' rights absolutely and there is no doubt that in any subsequent suit brought by the plaintiffs in respect of either the original holding or of *shamilat* the decree would be *res judicata* against them. The position has, however, been altered by the fact that on the 17th August 1897, the defendant's branch voluntarily gifted about 29 *bighas* to the plaintiffs out of the original holding of 146 *bighas*. This gift was incorporated in an unregistered deed and was formally attested in mutation proceedings on the 19th June 1898 with the full consent of defendant's branch notwithstanding the fact that plaintiffs' names had by that time been cut out of the record as being no longer, even in name, sharers in the joint holding. It will be observed that this gift, which seems to have been made in recognition of the fact that plaintiffs were entitled to something at any rate, covered almost exactly a one-fifth share of holding in place of the one-half share to which plaintiffs were entitled by pedigree.

The present suit has arisen out of the fact that about 75 *bighas* of *shamilat* area have now been allotted to the defendants on partition of the *shamilat* without giving plaintiffs any share. The plaintiffs have accordingly claimed one-half of the 75 *bighas* as by pedigree. The suit has been dismissed by both the lower Courts, but the judgment of the lower Appellate Court is brief and hardly discusses the legal aspects of the case.

The greater part of the judgment of the Munsif is taken up with the discussion of the question whether the present suit is *res judicata* in view of the previous suit of 1891. As the latter suit included *shamilat* rights, the Munsif's finding of *res judicata* is correct enough as far as it goes, but it does not go very far. The real point is that in 1897 the defendants surrendered to some extent the advantage which they had obtained in 1891, and of their own accord made a gift of certain land to the plaintiffs. What we have now to consider is whether that gift should be treated as restricted to the area given, or whether the understanding was that the plaintiffs should, to that extent, acquire a footing in the village as full proprietors with rights in the *shamilat*.

CHERIYONNI v. NHERA POYILE.

The defendants rely as to this on the well known ruling of *Ram Das* v. *Amir Shah* (1), which lays down that alienations of land are not to be understood as inclusive of *shamilat* rights unless these are specifically mentioned. That ruling should certainly be followed in all ordinary cases of alienations, but in the present case I think that what we have to look to is the intention of the parties. The gift of 1897 is really covered by the mutation proceedings and after examining them it seems to me clear enough that the defendant's branch intended that the plaintiffs should be restored to the position of full proprietors though not to the full extent indicated by their share as by pedigree. What defendants had to give was a portion of a joint holding and they did so without any sort of restrictive condition. They put the plaintiffs' branch into the same position as themselves as regards about 29 *bighas* or one-fifth of their holding.

Having done this act of grace, I do not think that the defendants are justified in now trying to put the plaintiffs on a lower position than themselves as regards the *shamilat*. The appeal is accordingly accepted and the plaintiffs are given a decree for one-fifth of the area in dispute as being approximately that proportion of the *shamilat* to which they are entitled in view of their position as owners of about one-fifth of the original joint holding. There is a good deal to be said on both sides in the matter and the plaintiffs ought to have raised the question in partition proceedings instead of waiting till the partition had been effected. The parties will accordingly pay their own costs throughout.

Appeal accepted.

(1) 113 P. R. 1901.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1043 OF 1910.

November 15, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

CHERIYONNI *alias* ANINHAT MOOTHAVAR, STYLED PAYYORAMALA KOTHE RAMAN—APPELLANT

versus

NHERA POYILE PARKUM MINJER PACKER AND ANOTHER—RESPONDENTS.

Mortgage—Personal covenant—Suit on mortgage—Withdrawal of prayer for sale of hypotheca—Second Appeal, value of, is determined by original value of suit.

A deed of mortgage provided as follows: "If I fail to pay the amount at the prescribed time I agree to your realising principal and interest ... ... by causing sale of my *jenmam* and all other rights in the properties hypothecated and to pay the deficit, if any, in person." The mortgagee sued on the document and in the course of the trial withdrew the prayer for sale.

Held, (1) that the plaintiff was not entitled to a personal decree for the amount sued for;

Madappa v. *Ram Krishna*, 13 Bom. L. R. 698; (1911) 2 M. W. N. 1; 15 C W. N. 962; 14 C. L. J. 245 35 B. 327; 12 Ind. Cas 42, distinguished.

(2) that a second appeal lay to the High Court, notwithstanding the withdrawal of the prayer for sale, as the question of whether a second appeal lies is determined by the nature of the suit as originally framed.

Second appeal against the decree of the District Court of North Malabar, in A. S. No. 222 of 1909, presented against that of the District Munsif of Quilandy, in O. S. No. 856 of 1907.

Mr *J. L. Rozario*, for the Appellant.

Mr. *T. Madhavan Nair*, for the Respondents.

JUDGMENT.—The first defendant, a *Stani*, executed a hypothecation-bond in favour of the plaintiff for a debt borrowed for the purpose of paying arrears of Government revenue on properties belonging to the *Satnom*. The document, Exhibit A., after setting out the purpose for which the loan was taken says: "I shall pay you the said sum of Rs. 200 before 30th *Makaram* 1078 next and receive back this deed . . . . . If I fail to pay the amount at the prescribed time, I agree to your realising the principal with interest accruing at 15 per cent. a year from the prescribed time so long as it remains unpaid by causing sale of my *jenmam* and all other rights in the properties hypothecated, and to pay the deficit, if any, in person . . . . " It will be observed that the parties depart from the phraseology ordinarily employed in hypothecation documents, that the amount may be recovered both from the property hypothecated and from the debtor personally and provide that the debt is to be recovered by sale of the hypotheca in the first instance and only the deficit, if any, from the debtor. The debt was borrowed for a purpose which would justify charging it on *Stanom* property and the purpose is recited in the document.

There is, no doubt, a general covenant to pay the debt within the time specified, which would ordinarily render the covenantor personally liable but the specific stipulation re-

lating to the creditor's rights in case of default shows, in our opinion, that the plaintiff was bound to proceed against the hypotheca before claiming a personal decree against the first defendant. In the plaint he asked for recovery of the debt by sale of the mortgaged property, but subsequently gave up that claim. We must hold that he is not entitled to a personal decree against the first defendant. The case of *Madappa* v. *Rama Krishna* (1), relied on by Mr. Madhavan Nair, affords him no help. The Privy Council in that case merely held, on the construction of a particular document, that there was a covenant to pay interest for a disputed period.

Mr. Madhavan Nair also raised a preliminary objection that no second appeal lies in this case, as the prayer for sale of the hypotheca was withdrawn and the amount sued for is less than Rs. 500. But it is the nature of the suit as originally framed that determines the question whether a second appeal is properly maintainable. We reverse the decrees of the Courts below and dismiss the suit with costs throughout.

Appeal allowed.

(1) 13 Bom. L. R. 698; (1911) 2 M. W. N. 1; 15 C. W. N. 962; 14 C. L. J. 245; 35 B. 327; 12 Ind. Cas. 42.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1087 OF 1910.

November 16 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

POLINA ACHANNA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MADIPATI VENKATARAMANA—DEFENDANT—RESPONDENT.

Madras Rent Recovery Act (VIII of 1865*)*, *ss.* 10, 12, 41, 49, 70—*Ejection of tenant by illegal order of Revenue Court—Suit for possession and damages under section* 12—*Suit for damages alone maintainable—'Proceedings', meaning of.*

A *ryot*, who was ejected from his land by an alleged illegal order of a Revenue Court passed under section 10 of Madras Act VIII of 1865, sued the landlord for possession and for damages under section 12 of the Act:

Held, that the suit for possession was not maintainable, but that the suit for damages was.

The expression 'proceedings' in section 49 of the Act is not restricted to proceedings taken by a public Officer or Court.

Raja Cheli Kani Venkatagopala Rayon Garu v. *Narayansami Reddi*, 27 M. 210 and *Velagaleti Ramakrishnaya* v. *Suramani Bapaya Appa Row*, 27 M. 430, referred to.

Second appeal against the decree of the District Court of Godavari, in A. S. No. 116 of 1908, presented against the decree of the Head Assistant Collector of Rajahmundry, dated 1st June 1908, in Summary Suit No. 3 of 1906.

Mr. *P. Narayana Murthy*, for the Appellant.

The Hon'ble Mr. *T. V. Seshagiri Aiyar*, for the Respondents.

JUDGMENT.—The suit in this case was instituted under section 12 of Act VIII of 1865 for recovery of possession of the land from which the plaintiff, a *ryot*, was ejected by the land-holder in pursuance of an order obtained under section 10 of Act VIII of 1865, in consequence of the plaintiff's failure to accept a *patta* which he was directed to accept by the Revenue Court. The plaintiff claimed also damages sustained by him in consequence of the unlawful eviction. The order of eviction was passed by the Revenue Court on the 20th January 1906 and was carried out on the 22nd contrary to the provisions of section 70 of the Act, which enacts that the tenant shall not be evicted before the expiration of thirty days from the date of the order. The District Court held that the suit was not maintainable under section 12 of the Act and in so holding it was right, as that section only provides that no tenant shall be ejected without an order under section 10 or section 41. But the learned Vakil for the appellants contends that as the eviction was unlawful, the suit is maintainable in so far as the claim for damages is concerned, under section 49 of the Act, which provides that "any person deeming himself aggrieved by any proceedings taken under colour of this Act shall be at liberty to seek redress by filing a summary suit for damages before the Collector." This contention must prevail. Mr. Seshagiri Iyer, for the respondent, contends that section 49 is not applicable to the case, as the expression "proceedings" must be understood to mean "proceedings taken by a public officer or a Court," and no proceedings of a public officer are impeached by the plaintiff as improper, and he refers to section 76 which speaks of "a judgment of a Collector in proceedings under this Act." We cannot accept this argu-

ment. Section 76 shows no more than that these are "proceedings" under the Act in which Collector may pass "a judgment." It does not show that there are no proceedings in which he would not do so. The Act authorises the land-holder also to take several proceedings without resort to the Collector. He can tender *pattas* and distrain property for arrears of rent on his own responsibility, and he may be guilty of various illegalities and irregularities in doing so. He may distrain property when there are no arrears, or without properly tendering a *patta* which the tenant is bound to accept. He may distrain without making a demand of the arrears as required by law. He may act in violation of the various provisions relating to distraint. Suits have been entertained in all these cases: See *Rajah Chelikani Venkatagopala Rayon Garu* v. *Narayanasami Reddi* (1), *Velagaleti Ramakrishnayya* v. *Suramani Bapayya Appa Row*(2). We must hold that the claim for damages is maintainable. We reverse the decrees of the lower Courts and remand the suit to the Court of first instance for fresh disposal according to law, in so far as it relates to the claim for damages. Each party will bear his own costs throughout up to date.

Decree reversed.

(1) 27 M. 210.
(2) 27 M. 430.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1782 OF 1910.

November 16, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

SUBIHA PILLAY AND OTHERS—APPELLANTS

versus

VELAPPA NAICKEN AND ANOTHER—RESPONDENTS.

Vendor and purchaser—Contract for sale—Subsequent sale to other vendees—Specific performance, suit for, by first contracting party—Decree, form of—Subsequent vendees to execute conveyance to plaintiff—Absence of prayer in plaint—Trust—Trusts Act (II of 1882), s. 91—Civil Procedure Code (Act V of 1908), O. XLI, r. 33.

Where it is agreed to sell property to one person and it is subsequently sold by the vendor in contravention of the agreement, and the first purchaser brings a suit for specific performance of the contract of sale, the proper form of the decree to be passed in case of plaintiff's success, is not to declare the subsequent sale void, but to direct the subsequent purchaser to execute a conveyance to plaintiff. The Court has power under Order XLI, rule 33, Civil Procedure Code, 1908, to pass such a decree even though the plaint does not contain a prayer to that effect.

The subsequent purchaser in such a case is in law a trustee of the property for the person who has a prior agreement for sale.

Second appeal against the decree of the District Court of Coimbatore, in A. S. No. 67 of 1910, presented against that of the District Munsif of Udamalpet, in O. S. No. 591 of 1908.

Hon'ble Mr. *P. S Sivaswami Iyer*, (Advocate-General), for the Appellants.

Mr. *T. R. Ramchandra Iyer*, for the Respondents.

JUDGMENT.—The suit is for specific performance of an agreement to sell certain land, entered into between the plaintiff and the first defendant. The latter subsequently sold the land to the second and fourth defendants. The plaintiff asked for a declaration that the sale in favour of defendants Nos. 2 to 4 was void as against him, and for a direction that the first defendant to execute a conveyance of the land in the plaintiff's favour and this is the decree that has been passed by the District Court We accept the finding of the Judge that the plaintiff is entitled to specific performance. The sale to the defendants Nos. 2 to 4 is good in law subject to the plaintiff's rights. Section 91 of the Trusts Act enacts that in such a case the subsequent purchaser is a trustee of the property in law for the person who has a prior agreement for sale. The proper course in such a case would be to direct a conveyance to be executed by the subsequent purchaser. We believe that the practice generally in the Mofussil Courts is to declare the subsequent sale void and to direct the vendor to execute a conveyance. We are not prepared, in the face of the existing practice, to accede to the appellants' contention that the suit should be dismissed on the ground that there is no prayer in the plaint for the execution of a conveyance by defendants Nos. 2 to 4. We have the power, if necessary, to direct the subsequent purchaser to execute the conveyance: See Order XLI, rule 33, of the Code of Civil Procedure. We, however, consider it unnecessary to do so in this case, as there are difficulties arising from the particular facts of the case.

We dismiss the second appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 49 OF 1910.

December 2, 1911.

Present:—Mr. Justice Johnstone and Mr. Justice Shah Din.

PARTAB SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat PANJABU AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Succession—Daughter—Self-acquired property—Collaterals—Burden of proof—Goriwal Jats *of Ludhiana District.*

The burden of proving that the collaterals of the propositus are entitled to succeed to his self-acquired property in preference to his daughter lies on the collaterals.

Among *Goriwal Jats* of the Ludhiana District a special custom, contrary to general custom, prevails whereby daughters are excluded by collaterals of the 4th degree as regards succession to self-acquired property.

Musammat Ishar Kuar v. *Raja Singh*, 9 Ind. Cas. 608; 29 P. R. 1911; 94 P. L. R. 1911; 124 P. W. R. 1911, followed.

Nawab-ud din v. *Kami*, 12 P. R. 1901; 77 P. L. R. 1901; *Rajo* v. *Karam Baksh*, 13 P. W. R. 1908; 11 P. R. 1908; 92 P. L. R. 1908, distinguished.

The fact that a daughter is in possession of the deceased's self-acquired property under a mutation order is not material except perhaps as regards burden of proof.

Second appeal from the order of the Divisional Judge, Ludhiana Division, dated the 1st November 1911, affirming that of the Additional District Judge, Ludhiana, dated the 31st July 1909, dismissing plaintiff's claim.

Lala *Lajpat Rai*, for the Appellants.

The Hon'ble Mr. *Muhammnd Shafi*, for the Respondents.

JUDGMENT.—The parties to this case are *Goriwal Jats* of *Tahsil* Jagraon, District Ludhiana. Plaintiffs as reversioners claim the property left by one Dhannu, while defendants Nos. 1 to 3 are Dhannu's married daughters, as *per* pedigree table:—

The other defendants are (1) ten plaintiffs in a connected case with which we are not now concerned, and (2) eight mortgagees for the property.

Plaintiffs claimed by right of inheritance on the contention that among *Goriwal Jats* of Ludhiana daughters are excluded from inheritance by collaterals in the 4th degree, whether the property is self-acquired or not. [The first Court talks of collaterals in the 10th degree and the lower Appellate Court of the 5th degree, but clearly plaintiffs are in the 4th degree, Jogi, being the common ancestor in *this* case.]

The first Court found that plaintiffs are collaterals of Dhannu as stated above, and this point need not be mentioned again. It then went on to hold that the property in suit was acquired by Diwana and not by Jogi and was, therefore, not ancestral *qua* plaintiffs. Lastly, remarking that in the Punjab generally daughters succeed to self acquisition in preference to remote collaterals, the Court expressed the opinion that plaintiffs had proved no special custom to the contrary, notwithstanding the entry in their favour in the *Riwaj-i-am*, and that in equity, collaterals in the "tenth degree" should not be given preference over daughters in such cases.

The suit having been thus dismissed, plaintiffs appealed to the learned Divisional Judge, who upheld the first Court's decision. He laid the *onus* upon plaintiffs, and this was, no doubt, right enough; and he proceeded to rule that the *Riwaj-i-am* entry was not sufficient to shift the *onus* and that the one decided case on the point among these *Goriwal Jats*, namely, *Musammat Ishar Kuar* v. *Raja Singh* (1), decided by the District Judge, Ludhiana, in 1908, did not help the plaintiffs.

The plaintiffs have come up here with a further appeal, which we think must succeed. The lower Appellate Court's judgment was delivered on 1st November 1909 and the appeal against it was laid before a Judge of this Court on 22nd June 1910, who, going upon the general custom of the Province in regard to succession of daughters to non-ancestral property, remarked that, if the property was non-ancestral the decision of the lower Appellate Court was, in his opinion,

(1) 9 Ind. Cas. 608; 29 P. R. 1911; 94 P. L. R. 1911; 124 P. W. R. 1911.

correct, but that it might be that after all the property was ancestral. This expression of opinion, of course, does not bind us now, the more especially as the Judge had not the benefit of considering the judgment of this Court (Division Bench) in *Musammat Ishar Kaur's* case (1) mentioned above, which came up here, on first appeal. Then, after an exhaustive examination of the evidence and a careful local inquiry by a Commissioner, it was laid down that among *Goriwal Jats* of Ludhiana there was a special custom contrary to general custom whereby daughters were excluded by collaterals. In that case the collaterals were related in the 3rd degree, but no stress was laid upon this circumstance, and it is apparent that the conclusion would have been the same had the degree of relationship been the 4th. See *Ishar Kaur* v. *Raja Singh* (1) [decided on 13th February 1911, and heard on 6th February 1911, 5 or 6 months after the case now before us first came before the Judge in Chambers.]

It seems clear to us that we must follow that ruling unless it can be effectually distinguished. Mr. Shafi, besides noticing the difference of one degree in nearness of relationship, takes three points in this connection. *First*, he points out that there the collaterals were in possession under a mutation, whereas here the daughters have this advantage; *next*, that there the plaintiff was not a daughter but a daughter's daughter (really a sister's daughter) and, *thirdly*, that there the original acquirers were two whole brothers, deceased being descendant of one brother and plaintiffs of the other. We cannot see that the first of these points is material except perhaps as regards burden of proof, which we have conceded lies on plaintiffs; and the facts as regards the third point are precisely the same as the present case. The second point alone thus needs examination.

It is true that the plaintiff in *Musammat Ishar Kaur's* case (1) was a sister's daughter, *i.e.*, daughter's daughter of the *penultimate* male-holder, but nevertheless the *dictum* that the daughter herself was not entitled to succeed as a full owner was not *obiter*, for it was part of plaintiff's case, strongly urged by her learned Counsel, Mr. Shafi, that she was entitled in preference to the collaterals *because* her mother was by custom entitled to succeed as a full owner. This made it necessary for this Court to consider and decide the question of the relative rights of a *daughter* and collaterals, and the appeal was decided against the plaintiff expressly on the ground that her mother, even considered as a daughter of a male-holder, was excluded by the collaterals and so *a fortiori* she was herself excluded. The local inquiry and the investigation in Court were all directed to the ascertainment of the rights of daughters of male holders as such. It is clear, then, that the case cannot be effectually distinguished from the present case.

And we do not think Mr. Shafi has succeeded in showing us that the ruling in that case was unsound. He refers us to section 23 of Rattigan's Digest, but that only states the general custom and here there is, for reasons fully given in the other case which we need not repeat here, a peculiar special custom followed by this section of *Jats*. Then he points to the Hindu law under which a daughter is an heir but a daughter's daughter is not; but we cannot see how this helps matters when a special custom is proved. Lastly, he quotes a number of rulings, see below* concerning which we offer the following remarks:—

Nawab-ud-din v. *Kami* (2) is a case of *Malak Rajputs* of Ludhiana city, and a gift to the daughter had been made. No doubt the *Riwaj-i-am* was the same as that now before us, but *here* the tribe is different and there was no gift; and there the learned Judges do not seem to have noticed the remark at page 40 of Mr. Gordon Walker's Volume on Customary Law in Ludhiana, para. 79, to the effect that in such matters no distinction is made between ancestral and self acquired property.

Rajo v. *Karam Bakhsh* (3) is a case of *Ratal Jats* of *Tahsil* Lahore, in which a bequest to a daughter made in presence of collaterals in the 8th degree was upheld.

The other rulings are quoted in order to

(2) 12 P. R. 1901; 77 P. L. R. 1901.

(3) 11 P. R. 1908, 92 P. L. R. 1908, 13 P. W. R. 1908.

**Nawab-ud-din* v. *Kami*, 12 P. R. 1901; 77 P. L. R. 190 ; *Rajo* v. *Karam Bakhsh*, 11 P. R. 1908; 92 P. L. R. 1908; 13 P. W. R. 1908; *Maula Bakhsh* v. *Muhammad Bakhsh*, 54 P. R. 1906; *Sayad Rahim Shah* v. *Sayad Husain Shah*, 102 P. R. 1901; 119 P. L. R. 1901; *Har Narain* v. *Musammat Deoki*, 24 P. R. 1893.

bring to our notice the warnings given by several learned Judges in them of the danger in relying too much upon statements of custom made by male to the prejudice of females. We are well aware of the danger; but we do not see how the warnings really affect this case. The ruling we elect to follow was based on a large mass of evidence which is not in any way weakened by any consideration of the danger of excessive reliance upon a *Riwaj-i-am.*

For these reasons, we accept this appeal, and, setting aside the judgments and decrees of the Courts below, we decree plaintiff's claim, but in view of the facts that the ruling we follow was not delivered until February 1911 and that the case, apart from that ruling, was a doubtful and difficult one, we direct that the parties do bear their own costs.

Appeal accepted.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 16 OF 1911.

November 22, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Abdur Rahim.

MULLASERI GOPALA MENON—APPELLANT

versus

KRISHEKI KOVILAKNATH MANAVIKRAMAN, *alias* ANUJAN RAJA AVERGAL—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), s. 273—Execution of decree—Application to execute decree already under attachment, whether an application in accordance with law—Limitation—Decree by first Court reversed on appeal—Restitution, whether enforceable in execution—Civil Procedure Code (Act V of 1908), s. 144.

An application for execution of a decree which was dismissed on the ground that the decree itself was already under attachment, is an application in accordance with law so as to save limitation.

Thuchakovil Unni Koya v. *Arapayil Pathuti Umma*, (1911) 1 M. W. N. 187, 9 Ind. Cas. 786, 9 M. L. T. 312, 21 M. L. J. 577, explained and distinguished.

The right of restitution arising out of the reversal of a decree of an Appellate Court is, under section 144, Civil Procedure Code, 1908, enforceable in execution and no separate suit lies for the purpose.

Appeal against the order of the Subordinate Judge at Palghat, in A. S. No. 761 of 1910, presented against the order of the District Munsif at Alatur, in Miscellaneous Petition No. 1112 of 1910.

Dr. *S. Swaminathan*, for the Petitioner.

Mr. *T. R. Ramachandra Aiyar*, for the Respondent.

JUDGMENT.—The first question argued before us relates to limitation and arises upon the facts. One Seshan Pattar was sued in the District Munsif's Court at Alatur in 1904 by the present appellant, and the latter recovered a decree for payment of money, but the decree was reversed by the Subordinate Judge's Court of Palghat on the 3rd September 1904. Before the judgment of the Appellate Court, however, was passed the appellant had executed the original decree against Seshan Pattar. Then it appears the assignor of the respondent in this appeal instituted a suit in 1906 in the District Munsif's Court at Alatur and attached before judgment the right of Seshan Pattar to the restitution of the property recovered from him by the appellant under the decree of the lower Appellate Court dated 3rd September 1904. The application for execution which the District Munsif found would save limitation, was made by Seshan Pattar's sons on the 30th August 1907. At the time of the application the decree had been attached, as already stated, and the question is whether the application which was dismissed on the ground that the decree was under attachment and could not, therefore, be executed can be regarded as an application according to law as a step-in-aid of execution. The learned Counsel for the appellant has strongly relied in support of his contention that the application was not in accordance with law on the case of *Thuchakovil Unni Koya* v. *Aropayil Pathuti Umma* (1). But that was a case in which the attachment was under the second paragraph of section 273 of the Code of 1882. But the provisions of this paragraph cannot be applied to the present case, for it is the same Court, that is, the District Munsif's Court of Alatur which passed the decree sought to be executed and which has to execute the decree of the Subordinate Judge's Court of Palghat which is under attachment. This case would rather seem to be covered by the first part of the penultimate paragraph of section 273, which does not direct stay of the execution of the attached decree. Even if that provision does not apply, the only effect of the attachment would be to prevent alienation. Nor is there any thing in the terms of the order passed on the application for attachment which

(1) (1911) 1 M.W.N. 187; 9 Ind. Cas. 786; 9 M.L. T. 312; 21 M. L. J. 577.

forbids the decree-holder from proceeding with the execution. We, therefore, hold that the application of the 30th August 1907 was in accordance with law.

The second point argued by Dr. Swaminathan is that a right of restitution arising out of a reversing decree cannot be enforced in execution. But section 14 of the present Civil Procedure Code, which governs the question, makes it quite clear not only that such a right can be enforced in execution; but that no suit shall lie for the purpose.

The result is that the appeal is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1120 OF 1910.

November 30, 1911.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Rattigan.

HAZARA SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

HARNAM SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Right of collateral in the eleventh degree to contest alienation—Right of succession wider than the right to control alienation.

In the absence of a special custom in his favour, a collateral of the alienor in the 11th degree has no right to object to the alienation.

Arur Singh v. *Musammat Lachmi*, 75 P. R. 1898 and *Khazan Singh* v. *Relu*, 35 P. R. 1906, not followed.

Natha Singh v. *Mohan Singh*, 93 P. R. 1906: 163 P. L. R. 1906; *Hira* v. *Karam Kaur*, 23 P. R. 1907; *Sawan Singh* v. *Harnaman*, 162 P. L. R. 1901; *Hardassing* v. *Buta*, 94 P. L. R. 1903; *Gujar* v. *Sham Das*, 107 P. R. 1887; *Mangal* v. *Chetu*, 20 P. R. 1890, relied upon.

The right to succeed, where escheat is the alternative to succession, is far more extensive than the right to control alienation. There is nothing inconsistent in the proposition that a distant collateral, who cannot control alienation, may still have a right superior to the Crown.

The mere fact that the property in respect of which the right of control has been asserted, has descended from the common ancestor of the alienor and the claimant does not, in the absence of a special custom in favour of the latter, entitle him to deprive the alienor of the right to select his successor or representative in estate, where the claimant is a very remote relation. The latter succeeds only to so much of the property as has not been disposed of by the alienor.

Dula Singh v. *Wazir Singh*, 69 P. R. 1887, relied upon.

Second appeal from the order of the Divisional Judge, Jullundur, dated the 3rd August 1910, reversing that of the Munsif, 1st Class, Jullundur, dated the 23rd December 1909, decreeing plaintiff's claim.

Rai Sahib Pandit *Sheo Narain* and Lala *Dharam Chand*, for the Appellants.

Rai Bahadur Bakhshi *Sohan Lal*, for the Respondents.

JUDGMENT.—This appeal and No. 1121 of 1910 can be disposed of together, the two suits having been dismissed, on the appeal of the defendants, by the lower Appellate Court on the ground that the plaintiffs' collaterals in the 11th degree of a mortgagor, had no right to control his alienation of his ancestral property.

The authorities cited on either side are *Muhammad* v. *Jahan Khan* (1), in which it was held that a well established rule, permitting male collaterals in the tenth degree from a deceased proprietor to contest an alienation by his widow to his sister's son, prevailed among Muhammadan *Jats* of Gujar Khan *Tahsil* Rawalpindi.

Dula Singh v. *Wazir Singh* (2), in which it was held that the collaterals in the tenth degree of a childless *Jat* landowner of the Batala *Tahsil*, Gurdaspur, had not discharged the burden of proving that they could control his power of alienating ancestral property.

Powell, J., said:—"A very remote relation may be entitled to the succession rather than that the property should escheat; but it is a well recognized rule that relations, at any rate beyond the fifth, or, possibly, sixth or seventh degree, must show that by custom they are entitled to intervene."

Gujar v. *Sham Das* (3), in which Plowden, S. J., said:—"It has been found as a rule that collaterals beyond the fifth or at most the seventh degree of relationship are not recognized as entitled to control the action of a sonless proprietor in respect of disposition."

The parties were *Sus Jats* of the Hoshiarpore District, and it was held that the transferee had not discharged the burden of proving that a grand nephew of the transferor could not contest the transfer.

(1) 119 P. R. 1883.
(2) 69 P. R. 1887.
(3) 107 P. R. 1887.

Mangal v. *Chetu* (4), in which it was held that among *Bajwah Jats* of *Mauza* Babiar, *Tahsil* Raya, Sialkot, collaterals in the tenth degree could not object to an alienation by a childless proprietor.

Allah Bakhsh v. *Buta* (5), in which it was held, following the principle laid down by the Full Bench in 1887, that the burden of proving affirmatively that they were entitled to challenge a sale by a sonless *Ghuman Jat* of *Mauza* Kala, Sialkot *Tahsil*, lay on the plaintiffs who had embraced the Mahomedan religion, lived in another village and were collaterals in the eighth degree of the vendor, the vendee being his collateral in the ninth degree, and that they had not discharged the burden.

Arur Singh v. *Musammat Lachmi* (6), in which it was held that among *Dhillon Jats* of the Lahore District, collaterals in the ninth degree of the alienor could object to an alienation.

The Division Bench said, referring to the dictum of Plowden, S. J., in *Ralla* v. *Budha* (7), at page 230, that the rule in favour of control by collaterals of alienation had been recognized thoroughly since the passing of the Full Bench decision in 1887, above cited, and continued:—"This being the case, all agnates who are heirs by virtue of their relationship have presumably the right of objecting to any act which injures their right of succession and it is difficult to see how an arbitrary line can be drawn in favour of agnates up to a certain degree, and those beyond excluded from the benefit of the presumption."

Khazan Singh v. *Relu* (8), in which it was held, that among the agricultural tribes of the Punjab there was no definite limit of propinquity up to which kinsmen are to be presumed to have the right to impeach alienations, without consideration or necessity, of ancestral land by a sonless proprietor, and beyond which they are to be presumed not to have it, and that collaterals in the tenth decree of the alienor had this right.

Natha Singh v. *Mohan Singh* (9), in which it was held that the *onus* of proving that among *Ghuman Jats* of the Sialkot *Tahsil*, collaterals in eighth degree could contest an alienation by a childless proprietor of his ancestral land was on the collaterals, who had failed to discharge it. The Division Bench said:—"It is not necessary to discuss in detail the instances cited on behalf of the defendants. * * * They consist of a number of cases in which it was held that collaterals of a higher degree of remoteness were held incapable of suing, and their value lies in the fact that they show that a numerical limit beyond which collaterals are not competent to sue is fully recognized * * * and they emphasize what has been noted in several rulings of this Court and what is undoubtedly the case that a right to succeed to an estate after the death of the owner does not necessarily infer the right to control its disposal by that owner during his life-time, even under the customary law.

Hira v. *Karam Kaur* (10), in which it was held that, among Hindu *Bhat Jats* of the Raya *Tahsil*, Sialkot, his collaterals in the eighth degree were not entitled by custom to contest an alienation of ancestral property by a sonless proprietor, as being made without necessity or consideration.

Sawan v. *Harnaman* (11), in which it was held, in a case between *Jat Sudas* of the Jullundur District, that collaterals in the 10th degree had not discharged the burden of establishing their right to control alienations by a childless proprietor.

Hardas Singh v. *Buta* (12), in which it was held that among *Bajwah Jats* of a *Tahsil*, other than Raya, in the Sialkot District, collaterals in the 11th degree could not interfere with a gift to a maternal uncle.

In some of the cases above cited the provisions of the *Riwaj-i-am* affected the decision, but the weight of authority is, in our opinion, very strongly opposed to be plaintiffs' alleged right to interfere with the alienations in suit, in the absence of evidence of special custom in his favour. It is true that *Arur Singh* v. *Musammat Lachmi* (6) and *Khazan Singh* v. *Relu* (8), to which Chatterjee, J., for whose opinion we have very great respect, was a party, indicated a tendency to admit the right of the remotest collaterals to control alienations but our brother Robertson, a party to the later of these two judgments, was also a party to *Natha Singh*

(4) 20 P. R. 1890.
(5) 79 P. R. 1891.
(6) 75 P. R. 1898.
(7) 50 P. R. 1893.
(8) 35 P. R. 1906.
(9) 93 P. R. 1906; 163 P. L. R. 1906.
(10) 23 P. R. 1907.
(11) 162 P. L. R. 1901.
(12) 94 P. L. R. 1903.

v. *Mohan Singh* (9) and *Hira* v. *Karam Kaur* (10), above cited.

The authorities confirm us in the opinion that the right to succeed, where escheat is the alternative to succession, is far more extensive than the right to control alienation, and there is, in our opinion, nothing inconsistent in the proposition that a distant collateral who cannot control alienation may still have a right superior to the Crown. The mere fact that the property, in respect of which the right of control has been asserted, has descended from the common ancestor of the alienor and the claimant does not, in the absence of evidence of a special custom in favour of the latter, entitle him to deprive the alienor of the right to select his successor or representative in estate, where the claimant is a very remote relation; the latter succeeds only to so much of the property as has not been disposed of by the alienor. In these cases no special custom has been established or even seriously asserted.

For these reasons, we dismiss this appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 11 OF 1911.

November 28, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Abdur Rahim.

KATCHALAI MUDALI—APPELLANT

versus

V. KUPPANNA MUDALI—RESPONDENT.

Mortgage--Prior and puisne mortgagees—Suit by second mortgagee—Joinder of first mortgagee as party—Decree for sale—Non-reservation of rights of first mortgagee, effect of—Whether bars first mortgagee's right to enforce his mortgage.

A decree in a mortgage suit, brought by a second mortgagee impleading a prior mortgagee as party defendant, which directed the sale of the property without reserving the rights of the prior mortgagee, does not, where the latter's right has been admitted, bar a suit by the prior mortgagee for enforcement of his mortgage right. The decree in such suit does not intend that the sale of property is to be in defeasance of the first mortgagee's rights.

Arunachella Reddi v. *Perumal Reddi*, 9 M. L. T. 90; 21 M. L. J. 635; 9 Ind. Cas. 285, referred to.

Sri Gopal v. *Pirthi Singh*, 24 A. 429; 29 I. A. 118; 4 Bom. L. R. 827; 6 C. W. N. 889, explained and distinguished.

It is not necessary, in a suit by a puisne mortgagee that the holders of prior mortgages should be made parties and questions relating to their mortgage determined.

Singam Marwari v. *Barhamdeo Prasad*, 1 C. L. J. 337 at p. 348, referred to.

Appeal against the decree of the District Court of North Arcot, in A. S. No. 228 of 1909, presented against the decree of the District Munsif of Sholinghur, in O. S. No. 1254 of 1907.

Mr. *K. C. Desikachariar* for the Appellant.

Mr. *T. V. Mathukrishna, Iyer*, for the Respondent.

JUDGMENT.—Here the appellant is a puisne mortgagee and the suit is instituted by the respondent, who is the assignee of a prior mortgagee, for enforcement of that mortgage. It is argued on behalf of the appellant that the decree in the prior suit instituted by the appellant for enforcement of his mortgage which directed the property to be sold in satisfaction of the appellant's mortgage without expressly reserving the right of the respondent, who had been added as a party defendant to that suit, was a bar to the present action. But we do not think there is force in this contention. In the previous suit, the appellant, who was the plaintiff, admitted the present respondent's mortgage and there was no dispute about its priority over the appellant's mortgage. The question at issue in that case was something else. No doubt, the decree made no provision for the respondent's mortgage but that does not necessarily mean that the sale of the property was to be in defeasance of his rights. See *Arunachella Reddi* v. *Perumal Reddi* (1). It is not necessary, in a suit by a puisne mortgagee that the holders of prior mortgages should be made parties, and the questions relating to their mortgages be determined: See *Singam Marwari* v. *Barhmadeo Prasad* (2).

The learned Vakil for the appellant has, however, strongly relied on the case of *Sri Gopal* v. *Pirthi Singh* (3). But, in that case, the object of the suit was to obtain a determination of the rights of the different incumbrancers on the property, and one of the parties failed to set up his alleged incumbrances. It was, therefore, held that he could not enforce it in a subsequent

(1) 9 M. L. T. 90; 21 M. L. J. 635; 9 Ind. Cas. 285.

(2) 1 C. L. J. 331 at p. 348.

(3) 24 A. 429; 29 I. A. 118; 4 Bom. L. R. 827; 6 C. W. N. 889.

suit. The present case, as we have pointed out, is quite different.

The appeal must be dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 283 OF 1910.

July 5, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

DEBI DAS MARWARI—PLAINTIFF—APPELLANT

versus

THE CHAIRMAN OF MOTIHARI MUNICIPALITY—DEFENDANT—RESPONDENT.

Municipality—Permanent lessee under Municipality—Exemption from payment of rates—Contract—Onus *of proof.*

A permanent lessee under a Municipality is not as such exempted from payment of Municipal rates. The case must be governed by the contract. If there is no provision in the lease for any exemption, the lessee must pay the rates which he is under a statutory obligation to pay.

The burden is upon the lessee to establish an exemption from the statute.

Mohanand Sahai v. *Said-un-nissa*, 8 C. L. J. 525; 12 C. W. N. 154, relied upon.

Appeal from the decree of the Sub-Judge of Mozaffarpur, dated July 24th, 1909, reversing that of the Munsif of Motihari, dated March 22nd, 1909.

Babu *Sasi Sekhar Bose*, for the Appellant.

Babus *Lachmi Narain Singh* and *Satya Charan Singh*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the plaintiff in a suit for declaration that he is not liable to pay Municipal rates under the Bengal Municipal Act. The plaintiff is a lessee under the Municipality and his contention is that he has been exempted from payment of Municipal rates by the proper authority. The Court of first instance decreed the suit, upon appeal the Subordinate Judge has dismissed it. The Courts below have discussed the question whether the plaintiff has been validly exempted from the payment of Municipal rates by a legally constituted authority. In our opinion, no such question arises or requires consideration. The case for the plaintiff is that his rights are regulated by the contract between the parties. That contract makes him permanent lessee under the Municipality. He is liable thereunder to pay for the use and occupation of the land at a specified rate. That rate, again, is liable to be enhanced after a prescribed period. It is further provided that the land is let out for building purposes but restriction is imposed as to the use of the building to be erected. There is also a provision by which the Municipality is entitled to exercise a right of pre-emption. There is no provision in the lease, however, to the effect that the plaintiff will be exempted from the payment of Municipal rates after the erection of buildings on the land demised. The plaintiff is clearly under a statutory liability to pay the rates demanded from him and the burden is upon him to establish an exemption from the statute: [*Mohanand Sahai* v. *Said-un-nissa*(1)]. If it was intended by the parties that the plaintiff should be exempted from the payment of Municipal rates, there ought to have been an express covenant in the lease to that effect. In the absence of such a provision we are unable to hold, that under the terms of the contract between the parties, the plaintiff has been exempted from the payment of Municipal rates which he is under a statutory obligation to pay to the Corporation. The conclusion follows that there is no foundation for the claim of the plaintiff and his suit has been rightly dismissed.

The appeal, therefore, fails and is dismissed with costs.

This decision, it is conceded, will govern the other appeals, namely, Nos. 289, 290 and 291 of 1910 which are also dismissed with costs.

Appeal dismissed.

(1) 8 C. L. J. 525; 12 C. W. N. 154.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 810 AND 826 OF 1910.

November 16, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

RANGASAMY PILLAI AND OTHERS—APPELLANTS

versus

MATHU CHIDAMBARA GURUKAL AND ANOTHER—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887)

UJAL SINGH v. DEBYA SINGH SARDAR.

Sch. II, Arts 13, 18—*Small Cause Suit—Claim for temple emoluments*—Takid *granting—Emoluments—Trusts—Suit for emoluments and* neividhanam—*Jurisdiction of Small Cause Court.*

A suit for temple emoluments, secured to the plaintiff by the author of a trust by a *takid*, which was registered on the same day as the instrument of trust itself, both in reality forming part of the same transaction, falls within the purview of Articles 13 and 18 of the Provincial Small Cause Courts Act; and is not cognizable by a Small Cause Court.

Where a claim for *neivedhanam*, or rice allowance, is sued for along with a claim for such emoluments, the whole suit is excluded from the cognizance of a Small Cause Court and is triable as a regular suit.

Second appeals against the decree of the District Court of Madura, in A. S. No. 336 of 1909, presented against the decree of the District Munsif of Madura, in O. S. No. 616 of 1907.

Mr. *V. C. Seshachariar*, for the Respondents.

Mr. *M. Narayanswami Iyer*, for the Appellants.

JUDGMENT.—One of the claims sued for is the amount due to the plaintiff as hereditary *Pujari* of the temple. The emoluments are secured to the plaintiff by the author of the trust by a *takid* which was registered on the same day as the instrument treating the trust itself, and both were in reality part of the same transaction. The claim would fall within the purview of Article 13, and apparently also of Article 18 of the schedule to the Provincial Small Cause Courts Act. The Munsif was quite wrong in holding that the claim for *neivedhanam*, or rice allowance would not be tried by him on the regular side. The plaintiff having sued for it along with the emoluments due to him under the *takid*, the whole suit was triable as a regular suit. The District Judge was wrong in holding that no appeal lay to his Court.

We reverse the decree of the lower Appellate Court and the decree of the Munsif in so far as it relates to *neivedhanam*. We remand the appeal to the lower Appellate Court for disposal according to law. The lower Appellate Court will dispose of claim both to the salary and to the *neivedhanam*.

It will either itself record the evidence on the question of the plaintiff's right to the *neivedhanam* or direct the District Munsif to do so.

The costs of the second appeals will abide the result.

Cause remanded.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2205 OF 1908.

November 29, 1911.

Present:—Mr. Justice Stephen and Mr. Justice Coxe.

UJAL SINGH DEFENDANT—APPELLANT

versus

DEBYA SINGH SARDAR—PLAINTIFF AND THE SECRETARY OF STATE FOR INDIA IN COUNCIL—RESPONDENT.

Central Provinces Land Revenue Act (XVIII of 1881), *s.* 83—*Suit for amendment of Settlement Record—Party—Whether Government necessary party.*

The plaintiff brought a suit for a declaration that he was the maintenance grant-holder of a certain *Mauzah* and for the amendment of the Settlement papers in which he had been described as a *ticcadar*. In the Courts below he obtained the declaration but he omitted to give notice of the suit to Government:

Held, that, the words of section 83 of the Central Provinces Land Revenue Act are imperative, and it was the duty of the plaintiff to give notice of his suit to Government.

Appeal from the decree of the Sub-Judge of Sumbalpore, dated June 1st, 1908, affirming that of the Munsif of the same place, dated February 28th, 1908.

Babu *Dwarka Nath Chakravarti*, and Mr. *G. Sircar*, for the Appellant.

Babu *Jogendra Chandra Ghose*, for the Respondent.

Babu *Ram Charan Mitra*, Senior Government Pleader, for the Secretary of State.

JUDGMENT.—In this case the plaintiff brought a suit for a declaration that he was the maintenance grant holder of a certain *mauzah* in perpetuity on payment of a *jama* of Rs. 15 per year. His grievance was that he had been entered in the Settlement Record as a *ticcadar* of a village with a protected status at an annual *jama* of Rs. 220. In his original plaint, he specifically asked that the Settlement papers might be amended and he might have a declaration in the sense in which he wished. In an additional plaint he prayed that the request for amending the Settlement papers might be excluded from the prayer. In the result he obtained from the first Court an order—a declaration—in the sense in which he wished and an order that the entry in the Settlement Record should be cancelled.

This decision was upheld on appeal. He did not take the precaution of giving notice to Government of his suit which it was

his duty to do under section 83, Central Provinces Land Revenue Act. The result was that Government was not represented in this case until it came up to this Court in second appeal. The Government now applies to have the case sent back for a re-hearing and we cannot see our way not to accede to this request. It is urged before us that the suit is not one for the cancellation or amendment of the Settlement under section 83 of the Central Provinces Land Revenue Act. We cannot take this view. In the first place, it is prayed that the record be cancelled. In the second place, the relief is obtained and in the third, it is obvious that it would be unjust that the rent payable by plaintiff should be reduced from Rs. 220 to Rs. 15 leaving the *zemindar* defendant liable to Government as though that rent remained at the figure recorded in the Settlement Record, Rs. 220. We regret that the parties should be put to the additional expenses of a trial which a remand will cause, but the plaintiff is responsible for this inconvenience because he did not do what it was clearly his duty to do under section 83, the words of which are imperative.

The order is that this case be remanded to the Munsif of Sambalpur for a re-hearing. Costs will abide the result.

Case remanded.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 284 OF 1910.

November 29, 1911.

Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.

TARA CHAND MUKERJI—PLAINTIFF—APPELLANT

versus

Mirza AFZAL BEG AND OTHERS—DEFENDANTS—RESPONDENTS.

Court Fees Act (VII of 1870*), Sch. II, Art.* 17 *(VI)—Partition suit—Plaintiff in possession—Claim merely for separation of share—Court-fee payable*—Ad valorem *Court-fee when payable.*

In a suit for partition, where the plaintiff alleges that he is in possession and merely claims partition of the property and separate possession of his share, a Court-fee stamp of Rs. 10 is sufficient. But where the plaintiff is out of possession and claims possession and partition, then he must pay a Court-fee calculated on the value of the share claimed by him.

Reoti v. *Lachhmen*, A.W.N. (1900), 90, *Wali Ullah* v. *Durga Prasad*, 28 A. 340; 3 A. L. J. 181; A. W. N. (1906) 38; *Bidhata Rai* v. *Ram Charitra Rai*, 12 C. W. N. 37; 6 C. L. J. 651; 3 M. L. T. 33, followed.

First appeal from the decision of the Subordinate Judge of Dehra Dun, dated the 24th May 1910.

Dr. *Satish Chandra Banerji*, for the Appellant.

Mr. *Muhammad Ishaq*, for the Respondents.

JUDGMENT.—This was a suit by the appellant for partition of a house and its appurtenances in Dehra Dun. The appellant paid a Court-fee stamp of Rs. 10 on his plaint under the Court Fees Act, Schedule II, Article 17 (VI). The respondents pleaded that the Court-fee paid was insufficient. They contended that it should be calculated on the value of the property. The Court below acceded to this contention and appointed a Commissioner to inquire into the value of the property. The Commissioner reported that the value of the whole property was Rs. 22,000 and that the value of the plaintiff's share therein was Rs. 16,500. The Court then held that the plaint should have borne a Court-fee stamp of Rs. 570 and called on the appellant to make good deficiency. The appellant having declined to do so, the Court dismissed the suit. Several decisions were cited in the Court below. We think that it is unnecessary to set them out here. In the case of *Reoti* v. *Lachhman* (1) this Court, following decisions of the Calcutta High Court, held that a plaint in which the plaintiff being jointly in possession with the defendant of property prayed that the plaintiff's share might be partitioned was sufficiently stamped with a Court-fee stamp of Rs. 10. To the same effect is the decision of this Court in *Waliullah* v. *Durga Prasad* (2). These decisions are supported by a recent decision of the Calcutta High Court in *Bidhata Rai* v. *Ram Charitra Rai* (3). In all these cases it has been held that where the plaintiff, as in the present case, alleges that he is in possession and merely claims partition of the property and separate possession of his share, a Court-fee stamp of Rs. 10 is sufficient. But where the plaintiff is out of possession and claims possession and partition, then he must pay a Court-fee calculated on the value of the share claimed by him. The decision of the Court below

(1) A. W. N. (1900) 90.
(2) 28 A. 340; 3 A. L. J. 181; A. W. N. (1906) 38.
(3) 12 C. W. N. 37; 6 C. L. J. 651; 3 M. L. T. 33.

is, in our opinion, erroneous. We allow the appeal and remand the case with directions that it be re-admitted on the file of pending cases and disposed of according to law. The respondents will pay the appellant's costs in this Court including fees on the higher scale.

Appeal allowed.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 1 OF 1911.

July 18, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

E. DALGLIESH AND OTHERS—DEFENDANTS—APPELLANTS

versus

NANDAN MISSER AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908). O. XX, r. 12—Determination of principle for ascertaining mesne profits—Decree—Appeal.

An order by which a Court determines the principle whereupon mesne profits are to be assessed and directs their ascertainment by a Commissioner, is an interlocutory order in a pending suit and not appealable as a decree.

Puran Chand v. *Roy Radhakishen*, 19 C. 132 (F. B) and *Debendra* v. *Khirode*, 5 Ind. Cas. 272, relied upon.

Surja Pershad Narain v. *Reid*, 29 C. 622, referred to.

Appeal from the order of the Sub-Judge of Darbhanga, dated December 7th, 1910.

Mr. *Sinha* and Babu *Bipin Behari Ghose*, for the Appellants.

Babus *Akshoy Kumar Baneriee* and *Mohendra Nath Roy*, for the Respondents.

JUDGMENT.—This appeal is directed against an order by which the Court below has determined the principle whereupon mesne profits are to be assessed and directed their ascertainment by a Commissioner. A preliminary objection has been taken to the competency of the appeal on the ground that the order in question is not appealable as an order under any provision of the Code of Civil Procedure of 1908 nor is it appealable as a decree.

On the 26th July 1909, the Subordinate Judge decreed the suit in favour of the plaintiffs who thereupon became entitled to obtain possession. The decree also directed that mesne profits would be ascertained after delivery of possession of the land. It is obvious that the decree was made in this form under rule 12 of Order XX of the Code of 1908. That rule provides that where the suit is for recovery of possession of immoveable property and for mesne profits, the Court may pass a decree for possession of the property directing an inquiry as to mesne profits from the institution of the suit until the delivery of possession to the decree-holder. The rule further provides that where the inquiry is directed in this manner, a final decree in respect of the mesne profits shall be passed in accordance with the result of such inquiry. It is clear, therefore, that the proceeding for assessment of mesne profits under rule 12 of Order XX is a proceeding in a pending suit. Consequently, before the final decree has been drawn up, an interlocutory decree, whereby a question of principle is directed, is not appealable. But, on behalf of the appellant reliance has been placed upon the decision in *Surja Pershad Narain Singh* v. *Reid* (1), in which it was ruled that an order of this description was appealable as a decree under section 244 read with section 2 of the Code of 1882. It is not necessary for us to consider now whether that decision can be defended on principle or whether it can be reconciled with the earlier decision in *Behary Lal Pundit* v. *Kedar Nath Mullick* (2), where it was ruled that an order merely determining a point of law arising incidentally or otherwise in the course of execution proceedings was not a decree within the meaning of section 2 of the Code of 1882 and was not appealable as such. We may point out that even under the Code of 1882 it had been recognised in this Court by a Full Bench in the case of *Puranchand* v. *Roy Radhakishen* (3) that proceedings for assessment of mesne profits were proceedings in a pending suit. [See also *Debendra* v. *Khirode* (4).] In our opinion it is plain upon rule 12 of Order XX of the Code of 1908 that the order sought to be assailed is an interlocutory order in a pending suit and is not appealable as a decree. It cannot also be disputed that it is not appealable as an order under any provision of the Code. The appeal is, therefore, incompetent.

(1) 29 C. 622.
(2) 18 C. 469.
(3) 19 C. 132.
(4) 5 Ind. Cas. 272.

PARBHU NARAIN SINGH PILLAI *v.* LALJI SINGH.

The result is that the preliminary objection is allowed and the appeal dismissed with costs. We assess the hearing fee at two gold *mohurs*.

Appeal dismissed.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 731 OF 1911.

December 14, 1911.

Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.

Sri Maharaja PARBHU NARAIN SINGH —DECREE-HOLDER—APPELLANT

versus

LALJI SINGH AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 230—Decree providing for payment of money from some of the defendants and for sale of mortgaged property in case of other defendants—Nature of decree—Whether such decree is a mortgage decree or a decree for payment of money.

In 1897 a decree was passed against four persons. The decree directed the defendants Nos. 1, 2 and 3 to pay the amount decreed in certain instalments and then went on to provide that if the money decreed could not be recovered from defendants Nos. 1, 2 and 3 then it should be recovered from the property mortgaged by the 4th as a surety.

In 1910, the decree-holder made an application to execute the decree against defendants Nos. 1, 2 and 3:

Held, (per *Karamat Husain, J.*) that the decree being a money-decree was barred by section 230 of the Code of Civil Procedure, 1882.

Held, (per *Chamier, J.*) that the decree was not barred by the provisions of section 230 of the Code of Civil Procedure, 1882, because a decree cannot be split up when different reliefs are given against different defendants.

Execution second appeal from the decision of the District Judge of Benares, dated the 11th March, 1911.

Mr. *Beni Madho Ghose*, for the Appellant.

Mr. *Gulzari Lal*, for the Respondents.

JUDGMENT.

KARAMAT HUSAIN, J.—The appellant obtained a decree from the Court of the Subordinate Judge of Arrah against four persons. The operative part of the decree may be rendered as follows: "It is decreed and ordered that the plaintiff's claim against defendant No. 3 be decreed *ex parte*, and against defendant No. 2 on his admission of the claim, and against defendants Nos. 1 and 4 according to a compromise." The decree goes on further to direct that if the decretal money be not recovered from the defendants Nos. 1—3, then it should be recovered from the property mortgaged by the fourth defendant as a surety. The decree was transferred to Benares. It was passed on the 26th of May 1897 and the application for execution of it was made on the 5th of January 1910. Lalji, one of the respondents in this Court, objected that the decree was barred under the provisions of section 230 of the Code of Civil Procedure of 1882. This contention was accepted by the learned Judge, who in his judgment said: "The decree with which I am concerned is, however, a money-decree so far as it affects the appellant and other lessees, and a mortgage-decree, so far as it affects the surety, Lachman Singh." Coming to that conclusion the lower Appellate Court dismissed the application for execution.

In second appeal it is urged by the learned Vakil for the decree-holder that the decree of which execution is sought is a mortgage-decree within the meaning of section 230 of the Code of Civil Procedure, Act XIV of 1882. I am unable to accept this contention. The decree so far as the respondent Lalji Singh is concerned, cannot be regarded as a mortgage-decree in any sense of the word. So far as the appellant is concerned, it is a decree for payment of money. I, therefore, would dismiss the appeal with costs including in this Court fees on the higher scale.

CHAMIER, J.—The suit in which the decree now in question was obtained was brought against three lessees, who were defendants Nos. 1, 2 and 3 and their surety who was defendant No. 4. The decree directed the defendants Nos. 1, 2 and 3 to pay the amount decreed in certain instalments, and then went on to provide that if the money decreed could not be recovered from defendants Nos. 1, 2 and 3, the decree-holder might proceed to bring to sale the property which had been mortgaged to the plaintiff by the surety. The decree-holder made several ineffectual attempts to recover his money in the district in which the decree was passed. Subsequently, the decree was transferred for execution to Benares. By the present application the decree-holder seeks to bring to sale some immoveable property belonging to defendants Nos. 1, 2 and 3, or one or more of them. His appli-

JAYANTI KISTAPPA *v.* JAYANTI CHINNAPIYA.

cation has been dismissed on the ground that the decree, so far as defendants Nos. 1, 2 and 3 were concerned, was a decree for the payment of money within the meaning of section 230 of the Code of Civil Procedure of 1882. The lower Appellate Court has accepted the contention and dismissed the application with costs.

This is a second appeal by the decree-holder. It is conceded, in accordance with a recent decision of this Court, that section 48 of the Code of Civil Procedure, 1903, does not apply to the case, and that the question for decision is whether the decree held by the appellant is a decree for the payment of money within the meaning of section 230 of the Code of 1882. The decree, in my opinion, cannot by any possibility be described as a decree for money against defendant No. 4. If it is possible to split up the decree into two decrees, then, no doubt, it may be said that the decree is a decree for payment of money against defendants Nos. 1, 2 and 3 and is a decree for the sale of immoveable property to which the third paragraph of section 230 of the Code of 1882 does not apply. But it seems to me that if a decree can be split up in this way, where different reliefs are given against different sets of defendants, then a decree may be split up also where several distinct reliefs are given against the same set of defendants. I find no justification for this course. The terms of the decree before us undoubtedly go beyond the terms of an ordinary decree for the payment of money as that expression has been interpreted by this Court. It provides for the sale of immoveable property under certain contingencies. In my opinion, the principle on which the case of *Pahalwan Singh* v. *Narain Das* (1) was decided applies to the present case, and I would hold that the decree before us is not a decree for the payment of money within the meaning of section 230, and I would allow this appeal, set aside the decree of the Court below, and remand the case for disposal on the merits according to law.

BY THE COURT.—The order of the Court is, that under the provisions of section 98 of the Code of Civil Procedure, this appeal is dismissed with costs which in this Court will include fees on the higher scale.

Appeal dismissed.

(1) 22 A. 401.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 50 OF 1911.

November 24, 1911.

Present:—Mr. Justice Wallis.

JAYANTI KISTAPPA—APPELLANT

versus

JAYANTI CHINNAPIYA—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIV, r. 4(2)—Deposit of amount in Court—Costs, award of—Finding as to which party was most to blame necessary—Demand before suit.

Where, in a suit for the recovery of a debt, the defendant pays the amount in Court under Order XXIV, rule 4 (2), and plaintiff avers that he made demands before suit but defendant denies them, the Court should, to enable it to determine by whom the costs have to be paid, record a finding as to whether plaintiff demanded the amount before suit.

Second appeal against the decree of the Court of the Subordinate Judge of Bellary in A. S. No. 168 of 1909 presented against the decree of the Court of the District Munsif of Bellary in O. S. No. 269 of 1909.

Dr. S. *Sawaminathan*, for the Appellant.

JUDGMENT.—In this case the plaintiff sued the defendant for a debt, averring in his plaint that the defendant had failed to pay in spite of repeated demands. He also obtained an order for attachment before judgment. Before the attachment issued, the defendant paid the amount sued for into Court and the defendant drew it out. Order XXIV, rule 4 (2) requires that when a defendant pays money into Court and the plaintiff accepts it in full satisfaction, the plaintiff shall present to the Court a statement to that effect, and such statement shall be filed and the Court shall pass judgment accordingly, and in directing by whom the costs of each party are to be paid the Court shall consider which of the parties is most to blame for the litigation. The District Munsif gave the plaintiff his costs, and the Subordinate Judge on appeal reversed this part of the judgment on the ground that the plaintiff should either have made a demand or given sufficient reasons for his failure to do so. The plaintiff in his plaint did allege previous demands which the defendant apparently denied in his written statement.

The Subordinate Judge should have called for a finding on the point before disposing of the case. The decree of the lower Appellate Court must be set aside and the case remanded for disposal according to law. Costs will abide the result.

Appeal allowed.

MADAN MOHAN DEY *v.* GANGA CHANDRA ROY.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 294 OF 1910.

July 12, 1911.

Present:—Mr. Justice Mookerji and Mr. Justice Carnduff.

MADAN MOHUN DEY—DECREE-HOLDER—APPELLANT

versus

GANGA CHANDRA ROY AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS.

Execution of decree—Limitation Act (XV of 1877), Sch. II, Art. 179, cl. (4)—Application to Court to take step-in-aid of execution—Deposit of Nazir's travelling allowance, if saves time—Time runs from date of application not from date of order.

To bring a case within clause (4) of Article 179 of Schedule II of the Limitation Act of 1877, it is not sufficient for the decree-holder to show that he has taken a step-in-aid of execution of the decree: he has to establish that he has applied to the Court to take some step-in-aid of execution. The mere payment of Nazir's fees cannot by itself bring the case within the clause.

Radha Prosad Singh v. *Sundur Lal*, 9 C. 644 and *Vijiaragahavalu Naidu* v. *Srinivasalu Naidu*, 28 M. 399, not followed.

Thakar Ram v. *Katwari Ram*, 22 A. 358 and *Sheo Prosad* v. *Indar Bahadur*, 30 A. 179; 5 A. L. J. 258; A. W. N. (1908) 74, followed.

Time runs from the date of the presentation of the application, and not from the date on which the application is disposed of by the Court.

Raj Behari Chakravarti v. *Kalihar Gupta*, 3 Ind. Cas. 336, 10 C. L. J. 479, relied upon.

Appeal from the order of the Sub-Judge of Tipprah, dated March 21st, 1910.

Babu *Satish Chandra Ghose*, for the Appellant.

Babu *Akshoy Kumar Banerji*, for the Respondents.

JUDGMENT.—This appeal is directed against an order by which the Court below has dismissed an application for execution of a decree made on the 21st June 1893, as barred by limitation. The previous application was made on the 6th April 1906. The present application was presented on the 15th April 1909. It is, therefore, *prima facie*, barred by limitation, even though it is pointed out that the Court was closed from the 9th to the 14th April 1909. The decree-holder, however, seeks to remove the bar of limitation by reference to a payment of travelling expenses of the Nazir made by him on the 12th April 1906. It appears that in the application of the 6th April 1906, the decree-holder had prayed that a writ might issue for the attachment of the moveable properties of the judgment-debtors and that the Nazir might be deputed for the purpose. The Court thereupon made a conditional order and directed the decree-holder to deposit the travelling expenses of the Nazir. This deposit was made on the 12th April 1906. The learned Vakil for the decree-holder contends, upon the authority of the decisions in *Radha Prosad Singh* v. *Sundar Lal* (1) and *Vijaraghavalu Naidu* v. *Srinivasalu Naidu* (2), that clause (4) of Article 179 of the Second Schedule of the Limitation Act saves the application from the bar of limitation. In our opinion, this contention is not well-founded and must be overruled.

In order to bring a case within clause (4) of Article 179 it has to be shown by the decree-holder that he has applied in accordance with law to the proper Court to take some step-in-aid of execution of the decree. The learned Vakil for the appellant does not dispute that no written application was made on the 12th April 1906, when the travelling expenses were deposited. But he argues that it may be assumed that on that date an oral application was made on behalf of the decree-holder and the Court was invited to entrust the writ of attachment to the Nazir for execution. This argument is ingenious but obviously unsound. The decision in *Radha Prosad Singh* v. *Sundur Lal* (1), no doubt, lays down that the deposit of Nazir's fees is sufficient to bring a case within clause (4) of Article 179, because when the decree-holder makes such a deposit he takes a step-in-aid of execution of the decree. This decision, however, as was explained in *Thakur Ram* v. *Katwaree Ram* (3) does not give effect to the plain language of clause (4) of Article 179. To bring a case within that clause it is not sufficient for the decree-holder to show that he has taken a step-in-aid of execution of the decree: he has to establish that he has applied to the Court to take some step-in-aid of execution. The mere payment of Nazir's fees cannot plainly by itself bring the case within clause (4) of Article 179. We may further point out that the view taken in the case of *Radha Prosad* v. *Sundar Lal* (1) is contrary to that adopted

(1) 9 C. 644.
(2) 28 M. 399.
(3) 22 A. 358.

in *Toree Mahomed* v. *Mahomed Mabood* (4) and *Ananda Mohan Roy* v. *Hara Sundari* (5). In so far as the decision in *Vijaraghavalu Naidu* v. *Srinivasalu Naidu* (2) is concerned, it may be conceded that it does support the contention of the appellant. There it was ruled by the learned Judges of the Madras High Court that the presentation of what is called a "*batta* memorandum" is sufficient to bring a case within clause (4) of Article 179. We are unable, however, to accept this view as well-founded on principle. If an application has already been made for the issue of a sale proclamation, the presentation of a subsequent application for the same purpose when the fees are paid, is not, in our opinion, sufficient to extend the period of limitation by virtue of clause (4) of Article 179. No doubt, as has been ruled by this Court in *Ambica Pershad* v. *Sardhari Lal* (6), an application by a decree holder for the issue of a sale proclamation is an application by him to the proper Court to take some step-in-aid of execution of the decree. But the mere payment of fees for the issue of a sale proclamation pursuant to an order of the Court on a previous application for the issue of the sale proclamation does not extend the time under clause 4 of Article 179. We may also observe that the view taken in *Vijaraghavalu Naidu* v. *Srinivasalu Naidu* (2) has not been accepted in *Sheo Prosad* v. *Indar Bahadur* (7). In the case before us, there was an application for the issue of a writ of attachment on the 6th April 1906. The Court, as we have already explained, directed the decree-holder to deposit the travelling expenses of the Nazir. This order was carried out on the 12th April 1906. The result was that the conditional order of the 6th April 1906, was perfected on the 12th April 1906. But it cannot be argued that the effect of this was to make time run from the 12th April 1906. As was ruled in *Raj Behari Chakravarti* v. *Kalihar Gupta* (8); time runs from the date of the presentation of the application and not from the date on which the application is disposed of by the Court. In the case before us, the application was made on the 6th April 1906 and time ran from that date.

(4) 9 C. 730; 13 C. L. R. 91. (5) 23 C. 196.
(6) 10 C. 851.
(7) 30 A. 179; 5 A. L. J. 258; A. W. N. (1908) 74.
(8) 10 C. L. J. 479; 3 Ind. Cas. 336.

The result, therefore, is that the order made by the Court below is affirmed and this appeal dismissed with costs. We assess the hearing fee at two gold *mohurs*.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1714 OF 1910.

November 17, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

YIMANI SITARAMA SASTRULU—PLAINTIFF—APPELLANT

versus

GORA RAMUDU AND OTHERS—DEFENDANTS RESPONDENTS.

Madras Act (III of 1895)—Whether applicable to Gadala service inam—*Palanquin bearing service, sale of —Public policy.*

Madras Act III of 1895 does not apply to a Gadala service *inam*.

Sreeramudhu Yarranna v. *Donhira Kannamma*, (1911) 2 M. W. N. 354; 21 M. L. J. 962; 10 M. L. T. 561; 12 Ind. Cas. 457, referred to.

The sale of a service *inam*, the service consisting of bearing a palanquin of the *zemindar*, is not contrary to public policy.

Second appeal against the decree of the District Court of Vizagapatam, in A. S. No. 871 of 1909, presented against the decree of the District Munsif of Chodavaram, in O. S. No. 405 of 1908.

Mr. *S. Sreenivasa Iyengar*, for the Appellant.

Mr. *V. Ramesam*, for the Respondents.

JUDGMENT.—Madras Act III of 1895 has no application to a Gadala service *inam*. See *Sreeramudhu Yarranna* v *Donhira Kannamma* (1). The service is that of a palanquin bearer to the *zemindar*. The sale of such an *inam* is not contrary to public policy. We reverse the decree of the lower Appellate Court and restore that of the District Munsif with costs both here and in the lower Appellate Court.

Appeal allowed.

(1) (1911) 2 M. W. N. 354; 21 M. L. J. 962; 10 M. L. T. 561; 12 Ind. Cas. 457.

GHANSHAM SINGH *v.* TEG BAHADUR SINGH.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 219 OF 1910.
November 29, 1911.
Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.
GHANSHAM SINGH—DEFENDANT—APPELLANT
versus
TEG BAHADUR SINGH—PLAINTIFF—RESPONDENT.

Hindu Law—Widow—Gift—Donee paying debt of donor's husband—Suit to set aside the gift by presumptive heir—Declaration that debt paid by donee was a charge upon the property, whether could be made in the suit.

A Hindu widow made a gift of her husband's property in favour of *B.* After the gift was made *B.* paid certain debts which were due from the husband of the widow who made the gift. *A.* the presumptive heir to the widow's husband brought a suit to have the deed of gift declared void and ineffectual as against him. *B.* pleaded that the debts which he had paid might be declared a charge upon the property:

Held, that *B.* was not entitled to such a declaration in this suit, as the question whether *B.* was entitled to a charge in the property was irrelevant in the present suit.

If *B.* was hereafter held to be entitled to retain possession after the death of the widow it will not be because he had any title to the property under the deed of gift but because being lawfully in possession under the gift during the life-time of the widow, he discharged a debt which was binding on the reversionary heir.

Mahomed Shamsoolhuda v. *Sewakram*, 22 W. R. 409; 2 I. A. 7; 14 B. L. R. 226; distinguished.

First appeal from the decision of the Subordinate Judge of Moradabad, dated 29th March 1910.

The Hon'ble Mr. *Moti Lal Nehru*, for the Appellant.

The Hon'ble Dr. *Sunder Lal*, for the Respondent.

JUDGMENT.—Ram Rikha Singh died in 1893, leaving him surviving his mother Ganga Kunwar and his widows, Ajudhia Kunwar and Hardei and the names of all the three women were entered on the Revenue Records. In February and September 1902, the three ladies transferred parts of the estate of Ram Rikha Singh to the defendant Ghansham Singh. In October 1905, Ganga Kunwar died. In the present suit, instituted in September 1909, the plaintiff, who claims to be one of the presumptive reversionary heirs of Ram Rikha Singh, prayed that the deeds of gift of February and September 1902 might be declared void and ineffectual so far as he is concerned and he also prayed for possession of one-sixth share in the property. The claim for possession has been dismissed and the correctness of that part of the decree is not challenged. The defendants pleaded in the Court below that if the plaintiff was entitled to a declaration that the deeds of gift were void and ineffectual as against him, that declaration should be limited by a proviso that he was entitled to a charge on the property to the extent of certain debts of Ram Rikha Singh, which had been paid by him. The Court below held that the question whether the defendant was entitled to a charge on the property in respect of the debts of Ram Rikha Singh paid by him was irrelevant in the present case and it gave the plaintiff a declaration that the two deeds of gift were void and ineffectual as against the person or persons on whom the property might devolve on the death of the ladies. The defendant has appealed contending that the declaration in favour of the plaintiff should be limited in the way stated above and the plaintiff has filed a cross-objection with regard to the order made by the Court below as to costs. We may dispose of the cross-objection at once by saying, that inasmuch as the plaintiff's claim for possession of part of the property has been dismissed, he was fortunate in being allowed any costs. In support of the defendant's contention we have been referred to the case of *Mahomed Shamsoolhuda* v. *Sewakram* (1). In that case a Hindu widow conveyed for value to a *bona fide* purchaser certain property which she had inherited from her husband. There was a mortgage on the property made by the last male owner which the purchaser paid off after taking possession of the property. In a suit brought by the son of a deceased daughter of the last male owner for a declaration that the widow had power to alienate the property for her life only, and that after her death he would be entitled to the property, it was held that the declaration should be limited by the proviso that he would be entitled to recover the property only on paying to the purchaser of the amount spent by him on redeeming the mortgage. That case differs materially from the present case for there the plaintiff was entitled to a vested remainder and it was possible for the Court to declare that the plaintiff or his heirs would

(1) 22 W. R. 409; 12 I. A. 7; 14 B. L. R. 226.

be entitled to possession on the death of the widow. In the present case the plaintiff is only a presumptive reversionary heir who may never be entitled to possession of the property. The learned Advocate for the defendant appellant admitted that his client could probably not now maintain a suit for a declaration that he was entitled to a charge on the property in respect of the debts of Ram Rikha Singh paid by him; but he maintained that his client would be materially prejudiced if the deed of gift were declared to be void as against the plaintiff and the defendant were not at the same time declared to have a charge on the property on account of the payment by him of the debts of Ram Rikha Singh. It seems to us, as it seemed to the Court below, that the question whether the defendant is entitled to a charge on the property and will be entitled to retain possession after the death of the ladies until he is reimbursed the sums expended by him, has nothing to do with the question whether the deeds of gift are valid, and that the suggested proviso in favour of the defendant will not really be a proviso to or in any way limit the declaration made in favour of the plaintiff but will be a substantive declaration of an entirely different right. If the defendant is hereafter held to be entitled to retain possession after the death of the widow, it will be not because he has any title to the property under the deeds of gift but because, being lawfully in possession under the deeds of gift during the life-time of the ladies, he discharged a debt which is binding on the reversionary heirs of Ram Rikha Singh. For these reasons, we think that the Court below is right in refusing to make any declaration in the present suit with regard to the right of the defendant to a charge on the property in respect of the debts of Ram Rikha Singh paid by him. The appeal and the cross-objection are dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 530 OF 1910.

December 5, 1911.

Present:—Mr. Justice Caspersz and Mr. Justice D. Chatterjee.

SHUKURUDDIN CHOWDHURY—JUDGMENT-DEBTOR—APPELLANT

versus

Rani HEMANGINI DEBI AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Landlord and tenant—Non-transferable occupancy-holding—Sale in execution with consent of co-sharer landlord—Consent after sale, of non-consenting landlord.

An occupancy-holding which is not transferable by custom, can be sold in execution with the consent of the landlord.

Ananda Das v. *Ratnakar*, 7 C. W. N. 572, relied upon.

But that consent must be by the whole body of landlords.

The landlords may consent even after the sale.

Dwarka Nath v. *Tarini Sankar*, 11 C. W. N. 513; 5 C. L. J. 294; 34 C. 199, relied upon.

Where a decree-holder applied for the sale of a non-transferable occupancy-holding in execution of a money-decree, with the consent of co-sharer landlord to the extent of 15¼ annas and an order for the sale of that share of the holding has been made, the High Court did not think it necessary to interfere, as the non-consenting landlords may give their consent after the sale.

Appeal from the order of the Sub-Judge of Bogra dated July 4th, 1910, affirming that of the Second Munsif of Bogra, dated January 29th, 1910.

Babu *Mohini Mohan Chakravarti*, for the Appellant.

Babu *Priya Sankar Mazumdar*, for the Respondents.

JUDGMENT.—The decree-holder applied for the sale of a non-transferable occupancy-holding in execution of a money-decree on the allegation that the landlords had given their consent. The *raiyat* judgment-debtor objected and the learned Munsif found that the consent was not by all the landlords but by co-sharers to the extent of 15¼ annas only and made an order for the sale of that share of the holding. That order has been affirmed by the lower Appellate Court.

It has been held that an occupancy-holding which is not transferable by custom can be sold with the consent of the landlord. See *Ananda Das* v. *Ratnakar* (1). That consent, however, must be by the whole body of landlords. It is contended that the result

(1) 7 C. W. N. 572.

of the order of the lower Courts would be a sale of a part of a holding and a consequent sub-division of the holding without the consent of the whole body of landlords. As regards the sale of a part of a holding there is some diversity of opinion and the matter has been referred to a Full Bench in another case. As regards the sub-division of the holding, that would not be a necessary consequence of the sale and the non-consenting landlords would not be bound to recognize the sub-division. It has also been held that the landlord may consent even after the sale; see *Dwarka Nath* v. *Tarini Sankar* (2). So that here the non-consenting landlords may give their consent after the sale. In any case the decree-holder takes the risk and in the present state of the law the purchaser will purchase at his peril. We do not think it necessary to interfere and we accordingly dismiss this appeal but without costs.

Appeal dismissed.

(2) 11 C.W.N. 513; 5 C. L. J. 294; 34 C. 199.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 24-5 OF 1911 AND CIVIL RULE No. 5356 OF 1911.

November 29, 1911.

Present:—Mr. Justice Stephen and Mr. Justice Coxe.

Raja RAGHUBIR SAHI—DEFENDANT—APPELLANT

versus

Maharajah Sri PROTAP UDOY NATH SAHI DEO—PLAINTIFF—RESPONDENT.

Chota Nagpur Tenancy Act (VI of 1908), ss. 87, 224—Civil Procedure Code (Act V of 1908), s. 100—Second Appeal—Order under s. 87 of Chota Nagpur Tenancy Act.

There is no second appeal from a decree of the Judicial Commissioner of Chota Nagpur made on appeal from an order under section 87 of the Chota Nagpur Tenancy Act.

Appeal from the decree of the Judicial Commissioner of Chota Nagpur, dated July 13th, 1911, reversing that of the Assistant Settlement Officer of Ranchi, dated August 31st, 1910.

Mr. *B. C. Mitter*, for Mr. *S. P. Sinha*, with Babus *Provash Chandra Mitter*, *Surendra Mohan Mallik* and *Harihar Prasad Singh*, for the Appellant.

Mr. *A. Chowdhury* and Babu *Jogesh Chandra Dey*, for the Respondent.

JUDGMENT.

S. A. No. 2485 OF 1911.

STEPHEN, J.—This matter comes before us on appeal and also on a Rule. The appeal was from a decree of the Judicial Commissioner of Chota Nagpur sitting on appeal from an order under section 87 of the Chota Nagpur Tenancy Act.

A preliminary objection is taken by the respondent that no second appeal lies in this case, and this contention, we think, must succeed. Sub-section (2) of section 87 of the Act enacts that an appeal shall lie in the prescribed manner and to the prescribed officer from decisions passed under sub-section (1). By an order of the Local Government, which has power to act in this matter, the prescribed officer is the Judicial Commissioner, and it is argued that an appeal lying to him from a decision of a Revenue officer there can be no second appeal. It is admitted that the provisions of section 100, Civil Procedure Code, must be excluded either expressly or by implication. There is no express exclusion in this Act, but we think, on looking at the frame-work of this Act, that it is intended that no second appeal should lie to this Court. An appeal is provided for, as we have said, in sub-section (2) of section 87, and if there is to be a further appeal we must then look to the provisions of section 224 of the Act, which lays down that "A second appeal shall lie to the High Court, under Chapter XLII of the Code of Civil Procedure, from an appellate decree passed by the Judicial Commissioner under this Chapter, or from any order passed by him on appeal under section 215, sub-section (3)". We are of opinion that section 87 has been deliberately excluded from its scope, we are led further to this conclusion by a consideration of the provisions of the Bengal Tenancy Act from which this Act has been very closely adopted. Reading section 87 with section 106 of the Bengal Tenancy Act, it seems to us that it is by implication provided that there shall be no second appeal in cases arising under that section.

We, therefore, hold that there is no second appeal in this case.

The appeal is dismissed with costs.

COXE, J.—I agree. It appears to me that clause (2) section 87, read with section 264, sub-section (1), clause (8) is tantamount to an express provision of law

within the meaning of section 100 of the Code of Civil Procedure, that these appeals should be heard by the prescribed officers and should not be heard by officers other than those. I only desire to state that in the case of *Mohunt Padmalav Ramanuja Das* v. *Lukshmi Rani* (1), to which we have been referred, there is nothing that in any way limits the scope of section 106 of the Bengal Tenancy Act in so far as it relates to suits between landlord and tenant.

The appeal is dismissed with costs.

Appeal dismissed.

RULE No. 5356.

We have then to consider this Rule. The Rule was on the opposite party to show cause why the decision complained of should not be set aside. The decision arrived at was that the petitioner was a tenant for life and not possessed of a tenancy of a hereditary nature. It is argued on his behalf that the Judicial Commissioner acted without jurisdiction in deciding this question. Under section 81, however, it is the duty of the Settlement Officer under section 87 to decide the matters contained in section 81, paragraph (*b*). It, therefore, was clearly his duty to decide the question which he has decided and we cannot see that there is any room for the contention that he has acted without jurisdiction.

The Rule is discharged without costs.

Rule discharged.

(1) 12 C. W. N. 8.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 662 OF 1911.

November 23, 1911.

Present:—Sir George Knox, KT., Judge, and Mr. Justice Griffin.

LALMAN AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

KALKA PRASAD AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS.

Decree—Execution—Attachment—Malikana *allowance payable from Government Treasury—Whether can be attached—Pensions Act (XXIII of* 1871*)*, *s.* 11.

A *malikana* allowance payable from a Government Treasury is an allowance of the nature of a pension and is not liable to be attached in execution of a simple money-decree.

Execution second appeal from the decision of the District Judge of Banda, dated the 23rd of May, 1911.

Mr. *Pearelal Banerji*, for the Appellant.

JUDGMENT.—This appeal arises out of an application made by the decree-holders to execute a money-decree held by them. The mode in which the assistant of the Court is required is set out as being by attachment of a *malikana* allowance. Both the Courts below have disallowed the application. It is contended before us that Order XXXIV, rule 14 of the Code of Civil Procedure does not bar the present application. It was that order and that rule which the lower Appellate Court held to be sufficient reason for disallowing the application. We have examined the record of the suit and we find both from it and from the application for execution that the property which the decree-holders seek to attach is a *malikana* allowance payable from a Government Treasury. Such allowance is of the nature of a pension and by Act XXIII of 1871, section 11, no money which is due or which is to become due on account of any pension or allowance shall be liable to seizure, attachment, or sequestration by process of any Court in British India at the instance of a creditor or in satisfaction of a decree or order of Court. It has not been shown to us that the *malikana* allowance which the decree-holders seek to attach is of any kind other than that contemplated by section 11 of Act XXIII of 1871. In the absence of such proof we see no reason to interfere and dismiss the appeal.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 1971 AND 2550 OF 1908.

December 18, 1911.

Present:—Mr. Justice Carnduff.

IN No. 1971

RAJENDRA NARAIN SAHA—PLAINTIFF—APPELLANT

versus

ASHUTOSH SANYAL AND OTHERS—DEFENDANTS—RESPONDENTS.

IN No. 2550

ASHUTOSH SANYAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAJENDRA NARAIN SAHA—PLAINTIFF—RESPONDENT.

Ejectment—Raiyat *inducted by trespasser—Good*

RAJENDRA NARAIN SAHA *v.* ASHUTOSH SANYAL.

faith—Judgment of affirmance by Court of Appeal, contents of—Civil Procedure Code (Act V of 1908), O. XLI, r. 31—Local investigation, application for—Refusal—Discretion.

The general rule of law is, that no one can confer on another any right which is not his, and the case of a *raiyat* inducted into a piece of land by a trespasser, is an exception to it.

Binode Lal Pakrashi v. *Kalu Pramanik*, 20 C. 708 (F. B)., referred to.

But the exception should not be extended to a case where there is shown to have been an absence of good faith on the part of either the trespasser or the *raiyat*.

Peary Mohan Mondal v. *Radhika Mohun Hazra*, 8 C. W. N. 315 at p. 319; on appeal, 5 C. L. J. 9, and *Upendra Narain Bhattacharya* v. *Protab Chandra Pardhan*, 8 C. W. N. 320 at p 321, referred to.

Where the Court below has delivered a good judgment, it may be difficult, if not impossible, for the Appellate Court to support it with independent reasons; and, in such a case, there is nothing to be gained by mere repetition or paraphrase, and an expression of concurrence with the finding of the Court below may be sufficient. But there must, of course, be at least enough in the appellate judgment to show that the Court of appeal has really applied its mind to the case and formed an opinion of its own on the points arising in it.

A suit was instituted on April 28th, 1906, the issues were settled on November 21st, and after several adjournments, the case was set down for May 11th, 1907, when an application for a local investigation was for the first time made, but was refused. The case was disposed of on August 12th.

Held, that the Court's refusal of the application, as it was filed too late, was not such an arbitrary exercise of discretion as can properly be interfered with on second appeal.

Appeal from the decree of the Sub-Judge of Pabna, dated July 6th, 1908, modifying that of the first Munsif of Pabna, dated August 12th, 1907.

IN No. 1971.

Babu *Shib Chandra Palit*, for the Appellant.

Babus *Mohini Mohan Chakravarti*, *Krishna Kamal Maitra* and *Biraj Mohan Majumdar* (for the Deputy Registrar), for the Respondent.

IN No. 2550.

Babus *Mohini Mohan* and *Gopal Chundra Das*, for the Appellant.

Babus *Shib Chandra Palit* and *Biraj Mohan Majumdar* (for the Deputy Registrar), for the Respondent.

JUDGMENT.—These two appeals arise out of an action in ejectment brought by certain *patnidars* in respect of seven plots of land alleged to be situate in their *putni*. For present purposes the defendants may be said to be, *first*, the *Sanyals*, who are admittedly the holders of a permanent tenure in the *patni* described in the judgments of the Courts below as a *jama* held in *kaimi raiyati* or *kaimi jote* right, and, *secondly*, the actual cultivators, who have been inducted by the *Sanyals* and are in occupation of some of the plots as the latters' tenants. Both the lower Courts have dismissed the suit as regards plots 3, 4, part of 5, and 7. As regards the remainder, the appellate decree is to the effect, that, as the *Sanyals* have failed to prove that these lands are included in their under-tenure, the suit should be decreed against them; but that the actual cultivators are entitled to remain in occupation as tenants of the plaintiffs, and the suit should be dismissed in so far as they are concerned. Against this decree the plaintiff *patnidars* have preferred S. A. No. 1971 of 1908; while S. A. No. 2550 of the same year is on behalf of two of the defendant *Sanyals*, who object to the finding that they have no right to intervene as rent-receivers between the cultivators and the *patnidars*.

I take up first the appeal of the *patnidars*, whose main contention is that the tenants inducted by the *Sanyals*, found by both Courts to have been trespassers in respect of plots 1, 2, part of 5 and 6, should themselves be evicted as trespassers. The ruling of the Full Bench of this Court in *Binode Lal Pakrashi* v. *Kalu Pramanick* (1) is, of course, relied upon by the other side; but it is urged that that ruling ought not to be extended to a case such as this.

No doubt, the Full Bench decision referred to, introducing, as it did, an exception to the general rule of law that no one can confer on another any right which is not his, should be carefully limited, and I think it clear that it ought not to be applied where there is shown to have been an absence of good faith on the part of either the trespasser or the person inducted by the trespasser. In this connection, I need not do more than refer to *Peary Mohan Mondal* v. *Radhika Mohan* (2) affirmed on appeal in 1904—See *Peary Mohan Mondal* v. *Radhika Mohan* (3) and *Upendra Narain Bhattacharya* v. *Protab Chandra Pardhan* (4). In *Binode Lal Pakrashi's* case (1) there was, so far as I can see, no trace of *mala fides* anywhere: the possession of the trespassers had been main-

(1) 20 C. 708.
(2) 8 C. W. N. 315 at p. 319.
(3) 5 C. L. J. 9.
(4) 8 C. W. N. 320 at p. 321.

tained by a Criminal Court in a proceeding under section 145 of the Code of Criminal Procedure, and it was never suggested that their tenants had acted otherwise than honestly. Similarly, in *Mohima Chandra Shaha* v. *Hazari Pramanik*(5), the decision in which was the subject of the reference to, and was affirmed by the Full Bench in *Binode Lal Pakrashi's* case(1) the defendants tenants had been let into occupation by the Collector before the plaintiff's success in proving, in a suit against the Government, that the land was a reformation on the site of their original estate.

But in the case before me now no imputation of bad faith is cast upon the cultivators inducted by the *Sanyals*, and the only foundation for any such imputation against the *Sanyals* is the remark in the judgment of the learned Munsif that "the *Sanyal* defendants are trying to include some more land in their admitted holding." This, in my opinion, is not sufficient. The question raised by the pleadings was one of parcel or no parcel, the *Sanyals* (who admittedly held an under-tenure in the *patni*) asserting that these plots were included in their under-tenure: but it does not follow from their failure to discharge the burden of proof resting on them that their claim was a dishonest one; and dishonesty is surely not to be presumed. As they had failed, it was quite correct on the part of the first Court to say that they were "trying to include some more land." But I cannot read this remark as tantamount to the finding that they knew that what they were claiming was no part of their under-tenure. On the contrary, the findings of fact point in the opposite direction: for it appears that the *Sanyals* have been in possession of these parcels "for many years" without paying any additional rent for them to the *patnidars*; that their tenants have, as such, been holding them "for a long time;" and that a dispute regarding them had led, in 1903, to a proceeding under Chapter XII of the Code of Criminal Procedure and an order of attachment under section 146. In these circumstances, I am disposed to think that the case may well be held to be within the scope of the Full Bench ruling, that the defendants in actual occupation are, therefore, *raiyats* within the meaning of the Bengal Tenancy Act, 1885, and that they have most justly been left undisturbed as tenants liable to pay rent to the plaintiffs.

It is next contended on behalf of the *patnidars* that the judgment of the lower Appellate Court amounts to nothing beyond an expression of concurrence with the finding of the Court of first instance, and can, therefore, hardly be called a judgment at all A remand is, consequently, suggested as necessary. As to this, I find, that although the Subordinate Judge has disposed of much of the case by referring to the "detailed reasons" given by the first Court, he has added the remark that the plaintiff's Pleader "could scarcely assail, with any show of reason, any of the findings of the learned Munsif," and he has gone on to discuss what he has described as "the only point he (the Pleader) had made out." Where the Court below has delivered a good judgment, it may be difficult, if not impossible, for the Appellate Court to support it with independent reasons; and, in such a case there is nothing to be gained by mere repetition or paraphrase. There must, of course, be at least enough in the Appellate judgment to show that the Court of Appeal has really applied its mind to the case and formed an opinion of its own on the points arising in it: but that is the only rule that I can venture to lay down on the subject. In this case, having read both judgments, I am satisfied that the learned Subordinate Judge has dealt with the appeal with intelligence; and I think that his judgment fulfills the requirements of the rule I have indicated above.

Then it is urged, with special reference to plot 3, *first*, that the judgment of the lower Appellate Court is unintelligible, and, *secondly*, that both Courts were wrong in refusing to order a local investigation, as prayed for by the plaintiffs.

As to former complaint, the passage attacked reads as follows:—"On the first point (*i. e.*, the point whether plot 3 formed a portion of the plaintiff's estate) it would appear from the deposition of the plaintiff's *gomasta* that the *zemindar* Khirod Govinda examined by the defendants, has not a portion in Chota Salika *Mauza* in question. As stated by the learned Munsif in detail, the plaintiff's evidence is not sufficient to find

(5) 17 C. 45.

that this plot 3 is comprised in his *Saham* or portion of the *Mauza*."

The words, as committed to paper, are certainly open to the criticism passed upon them,—so much so, indeed as to raise the suspicion that there must be something wrong. And a reference to the deposition alluded to at once makes it clear that the Judge intended to say "got" when he wrote "not." The whole then becomes quite intelligible, and no fault can be found with it.

As to the local investigation, it appears that the suit was instituted on the 28th April 1906, the issues were settled on the 21st November 1906, and after several adjournments, the case was set down for the 11th May 1907, when an application for a local investigation was, for the first time, made. Now, the mere fact that the case was not ready for final hearing on that day, and was, as a matter of fact, not disposed of till the 12th August following, does not make the Munsif's refusal on the ground that the application had been "filed at too late a stage" such an arbitrary exercise of discretion as can properly be interfered with on second appeal. I must, it seems to me, look at the matter as it stood and presented itself to the Munsif on the 11th May 1907, and not in the light of what subsequently happened; and, so regarding it, I am quite unable to hold that the Munsif was acting at all arbitrarily.

There remains the *Sanyals'* appeal. The argument on their behalf is that the first Court, having found that they have been in possession of some of the parcels "for a long time ought to have gone further and found how long precisely they had held possession, and whether they had not thereby acquired a title to be left undisturbed on the principle explained in *Ishan Chandra Mitter* v. *Raja Ram Ranjan Chakrabutty*(6). The short answer to this is that the *Sanyals* set up no such case and the learned Munsif would have been in error had he made it for them.

The result is that each of these appeals must be dismissed with costs.

Appeals dismissed.

(6) 2 C. L. J. 125.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 451 OF 1911.

December 21, 1911.

Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.

GENDAN LAL—PLAINTIFF—APPELLANT

versus

BABU RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), *O. I, r.* 9—*Applicability of the rule—Hindu Law—Mortgage—Suit against joint Hindu family for sale of mortgaged property—One of the members not made defendant within limitation—Objection as to non-joinder taken at earliest opportunity, effect of—Dismissal of suit—Limitation.*

G. sued C. and others, members of a joint Hindu family, on foot of a mortgage for sale of the mortgaged property. *G.*, however, did not implead an infant of the defendants' joint family as party to the suit within limitation. An objection as to non-joinder was taken at the earliest opportunity:

Held, that under the circumstances the entire suit should be dismissed as time-barred.

Balwant Singh v. *Aman Singh*, 7 A. L. J. 852; 7 Ind. Cas. 712; *Jaddo Kuer* v. *Sheo Shanker Ram*, 7 A. L. J. 945; 7 Ind. Cas. 902; *Gurivayya Ganda* v. *Dattatraya Anant*, 28 B. 11; *Thakurmani Singh* v. *Dai Rani Koeri*, 33 C. 1079, *Imam Ali* v. *Baijnath*, 33 C. 613; 10 C. W. N. 551; 3 C. L. J. 576, referred to.

Second appeal from the decision of the District Judge of Shahjahanpur, dated 16th February 1911.

The Hon'ble Mr. *Moti Lal Nehru*, (with him Dr. *Satish Chandra Banerji*), for the Appellant.

Mr. *Govind Prashad*, for the Respondents.

JUDGMENT.

CHAMIER, J.—This appeal arises out of a suit brought by the appellant upon a mortgage, made in favour of his father by one Mendhai Singh. The defendants to the suit are the three sons of the mortgagor who is dead. Bismillah Begam who purchased a portion of the mortgaged property after the mortgage, and five members of the family of one Baldeo Sahai, deceased, who purchased another portion of the property after the mortgage. The Munsif decreed the claim against the sons of the mortgagor and against Bismillah Begam but dismissed it as against the remaining defendants on the ground that the plaintiff had failed to implead Bishambhar Nath, the son of the defendant Ram Chandar, who was a member of the joint family to which defendants Nos. 5 to 9 belong. That decision was affirmed by the District Judge who agreed with the Munsif that Bishambhar Nath was a

necessary party to the suit and that the provisions of Order I, rule 9 could not avail the plaintiff as Bishambhar Nath had no specific share in the property. I may mention here that both Courts have held that the plaintiff can have made no proper inquiry regarding the members of the family to which Bishambhar Nath belongs. They note the fact that the plaintiff lives in the same quarter of the city as the defendants do and it seems that both Courts were of opinion that if the plaintiff had made inquiries he would have come to know of the existence of Bishambhar Nath though he was only 9 or 10 months old at the date of the institution of the suit.

In second appeal it is contended that a decree should have been made, at all events, for sale of the interests of the members of the family who are parties to the suit. The question is one of considerable importance in view of the passing of Act IX of 1908, which, so far as the Province of Agra is concerned, reduced the period of limitation for a suit of this kind from 60 years to 12 years. Before that Act was passed it was the practice in suits of this kind either to add the necessary parties or to allow the plaintiff to withdraw the suit with permission to bring another suit. One or other of these courses could generally be adopted as most suits were instituted well within limitation. The present suit, like thousands of others was instituted on August 6th, 1910, almost the last day of limitation under the Act of 1908 and the non-joinder of Bishambhar Nath was not brought to the notice of the Court till after the period of limitation for bringing a suit against him had expired, although the objection was taken at the first possible moment. The question what should be done in such circumstances seems to have been decided in three different ways in Shahjahanpur and it is probable that there have been similar conflicting decisions elsewhere. In some cases the claim has been dismissed in accordance with the ruling in *Gulam Kadir Khan* v. *Mustakim Khan* (1), in others where the party omitted was a minor the claim has been decreed on the ground that he was sufficiently represented by his father or some other adult member of his family or party to the suit and in others, decrees have been made for sale of the interest of the portion to the suit.

We have been referred to a large number of rulings but the precise question which we have to decide does not appear to have been the subject of any reported decision since the passing of the Code of Civil Procedure 1908, whereby section 85 of the Transfer of Property Act was repealed. The last mentioned section provided that, "subject to the provisions of the Code of Civil Procedure (1882), section 437, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit" under this Chapter relating to such mortgage: Provided that the plaintiff has notice of such interest. When that section was in force, if a plaintiff failed to implead a child like Bishambhar Nath in a suit like this not having notice of his existence and for any reason the child could not be added as a party, as for instance when the objection was taken at a very late stage, the practice was to allow the suit to proceed and if the claim succeed to make the usual decree for sale. It often happened that the absent member of the family was unable to challenge the decree or sale held in pursuance of it effectively, see for example the cases of *Balwant Singh* v. *Aman Singh* (2) and *Jaddo Kuer* v. *Sheo Shankar* (3) and cases there cited. The result was often the same where the failure of the plaintiff to implead a member of a family of whose existence and interest he was aware was discovered by his opponent or by the Court after the suit had been decreed. In cases other than those in which Hindu families were concerned and in some cases where such families were concerned it was held that the person who ought to have been but was not impleaded did not lose his right to redeem the mortgage.

Order XXXIV, rule 1 which has taken the place of section 85 of the Transfer of Property Act provides that "subject to the provisions of this Code all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage." There is nothing in the rule corresponding with the last nine words of section

(1) 18 A. 209.

(2) 7 A. L. J. 852; 7 Ind. Cas. 112.

(3) 7 A. L. J. 945; 7 Ind. Cas. 902.

58 of the Transfer of Property Act, and the rule is made subject not merely to Order XXXI, rule 1, which corresponds with section 437 of the old Code, but to all the other provisions of the Code. Under the present law it would appear that the decision of the Court upon an objection as to non-joinder in a case of this kind must be the same whether the plaintiff had or had not notice of the existence of the person whom he omitted to implead. It must often happen that no amount of diligence will enable the plaintiff in a suit upon a mortgage to ascertain all the persons who ought to be joined. This is a consideration which should not be lost sight of in determining what the duty of Court is when it is discovered that a person who ought to have been made a party, has not been impleaded.

It was suggested that no question of limitation would have arisen if either of the Courts below had made Bishambhar Nath a party or if we were to do so now and the ruling in *Guruvayya Gonda* v. *Dattatraya Anant* (4) was referred to. But all that was held in that case was, that a plea of non-joinder of a necessary party may be waived and that if fresh parties are joined merely for the purpose of safe-guarding the rights subsisting between them and others claiming generally in the same interest the determination (by application of the provisions of section 22 of the Limitation Act) of the date of institution of the suit as regards such freshly joined parties does not ordinarily affect the right of the original plaintiff to continue the suit. In the present case the plea of non-joinder was taken at the first possible moment and the decision in that case does not go the length of holding that a suit for sale may be continued against a person who, having a share in the property, ought to have been but it was not made a party when that person is made a party after the period of limitation for a suit against him has expired. A stronger authority in favour of the plaintiff in the decision in *Thakurmani Singh* v. *Dai Rani Koer* (5), where the Court held that the fact that an infant grandson of the plaintiff in a suit on a mortgage and a purchaser of a portion of the mortgaged property had been made parties to the suit after limitation had expired, was not fatal to the suit. The ruling in *Guruvayya Gonda* v. *Dattatraya Anant* (4) cited above, was referred to as authority for the decision regarding the infant plaintiff but does not appear to me to go to that length. It seems to me that Order I, rule 10 (5) would have applied if either of the Courts below had made Bishambhar Nath a party to the suit and that the suit is as against him barred by limitation. It is, therefore, useless to have him made a party now.

We have not been asked to hold nor, in my opinion, is it possible to hold in his absence that he is sufficiently represented by his father Ram Chandar. If the objection had not been taken and the interests of the whole family had been sold and a suit had been brought by Bishambar Nath to recover his share or to redeem the property it might have been held that he was sufficiently represented by his father. At this stage it is impossible to hold that Order XXXIV, rule 1 is subject to the other provisions of the Code, one of which is that no suit shall be defeated by reason of the misjoinder or non-joinder of parties and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it (Order I, rule 9). The case presents no difficulty where the interest of the person who ought to have been but has not been made a party is separate from the interests of the parties to the suit. In such a case the Court can order the sale of the interest of the parties for recovery of a proportionate amount of the mortgage-money as was done in *Imam Ali* v. *Baijnath* (6), and other cases. But where the interest or the person who ought to have been but has not been made a party to the suit is inseparable from the interests of the persons who have been made parties it is not practicable to deal with the claim as regards the interests of the persons before the Court. In a case like the present one, it is impossible to say for what amount the shares of the members of the family who are parties to the suit are liable and the appellant is not entitled to throw the burden of the whole mortgage upon the undivided interests of the members of the

(4) 28 B. 11.
(5) 33 C. 1079 at p. 1093.
(6) 33 C. 613; 10 C. W. N. 551; 3 C. L. J. 576.

family before the Court against their will. Had the members who are parties taken the objection at a later stage the Court, on becoming aware of the existence of Bishambar Nath, might have made a decree for the sale of the undivided interests of these members for the recovery of the whole debt and left the purchaser at auction to work out his rights by partition as is done where the undivided interest of a member of a joint family is attached and sold in execution of a money decree.

The conclusions at which I have arrived, not without considerable hesitation are that Bishambar Nath is necessary party to the suit that the suit as against him was barred by limitation when the objection on the score of non-joinder was raised, that although ordinarily it is the duty of the Court in a case like this to deal with the matter in controversy so far as regards the rights and interests of the parties before it, in the present case it is impossible to do so and the only alternative is to dismiss the suit. If the view that I have taken is correct, it seems probable that innocent parties may suffer hardship in some cases. But all possibility of hardship will be avoided if plaintiffs bring their suits well within the prescribed period of limitation for all objections on the score of misjoinder or non-joinder of parties must be taken at the earliest possible opportunity and if not so taken, must be deemed to have been waived. (Order I, rule 13). In the present case the plaintiff followed the previous practice of bringing his suit at the last possible moment and has himself to thank for the result.

I would dismiss this appeal with costs.

KARAMAT HUSAIN, J.—I fully agree with my learned brother in the order proposed by him. What we have to decide is whether we have to dismiss the appeal for non-joinder of Bishambhar Nath (a member of the Hindu joint family of which Babu Ram and others also are members) who was a necessary party under Order XXIV, rule 1 or to decree it dealing with the rights and interests of the defendants before us in the joint family property under Order I, rule 9. Order XXIV, rule 1 is no doubt subject to the provisions of the Code of Civil Procedure including Order I, rule 9 but Order I, rule 9 has no application to the case before us. Where the rights and interest of the parties actually before the Court are such as can be dealt with it in its discretion can do so. This, however, pre-supposes that the rights and interests of the parties actually before the Court are so defined and separable from the rights and interests of the parties which are not before it as to have adjudication in respect thereof possible without affecting the rights and interest of the parties not before it. In an action upon a mortgage for sale of a joint family property when some of the members of the joint family are made defendants their rights and interests in the joint family property are neither defined nor separable from the rights and interests of those members of the joint family who are not before the Court. In such circumstances, the Court cannot possibly proceed under Order I, rule 9 to deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

What has already been stated shows that non-joinder of Bishambar Nath is fatal to the suit of the plaintiff inasmuch as in his absence the rights and interests of other members of the joint family in the joint family property cannot be dealt with under Order I, rule 9. The appeal must, therefore, be dismissed with costs.

BY THE COURT.—Order of the Court is that the appeal be dismissed with costs which in this Court will include fees on the higher scale.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 222 OF 1910.

November 20, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Abdur Rahim.

RAMASAMI REDDI—APPELLANT

versus

LAKSHMIAMBAL AMMAL AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIV, r. 4—Suit for recovery of debt—Deposit of amount in Court by defendant—Costs, award of—Discretion of Court.

DWARKA NATH *v.* PRALHAD RAM.

In a suit for the recovery of a debt, where the amount has been deposited in Court, the Court has a discretion as to the disposal of costs.

Appeal against the decree of the District Court of South Arcot, dated 12th September 1910, in A. S. No. 130 of 1910, presented against the decree of the District Munsif of Panrut, in O. S. No. 111 of 1910.

Mr. *C. V. Anathakrishna Iyer*, for the Appellant.

Mr. *M. Narayanasawmi Iyer*, for the Respondents.

JUDGMENT.—We think the order of the District Judge is right. Order XXIV, rule 4 gives the Court a discretion as to the disposal of costs in a suit for the recovery of a debt, where the amount claimed has been deposited in Court.

The appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2877 OF 1908.

December 13, 1911.

Present:—Mr. Justice Carnduff.

DWARKANATH MISSER—DEFENDANT—APPELLANT

versus

PRALHAD RAM TEWARI—PLAINTIFF—RESPONDENT.

Chota Nagpur Landlord and Tenant Procedure Act (I B. C. of 1879), s. 124—Chota Nagpur Tenancy (Amendment) Act (V B. C. of 1903), s 35—Resumable under-tenure—Sale at auction—Sale before Tenancy Amendment Act—Effect of sale—Costs—Second Appeal.

Under section 124 of the Chota Nagpur Landlord and Tenant Procedure Act, 1879, as it stood originally, a resumable under-tenure could not be sold in execution of a rent-decree, but the right and title of the judgment-debtor could be sold. That section was repealed by section 35 of the Chota Nagpur Tenancy (Amendment) Act, 1903. The repealing enactment came into force on November 4th, 1903, and its section 1, sub-section (3) declared it applicable to all cases pending on the date of its commencement so far as might be.

A resumable under-tenure was sold at an auction-sale in execution of a rent-decree, on August 18th, 1903:

Held, that, the repealing enactment could not affect the sale concluded before its commencement; that section 124 as originally passed applied, and that the purchaser purchased only the right and title of the defaulting under-tenure-holder.

The High Court will not interfere in second appeal with the discretion exercised by a lower Appellate Court on a question of costs.

Appeal from the decree of Sub-Judge of Ranchi, dated August 27th, 1908, modifying that of the Munsif of Ranchi, dated April 11th 1908.

Babu *Bipin Behari Ghosh*, for the Appellant.

Babu *Nagendra Nath Ghosh*, for the Respondent.

JUDGMENT.—This appeal relates to a resumable under-tenure formed out of an eight-annas share of *Mauza* Moro in Chota Nagpur. The original under-tenure-holders had mortgaged half of it to the respondent plaintiff, and had given him an usufructuary lease thereof at a moiety of the rent due to the superior landlord, the Maharaja of Chota Nagpur. On the 18th August 1903, the appellant-defendant purchased what may, for the present, be called the whole under-tenure at a sale held in execution of a decree for arrears of its rent obtained by the Maharaja under the Chota Nagpur Landlord and Tenant Procedure Act of 1879 (Bengal Act I of 1879); while the respondent-plaintiff purchased, on the 15th July 1905, the half mortgaged to him at a sale in execution of a mortgage-decree which he had secured against his mortgagors. So far, then, this was the position of affairs. From March 1903 till July 1905, the defendant was the under-tenure-holder, from whom the whole of the rent of the under-tenure was due to the Maharaja; whereas the plaintiff was the defendant's sub-lessee of half of the under-tenure, and was bound to pay the defendant half of the said rent. In July 1905, however, the parties became equal co-sharers, and thereafter each of them was responsible for a moiety to the superior landlord.

In 1906, the Maharaja sued the defendant for the entire rent of the years 1902 to 1904 (roughly), and obtained a decree, which the plaintiff paid in order to prevent the sale of the under-tenure in execution. Again, in 1907, a similar decree for the rent of 1905 was obtained against the defendant and similarly satisfied by the plaintiff. The suit out of which the present appeal arises, was subsequently brought by the plaintiff for the recovery from the defendant of half of the rent thus discharged by the plaintiff for the years 1902 to 1905, the plaintiff further claiming, for reasons which will presently appear, the whole instead of a moiety, of the rent which he had paid for the year 1904

DWARKA NATH *v.* PRALHAD RAM.

In the Court of first instance the Munsif allowed the claim for half of the rent throughout, and refused the further claim for the other half of the rent of 1904; but the Sub-Judge, on appeal, allowed the latter also, and the first of the two points taken before me is that he was wrong in law in so doing.

As has been shown already, the respondent was in 1904 the sub-lessee of the appellant in respect of half of the under-tenure and bound to pay him half the rent thereof; and this liability he discharged—or, rather, was compelled by suit to discharge. The appellant, however, failed on this part to pay the rent due for 1904 to the superior landlord: a decree therefor was obtained by the Maharaja against him; and the respondent had to pay the decretal amount in order to save the under-tenure from sale. In these circumstances, the respondent sought to recover that amount in full from the appellant, and it seems to me that he was clearly entitled to do so. The arrear for 1904 had fallen due before the respondent's purchase in 1905; so that the respondent was, in regard to it, only the mortgagee in possession, whereas the appellant stood in the shoes of the mortgagors, the original under-tenure-holders. The only person bound to pay the Maharaja's rent for 1904 was, therefore, the appellant, whom the *Maharaja* accordingly sued and obtained a decree against. The respondent's mortgage-interest then became liable to be defeated by the threatened sale under the law, as amended by sections 34 and 35 of the Chota Nagpur Tenancy (Amendment) Act, 1903 (Bengal Act V of 1903), which had, for the first time, rendered a resumable under-tenure saleable, subject to the superior landlords' right of resumption, in execution of a rent-decree. The respondent had, therefore, to protect himself by depositing the whole of the rent decreed, and, as he thereby protected the appellant also, he was surely entitled to get it all back from the latter. I agree, therefore, with the lower Appellate Court, and I think that there is neither law nor logic in the Munsif's decision awarding the respondent one-half, and not the whole.

The only other ground of appeal relates to a set off, which the Court of first instance allowed, but the lower Appellate Court disallowed the appellant. The Maharaja had sued the original under-tenure-holders for the rent of the years 1899 to 1901, a period anterior to the purchase of either the appellant or the respondent, and he had obtained a decree. This decree the appellant had satisfied on the 17th March 1906, in order to prevent the sale of the under-tenure on that date, and he sought in the present suit to set off half the decretal amount so paid by him against the respondent's claim for contribution.

Now, as has been set forth above, the appellant purchased this resumable under-tenure at an auction sale held on the 18th August, 1903, in pursuance of the provisions of the Chota Nagpur Landlord and Tenant Procedure Act of 1879. But, under section 124 of that enactment, as it stood originally, such an under-tenure could not be sold at all in execution of a decree for arrears of rent, and all that could be sold, with the sanction of the Commissioner of the Division, was the right and title of the judgment-debtor in it. By section 35 of the Chota Nagpur Tenancy (Amendment) Act, 1903 (Bengal Act V of 1903), section 124 of the original Act was, no doubt, repealed. But the repealing enactment did not come into force till the 4th November 1903; and, although its section 1, sub-section (3), declared it applicable, not only to all proceedings instituted after its commencement, but also, "*so far as might be* to all *cases* pending in any Court or before any officer on the date of such commencement," it cannot possibly, in my opinion, be held to have in any way affected an auction-sale concluded before that date. The learned Vakil for the appellant has referred to the well known exception in favour of enactments merely regulating procedure and practice to the ordinary rule against retrospective effect laid down by section 8 of the Bengal General Clauses Act, 1899 (Bengal Act I of 1899); but there seems to me to be no cogency in his argument and I have no hesitation in saying that the learned Sub-Judge has arrived at the right conclusion. Section 124 of the Act of 1879, as originally passed, applied: whence it follows that the appellant's purchase on the 18th August 1903, was a purchase of, at most, only the right and title of the defaulting under-tenure-holders, and did not carry with it any charge in respect of the arrears of rent owed by them. Nor could the respondent incur any such liability by his

purchase in July 1905, in execution of his mortgage decree. The liability for the arrears of 1899 to 1901 was a purely personal liability, which continued to rest on the mortgagors, the original under-tenure-holders and the appellant's payment was a purely voluntary payment which benefited them alone. *Ergo*, the appellant's claim by way of set-off has, in the view which I take of the case, been rightly rejected.

There remains only the respondent's cross-objection to the order depriving him of his costs in the Court of first instance. I am not prepared to interfere on a special appeal with the discretion exercised by the lower Appellate Court in a matter of this kind.

The result is, that this appeal is dismissed with costs, and the cross-objection is similarly disallowed.

Appeal and Cross-objection dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 929 OF 1910.

November 28, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Abdur Rahim.

VARIANGATTIL PAKSSERI RAMAN MENON, KARNAVAN OF THE TARWAD—APPELLANT

versus

SANKARA SUBBA PATTAR'S SON, CHANDRA SEKHARAN PATTER AND OTHERS—RESPONDENTS.

Indemnity mortgage—Sub-mortgage—Amendment of plaint—Discretion of Court.

Plaintiff mortgaged his property to 1st defendant, who sub-mortgaged it. After discharge of mortgage, plaintiff was sued by sub-mortgagee for his amount and a decree was obtained against plaintiff. Plaintiff filed an appeal against that decree and while it was pending, instituted the present action against 1st defendant for indemnity, praying for the amount of the decree or, in the alternative, for the deposit of the amount in Court. After the institution of the suit and during the pendency of this second appeal plaintiff satisfied the sub-mortgagee's decree and prayed for the amendment of his plaint by mention of that fact:

Held, that though plaintiff's suit for indemnity, while he had not sustained the loss, was not sustainable, he was entitled to the alternative prayer for deposit in Court;

Patti Narayanamurthy Iyer v. *Marimuthu Pillai*, 26 M. 322, *Pundi Doraisami Tevar* v. *Lakshmanan Chetty*, 14 M. L. J. 285, and *In re Richardson*, (1911) 2 K. B. 705; 80 L. J. K. B. 1232, referred to.

(2) that the amendment prayed for, should be allowed.

Second appeal against the decree of the District Court of South Malabar, in A. S. No. 60 of 1910, presented against the decree of the District Munsif of Chowghat, in O. S. No. 845 of 1908.

Mr. *C. V. Anantha Krishna Iyer*, for the Appellant.

Mr. *T. R. Ramachandra Aiyar*, for the Respondents.

JUDGMENT.—The position in this case is somewhat curious. The plaintiff in the suit mortgaged certain properties to the father of the 1st defendant for about Rs. 1,000, and the mortgagee, for about Rs. 700, executed at sub-mortgage.

The plaintiff, after the execution of the sub-mortgage, paid off the mortgage, and then the sub-mortgagee, in a suit to enfore his sub-mortgage, recovered a judgment against the present plaintiff for the amount of the sub-mortgage. The present plaintiff in this suit, who was a defendant in the suit of the sub-mortgage, appealed against the decree, but, pending the appeal, instituted the present action against the first defendant and his son, the second defendant, for a decree for payment to him of the amount decreed in the sub-mortgagee's suit or for an order directing the defendants to deposit the amount in Court for payment to the plaintiff. Now, the decisions of this Court lay down that a person cannot maintain a suit for indemnity unless he has actually incurred the loss against which he seeks to be indemnified. *Patti Narayanamurthy Iyer* v. *Marimuthu Pillay* (1) and *Doraisami Tevar* v. *Lakshmanan Chetty* (2) show that it would debar the plaintiff from obtaining a decree for the payment of the amount decreed against him. But, the case of *In re Richardson* (3) shows that in equity a plaintiff in a case of this nature may still be entitled to a relief in the nature of the alternative remedy asked for in his plaint. The learned Vakil for the appellant further states, that since the institution of the second appeal, his client has satisfied the decree obtained by the sub-mortgagee and he asks for leave to amend the plaint so as to enable him to obtain

(1) 26 M. 322.
(2) 14 M. L. J. 285.
(3) (1911) 2 K. B. 705; 80 L. J. K. B. 1232.

decree for the amount so paid to him. We think this is a proper case in which the amendment should be allowed. The effect of such amendment will enable the plaintiff to obtain, in the present state of facts, a remedy more complete than he was entitled to on the date of the institution of the suit. But it would not, in our opinion, be a case of converting one cause of action into another, and under the new Code of Civil Procedure, the powers of the Court to allow amendment are very wide. We think, by allowing the amendment, the question at issue between the parties will be completely disposed of and would obviate the necessity for a fresh suit. We, therefore, set aside the decree of the lower Courts and order that the plaintiff may be allowed to amend his plaint by alleging that he has paid the amount sought to be recovered from the defendants to the sub-mortgagee. The District Munsif will, on receiving the amended plaint proceed to dispose of the suit according to law. The defendant will be at liberty to file additional written statement in so far as it may be occasioned by the amendment, and the parties will be permitted to adduce such fresh evidence as may be necessitated by the amendment. The costs of the 2nd and 3rd defendants incurred in this Court will be paid by the plaintiff. The costs in the Court of first instance will be costs in the cause.

Cause remanded.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 167 OF 1910.

November 28, 1911.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

SUBBARAYA IYER AND OTHERS—APPELLANTS

versus

RAMSAWMI PILLAI—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), ss. 257 A, 244—Civil Procedure Code (Act V of 1908), s. 47, O. XX, r. 11—Execution of decree—Arrangement between parties substantially adding to decree—Sanction of Court—Execution after coming into force of Civil Procedure Code, 1908—Enforceability.

Order XX, rule 11, and section 47 of the new Civil Procedure Code, 1908, has altered the law contained in section 257 A of the old Code, and renders legal arrangements between parties after decree, which provide for a distinct benefit to one of them, and treats proceedings under section 244 of the old Code as a suit.

In the course of execution proceedings, the parties came to an arrangement, while the old Code was in force, whereby. in consideration of defendant being given time, plaintiff was to get higher interest and was given liberty to proceed against defendant's person. This arrangement having been sanctioned by Court the plaintiff applied to enforce it after the Code of 1908 came into force:

Held, that plaintiff was entitled to enforce it.

Venkatagiri Iyer v. *Sadagopachariar*, 14 M L.J. 359 and *Palaniappa Chattiyar* v. *Sayari Naidoo*, 18 M.L.J. 548; 4 M. L. T. 233, held to have lost its force with the repeal of the Civil Procedure Code of 1882.

Sheo Gulam Lall v. *Beni Prasad*, 5 C. 27; 4 C. L. R. 29; *Durga Prasad Banerjee* v. *Lalit Mohan Singh Roy*, 25 C. 86 and *Thakoor Dyal Singh* v. *Sarju Pershad Misser*, 20 C. 22, followed.

Appeal against the order of the District Court of Trichinopoly, dated 21st September 1909, in E P. No. 51 of 1909, in O.S. No. 28 of 1903.

Mr. *B. Sita Ram Row*, for the Appellants.

Mr. *G. Annajee Row*, for the Respondents.

JUDGMENT.—In the course of executing the decree in Original Suit No. 28 of 1903 on the file of the District Court of Trichinopoly, obtained upon a deed of hypothecation, the parties entered into an agreement whereby the second defendant was given time to satisfy the decree on condition of his paying interest at 12 per cent. per annum instead of 9 per cent. per annum and the decree was made executable against the person of the second defendant as well as by sale of the hypotheca. The Court sanctioned the arrangement under section 257 A of the Code of Civil Procedure on July 26th, 1905. On August 2nd, 1909, the plaintiff's legal representatives sought to execute the decree for the unpaid balance by arresting the second defendant. The District Judge dismissed the application, relying on the ruling in *Venkatagiri Iyer* v. *Sodagopa Chariar* (1). It was held in that decision that the Court's sanction of an agreement between the decree-holder and the judgment-debtor by which the former is benefited does not make it a part of the decree, but the decree-holder must bring a separate suit to enforce it. Bashyam Iyenger, J., pointed out that a Court has no power to vary or add to its decrees after they are passed except under particular provisions of law and he quoted in support of his view the opinion of the Privy Council in

(1) 14 M. L. J. 359.

KOSURI RAJAGOPAL *v.* DATLA RADHAYYA.

Kotagiri Venaatasubbamma Row v. *Vellanki Venkatrama Row* (2), that subsequent variations of decrees unless made under section 206 or section 623, Civil Procedure Code, were *ultra vires*. Their Lordships of the Privy Council observed at the same time that it was open to the Court to treat such a compromise as a rule of Court and to stay all further proceedings in the decree against the third defendant who alone compromised in that case with the plaintiffs except for the purpose of enforcing the compromise.

Now, in the present instance the compromise was sanctioned by the Court at a time when the Code of 1882, was in force and compromises of this nature after suit were declared by section 257A to be void unless made for consideration and with the sanction of the Court.

When execution against the person of the second defendant was applied for in 1909, the Code of Civil Procedure of 1908 was in force and the old section 257A had dropped out. Further, the old section 210 had reappeared as Order XX, rule 11 in a new form containing a provision for a Court after the passing of a decree where and in so far as it is a decree for the payment of money, ordering the postponement of payment of the amount decreed on such terms as to the payment of interest as it thinks fit. Lastly, section 47 of the new Code of Civil Procedure, corresponding to section 244 of the old Code, had an additional clause added to it, which permits Courts, subject to objections that may be raised on account of limitation or jurisdiction, to treat proceedings under this section relating to the execution, discharge or satisfaction of a decree as a suit or a suit as a proceeding.

With this alteration of the law the *ratio decidendi* of the decisions in *Venkatagiri Iyer* v. *Sadagopachariar* (1) and *Palanippa Chettiyar* v. *Sayari Naidoo* (3) has lost its force.

We find no difficulty in following the decisions in *Sheo Golam Lall* v. *Beni Prosad* (4); *Durga Prasad Banerjee* v. *Lalit Mohan Singh Roy* (5) and *Thakoor Dyal Singh* v. *Sarju Pershad Misser* (6) and we think accordingly that the second defendant who had the benefit of the arrangement for delay in execution and the order passed sanctioning it, is not at liberty to resile from that arrangement.

The lower Court's order is reversed and the case will be sent back to the District Judge for proceeding with the execution application.

The respondent will bear the appellant's costs in both Courts.

Appeal allowed.

(2) 24 M. 1.
(3) 18 M. L. J. 548; 4 M. L. T. 233.
(4) 5 C. 27; 4 C. L. R. 29.
(5) 25 C. 86.
(6) 20 C. 22.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1284 OF 1910.

November 30, 1911.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

KOSURI RAJAGOPAL RAJA AND OTHERS —APPELLANTS

versus

DATLA RADHAYYA AND OTHERS—RESPONDENTS.

Contract—Provision for benefit of third parties—Right of such third parties to enforce the provision in their favour.

Where, at a partition between the members of a joint Hindu family, provision is made for the female members of the family the latter are entitled to enforce the same and sue upon it:

Defendants Nos. 3 and 5 entered into a deed of partition whereby their mother was to get certain land which was to be taken by her daughters after her death. The mother having died, plaintiff, one of three daughters, sued for her third-share of the said land:

Held, that plaintiff was entitled to succeed.

Shuppu Ammal v. *Subramaniam*, 33 M. 238; 19 M. L. J. 739; 4 Ind. Cas. 1083; *Arumuga Goundan* v. *Chinnammal*, 14 M. L. T. 214; 21 M. L. J. 918; (1911) 2 M. W. N. 524; 12 Ind. Cas. 185, *Rakhmabai* v. *Moreshwar*, 6 Bom. L. R. 421, *Protab Narain Mukerjee* v. *Sarat Kumari Debi*, 5 C. W. N. 386, referred to.

Second appeal against the decree of the Subordinate Judge of Kistna, at Ellore, in A. S. No. 223 of 1907, presented against the decree of the District Munsif of Narsapur, in A. O. No. 235 of 1908.

Mr. *Prakasam*, for the Appellants.

Mr. *Ramesam*, for the Respondents.

JUDGMENT.—The plaintiff and defendants Nos. 1 and 2 are sisters of defendants Nos. 3 to 5. By an instrument of partition entered into between defendants Nos. 3 to 5 it was stipulated that certain land was to be enjoyed by the mother of the parties for her life and to be taken by her daughters,

that is the plaintiff and defendants Nos. 1 and 2, after her death. The mother is now dead. This suit by the plaintiff is to recover one-third of that property, defendants Nos. 1 and 2 being entitled to the remaining two-thirds.

Defendants Nos. 3 to 5, the brothers, contend that the plaintiff not being a party to the partition instrument has no cause of action for the recovery of the property. They plead that by a subsequent arrangement soon after the partition they cancelled the allotment to the mother and sisters. It was suggested during the course of the argument here that the partition deed never became operative, but we do not read the written statement as raising this question. The issue was whether the arrangement was subsequently cancelled. The lower Appellate Court has given the plaintiff a decree and defendants Nos. 3 to 5 are the appellants in this Court.

We are of opinion that the decision appealed from is right. To the general rule that persons who are not parties to a contract have no right of action based on it, there are several exceptions. The Privy Council has recently pointed out that the rule must be applied to this country with considerable exceptions. In that case a Muhammadan wife was held entitled to sue upon a contract entered into between her father and her husband's father before the marriage. We are of opinion that where at a partition between the members of a joint family provision is made for female members of it, it must be held that as the contract was entered into for the benefit of those who are provided for by the instrument of partition, they are entitled to the benefit of it and to sue upon it. This principle has been affirmed by this Court in *Shuppu Ammal* v. *Subramaniam* (1). See also *Arumuga Goundan* v. *Chinnammal* (2). The decisions of other High Courts have also affirmed the principle. See *Rakhmabai* v. *Govind Moreshwar* (3); *Protab Narain Mukerjee* v. *Sarat Kumari Debi* (4).

The exceptions are not confined to cases where one or other of the parties to the contract can be said to have made himself a trustee for strangers who claim to sue on it. In Pollock on Contracts four exceptions are stated. The third class of exceptions according to the learned author is the case of trusts. Then he mentions another and distinct class. To quote his own words: "Closely connected with the cases covered by the doctrine of trusts but extending beyond them, we have the rule of equity by which special favour is extended to provisions made by parents for their children." In Halsbury's Laws of England, Vol. VII, page 344, section 711, the case of marriage settlement is treated as included in the case of trusts. Sir Frederick Pollock's classification commends itself better to us. It may be observed that the general statement in Halsbury's Laws of England that another exception to the rule is recognized in cases where the contract is intended to secure a benefit to a person who is not a party to it will cover cases which are not comprised in trusts. It is usual amongst Hindus to allot portions to sisters at a partition between brothers. In the document in this case the provision for the plaintiff and her sisters is stated to be for *Pasum Kunkumam*. We find no difficulty in holding that sisters are within the equity of a family settlement amongst Hindus. The allotment of the land in this case was made for the benefit of the plaintiff and her sisters. They are persons for whom it was the moral duty of the parties to the instrument to provide. We are of opinion, therefore, that the plaintiff's right to sue was rightly upheld.

We dismiss the second appeal with costs.

Appeal dismissed.

(1) 33 M. 238; 19 M. L. J. 739; 4 Ind. Cas. 1083.
(2) 10 M. L. T. 214; 21 M. L. J. 918; (1911) 2 M. W. N. 524; 12 Ind. Cas. 185.
(3) 6 Bom. L. R. 421.
(4) 5 C. W. N. 386.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1308 OF 1909.

December 20, 1911.

Present:—Mr. Justice Carnduff.

GANAPAT MARWARI—DEFENDANT—APPELLANT

versus

BALMAKUND BEHARA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Property in hand of a member of Hindu family—Presumption that property is joint—Nucleus of family property—Manager of family doing banking business, powers of—Second Appeal—Point of law—Misconstruction of piece of documentary evidence—Civil Procedure Code (Act V of 1908), s. 100.

GANAPAT *v.* BALMAKUND.

Where it is proved that there was a nucleus of joint Hindu family property, any property in the hands of a member of such family should be presumed to be family property.

Ram Persad Singh v. *Lakhpati Koer*, 30 C. 231 at p. 244; 7 C. W. N. 162; 30 I. A. 1, *Gonnu Singh* v. *Bhagwati Koeri*, 3 Ind. Cas. 234 and *Dwarka Prosad Raghubir* v. *Jamna Das Gordhan Das*, 13 Bom. L. R. 233; 9 Ind. Cas. 948, referred to.

A person who, on behalf of a joint Hindu family carries on the family banking business as manager thereof can, not only enter into contracts and give discharge so as to bind his co-parceners, but may also sue and be sued alone without the other members of the family being joined with him in the suit.

Kishen Parshad v. *Har Narain Singh*, 38 I. A. 45; 15 C. W. N. 321; 13 C. L. J. 345; 9 Ind. Cas. 739; 8 A. L. J. 256; 9 M. L. T. 343; 21 M. L. J. 378; 13 Bom. L. R. 359; 33 A. 272; (1911) 2 M. W. N. 195, relied upon.

The misconstruction of a piece of documentary evidence is not a mistake of law sufficient to concede a second appeal.

Nowbut Singh v. *Chatterdharee Singh*, 19 W. R. 222, followed.

Appeal from the decree of the District Judge of Cuttack, dated May 25th, 1909, reversing that of the Sub-Judge of Sambalpore, dated February 13th, 1907.

Babu *Jogendra Chandra Ghose*, for the Appellant.

Babus *Sarat Chandra Ray Chaudhuri* and *Biraj Mohan Mazumdar*, for the Respondents.

JUDGMENT.—This was a suit brought by the two plaintiffs for the recovery of Rs. 1,000 admittedly deposited by their deceased brother Radhasham Behara, with a banker. In the Court of first instance it was found that the money was not joint family property; that therefore, Radhasham's widow being alive, the plaintiff had no right to sue; and that the money had, in fact, been re-paid. As a result, the suit was at first dismissed. The learned District Judge has, however, reversed all the above findings and decreed it; and the defendant-banker has now preferred this second appeal.

The District Judge's decision is attacked mainly with reference to the law he has enunciated as to the presumption in favour of a Hindu family being joint and property in the hands of a member of it being family property. He has, it is said, gone too far in throwing the onus entirely on the appellant and holding that it is to be presumed, not only that Radhasham was joint with his brothers, the respondents, when the money was deposited by him, but also that the deposit was derived from joint funds. The contention is that, in circumstances such as those of the present case, the ordinary presumption of Hindu law does not arise; and in support of it I am referred to *Ram Pershad Singh* v. *Lakhpati Koer* (1) and *Gannu Singh* v *Bhagwati Koeri* (2). In these cases this Court, undoubtedly, expressed the opinion that, when there is separate residence, separate messing and separate worship among the members of a Hindu family, the presumption based on the theory of the normal condition of such a family "can hardly be said to hold good" or, in the words used in the latter case, "falls to the ground;" the contrary presumption then arises; and it rests on the party who alleges continuance of indivision in spite of severance in these particulars to establish his allegation. Now, in each of these instances this Court was dealing with the facts in a regular appeal, and what was held was simply this, that the facts found as to cesser of commensality and so forth, being themselves inconsistent with the normal state of a Hindu family, were sufficient, *prima facie*, to show separation and shift the burden of proof on to the side asserting that the family had nevertheless remained joint. Jointness is, I imagine, becoming almost daily less and less the rule, and the presumption and re-consideration is, amid the changing conditions, and in response to the natural demands of a progressive society, steadily losing strength, in the sense that it is more and more easily rebutted as time advances. It may well be that it will disappear altogether some day—perhaps at no distant date; but I can find no authority either in the ruling cited or elsewhere, such as to justify me in holding to-day that there are cases in which it does not exist at all and is not, so to speak, the starting point. On behalf of the appellant it has, indeed, been conceded that no fault can be found with the learned District Judge's initial observation that the onus of proving that the three brothers were not joint lay upon him. But it is argued that the Judge misdirected himself when he proceeded to lay it down that it was also to be presumed that the money deposited was derived from joint funds, and that he was wrong in dismissing the suit because the

(1) 30 C. 231 at p. 244; 7 C. W. N. 162; 30 I. A. 1.
(2) 3 Ind. Cas. 234.

defendant had failed to prove affirmatively that it was self-acquired property. In this connection reference is made to the case of *Dwarka Prasad Raghubir* v. *Jamna Das Gordhan Das* (3) in which Beaman, J., has held "that it is not a presumption of the Hindu law that every member of a joint Hindu family, found to be in possession of property at his death, has necessarily acquired that property as a member of the joint family and so imprinted upon it the character of joint Hindu family property." But the learned Vakil for the appellant has overlooked the fact that Mr. Justice Beaman at once goes on to observe, that "before that presumption can be made it lies upon the party so alleging to prove that there was at least a nucleus of joint family property out of which the property ultimately acquired by an individual member may be said to have grown." Here it is obvious, and cannot be denied, that there was such a nucleus; and, therefore, the Bombay case really does not help the appellant. My conclusion, then, is that the learned District Judge made no mistake in this connection and that his findings of fact conclude this part of the appeal.

It is next contended, that even if the family were joint and Radhasham acting as manager, his discharge in respect of the sums paid before his death was good and sufficient to bind the family: and the appellant relies for support upon the recent decision of the Judicial Committee in *Kishen Parshad* v. *Har Narain Singh* (4), by which it has been settled that the manager on behalf of a joint Hindu family of the family banking business can not only enter into contracts and give discharges so as to bind his co-parceners, but also sue and be sued alone without the joinder of the other members of the family. This contention seems to me to be right: otherwise, no bank could with safety honour cheques drawn by its Hindu clients against their deposits, and business on modern lines would be impossible. But, unfortunately for the appellant, the lower Appellate Court has found that his plea of re-payment has not been proved, and he is again concluded by a finding of fact which, so far as I can see, cannot be questioned on second appeal.

The last point made is as to the construction placed on a certain *ekrarnama* (Exhibit I) upon which the learned District Judge has relied as proving, "almost, if not quite, conclusively" that the brothers were joint a fortnight before the death of Radhasham. In this document, which was signed by all three brothers, it was agreed that "there having been serious disputes about the partition of the whole of their moveable and immoveable joint properties and there having been no settlement about the said partition" a *panch* was to be appointed to settle the dispute by arbitration. This, it is argued, instead of indicating jointness on the date of the document, points to their having already been some sort of a partition regarding which disputes calling for settlement by arbitration had arisen. It may be that there is something to be said for this construction; but it has long since been established—see the well-known and frequently cited ruling of Couch, C. J., and Glover, J., in *Nowbut Singh* v. *Chutterdharee Singh* (5)—that the misconstruction of a piece of documentary evidence such as this is not a mistake of law upon which a second appeal will lie. Moreover, the suggestion that the *ekrarnama* ought to be construed in this way is made for the first time in the course of the argument before me, the theory of the defence having hitherto been that it was an agreement to separate which at once operated as a separation. For all these reasons, I find myself unable to yield the point.

In the result I am of opinion that this second appeal must be dismissed with costs.

Appeal dismissed.

(3) 13 Bom. L. R. 133; 9 Ind. Cas. 948.

(4) 38 I. A. 45; 15 C. W. N. 321; 13 C. L. J. 345; 9 Ind. Cas. 739; 8 A. L. J. 256; 9 M. L. T. 343; 21 M. L. J. 378; 13 Bom. L. R. 359; 33 A. 272; (1911) 2 M. W. N. 395.

(5) 19 W. R. 222.

EMPEROR v. QADIR BAKHSH.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 1452 OF 1911.

December 9, 1911.

Present:—Mr. Justice Shah Din.

EMPEROR—PROSECUTOR

versus

QADIR BAKHSH—ACCUSED.

Cantoment Code, 1899, *s.* 94—*Notice not specifying the nature and extent of repairs whether legal.*

Section 94 of the Cantonment Code contemplates that the owner should know the precise nature and extent of the repairs which, in the opinion of the Cantonment authority, he should execute in the interests of the safety of the occupier or of the public. Therefore, a notice under the section which does not state at all what kind of repairs the Cantonment authority requires the owner to make to the houses specified in the notice is illegal.

Case reported by the Sessions Judge, Lahore Division, with his No. 1201 of 1st November 1911.

FACTS.—The facts of this case are as follows:—

By an order dated 30th November 1910, a notice purporting to be under section 94 of the Cantonment Code was issued to Mr. Qadir Bakhsh, *Tahsildar* of Batala, owner of houses, Nos. 85, 86, 87, 88, 89; 90, 91, 120, 121 and 396, situated in the Lahore Cantonments, requiring him to repair or demolish these houses and level the site within 15 (fifteen) days, they being reported to be in a ruinous condition.

The accused, on conviction by Major W. T. Barry, Cantonment Magistrate, Lahore, exercising the powers of a Magistrate of the 1st Class in the Lahore District, was sentenced, by order dated 10th May 1911, under sections 94, 104 of the Indian Penal Code, to a fine of Rs. 15 for non-compliance with the order.

Note—Fine realised.

The proceedings are forwarded for revision on the following grounds:—

(1) The Cantonment Magistrate did not issue his order on the grounds that the condition of the houses constituted a public danger. The notice, therefore, under section 94 of the Cantonment Code was legally invalid:—Vide *Wazirullah* v. *Crown* (1).

(2) The prosecution was not instituted for over three months as required by section 284 of the Cantonment Code.

For these reasons I recommend that the conviction be quashed.

Mr. *Fazl-i-Hussain*, for the Accused.

(1) 1 P. R. 1906 Cr., 48 P.L. R. 1906, 3 Cr. L. J. 43.

ORDER.—After hearing Mr. Fazl-i-Husain who appears in support of the recommendation made by the Sessions Judge under section 438, Criminal Procedure Code, for the reversal of the sentence passed by the Magistrate on Mr. Qadir Bakhsh, I think that the conviction of the accused in this case is illegal and must be set aside. Section 94 of the Cantonment Code, 1899, as amended, under which the Secretary of the Lahore Cantonment Committee issued notice to the accused on the 30th November 1910 runs as follows:—

"Where any building..... is in the opinion of the Cantonment authority in a ruinous state..... .....the Cantonment authority may, by notice in writing, require the owner or occupier thereof forthwith either to remove the same, *or to cause such repairs to be made as it may think necessary* for the safety of the occupier or of the public..... ..... The words of the section which I have italicised show that in the notice which the Cantonment authority issues to the owner or occupier of the building alleged to be in a ruinous state, the Cantonment authority has to state the nature of the repairs to be made by the owner or occupier which it may think necessary for the safety of the occupier or of the public, as the case may be. As laid down in *Petman* v. *King-Emperor* (2), a notice under section 94 of the Cantonment Code must give the owner the option of removing a building or making adequate repairs and in regard to the option of making repairs the section contemplates that the owner should know the precise nature and extent of the repairs which, in the opinion of the Cantonment authority, he should execute in the interests of the safety of the occupier or of the public.

The notice dated the 30th November 1910 which was issued to the accused in this case was as follows: "It having been reported to the Cantonment authority that your houses (of which the numbers are given in the heading of the notice) are in a ruinous condition. I am directed to request you within 15 days of the service of this notice to repair or demolish these houses and level the site."

In the above notice it is not stated at all what kind of repairs the Cantonment autho-

(2) 23 P. R. 1905 Cr., 168 P.L.R. 1905, 3 Cr.L.J. 301.

IMPERATOR *v.* RINO.

rity required the owner to make to the houses specified in the notice; and on this ground alone the notice was, in my opinion, illegal. That being the case, the accused was not liable to be prosecuted under section 104 of the Cantonment Code, and his conviction is bad in law. I, therefore, set aside the conviction and the sentence and direct the fine, if realised, be refunded.

Conviction set aside.

(s. c. 5 S. L. R. 123.)

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL NO. 37 OF 1911.

July 17, 1911.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

IMPERATOR

versus

RINO *valad* SOBHDAR—ACCUSED.

Penal Code (Act XLV of 1860*)*, *ss.* 201, 202—*Causing evidence of offence to disappear—Positive destruction of evidence not necessary—Burying corpse with marks of violation—Offence under section* 202 *not included under s.* 201—*Criminal Procedure Code (Act V of* 1898*)*, *s.* 238.

The offence under section 202 of the Penal Code is not a minor offence included under section 201, for an essential ingredient of the offence under section 202, is the legal duty of the accused to give information and this is no part of the offence under section 201. Consequently, an accused against whom a charge under section 201, is framed cannot be convicted of an offence under section 202 without a charge under the latter section being framed against him.

In order to support a finding that the accused has caused evidence to disappear, it is not necessary to prove the *positive destruction* of evidence.

The burial of the corpse of a murdered man if done with the intention of concealing the fact that there were marks of violence on it might be an offence under section 201.

Mr. *Mulchand*, for the Appellant.

The *Public Prosecutor*, for the Crown.

JUDGMENT.—The accused was tried by the Additional Sessions Judge, Hyderabad, on a charge undersection 201, Indian Penal Code, in that he knowing or having reason to believe that Chutta Kapri had been murdered (1) caused evidence of the offence to disappear by burying the body, and (2) gave false information as to the cause of death to the Tappedar.

The Additional Sessions Judge found the coused not guilty of this offence, but convicted him without framing a charge of an offence under section 202, Indian Penal Code.

The Additional Sessions Judge was clearly wrong in treating section 202, as a minor offence included under section 201, for an essential ingredient of the offence under section 202 is the legal duty of the accused to give information, and this is no part of the offence under section 201. Section 238, therefore, does not apply and a charge under section 202, should have been framed.

For this reason alone, we must under section 232, reverse the conviction and sentence and order a re-trial.

We are not satisfied, however, with the order of acquittal under section 201.

The Additional Sessions Judge appears to have thought that some evidence of positive destruction of evidence is necessary to support a finding that the accused has caused evidence to disappear. This is not so—the burial of a corpse of a murdered man if done with the intention of concealing the fact there were marks of violence on it might be causing evidence of the commission of the offence to disappear. The Sessions Judge has also omitted to notice the statement of Soniat that the accused stood over her with a stick and made her wash the blood stained clothes. On the other branch of the charge under section 201, there is the evidence of the Tappedar that the accused gave him false information which he recorded in his register. The Sessions Judge has dealt with this part of the case in an equally unsatisfactory manner. He does not say that he disbelieves the Tappedar but merely remarks that the evidence is not conclusive.

We set aside the order of acquittal under section 201, and direct that the accused be re-tried for offences under sections 201, 203 and 202, Indian Penal Code. The accused to be re-arrested unless he gives bail himself in Rs. 1,000 with one surety in Rs. 1,000 to appear in the Sessions Court, Hyderabad, on the 1st September.

Re-trial ordered.

MUTHUVARAPU SESHIAH *v.* GATRAM RAMIAH.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 14 OF 1910.

November 1, 1911.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

MUTHUVARAPU SESHIAH—APPELLANT

versus

GATRAM RAMIAH—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction for prosecution—Forgery—Document put in Court—Absence of judicial inquiry—Preliminary inquiry whether necessary before giving sanction—Penal Code (Act XLV of 1860), ss. 463, 471, 475, 476.

Per Abdur Rahim, J., (whose opinion was the judgment of the Court under section 36 of the Letters Patent)—Where a document has been filed in Court by a party, about whose genuineness or otherwise there is no judicial inquiry, the Court should not accord sanction to prosecute the party for having filed a forged document. The Court must make some preliminary inquiry and satisfy itself that there is a *prima facie* case for prosecution.

Per Spencer J., Contra.—Where a document was judicially before the Court and was produced in a proceeding in Court within the meaning of section 195, clause (c) of the Criminal Procedure Code, it was competent to the Court to exercise its powers under section 195.

Section 195 of the Criminal Procedure Code, does not require any inquiry as a necessary antecedent to the grant of sanction.

Ambika Prasad Singh v. *Emperor*, 35 C. 820, 8 Cr. L. J. 398, explained.

Akhil Chandra De v. *Queen-Empress*, 22 C. 1004; *Bapuram Surma* v. *Gouri Nath Dutt*, 20 C. 474, referred to.

An inquiry, if held under section 195, Criminal Procedure Code, need not be a judicial inquiry.

Queen v. *Nujum Ali*, 6 W. R. 41, Cr., followed.

Appeal against the order of the District Court of Guntur, in O. P. No. 110 of 1903, presented against the order of the District Munsif of Ongole, in C. M. P. No. 1017 of 1908 in O. S. No. 340 of 1908.

Mr. *T. Prakasam*, for the Appellant.

Mr. *C. R. Subramanya Aiyar*, for the Respondent.

JUDGMENT.

ABDUR RAHIM, J.—I think in this case the order of the District Judge granting sanction must be set aside. The petitioner filed a suit on a promissory-note bearing a certain date. He afterwards withdrew the suit with the permission of the Court, before any summons or notice was taken out for the defendant. The defendant made an application for sanction for the prosecution of the plaintiff under sections 463, 471, 475 and 476 of the Indian Penal Code. The District Munsif refused sanction, but the District Judge has set aside that order and granted sanction. There has been no inquiry into the question whether the promissory-note is forged. The suit was not heard, and no evidence has been taken as to the genuineness or otherwise of the note. The defendant has filed an affidavit stating that the promissory-note was a false document and that he owed no money. The plaintiff, on the other hand, insists that it is genuine and was executed for proper consideration.

The District Judge says that, because the stamp used did not come into use on the alleged date of the promissory-note, it must at least have been ante-dated. But the plaintiff gives an explanation as to how such a stamp came to be affixed on the note. He says that the defendant himself fraudulently affixed the stamp in question in order to evade his liability. There has been no inquiry as to which of the allegations is correct, and there is nothing like a judicial finding that the promissory-note is forged. A Court before granting sanction, ought to be satisfied that there is at least a *prima facie* case for prosecution, and the person to be prosecuted must have had an opportunity of showing that the document on which he based his suit is true and genuine. I do not wish to lay down that the inquiry must be in any particular form. But there must be some inquiry and the Court granting sanction must be satisfied on evidence that the document used in Court is false. There are, no doubt, cases in which it has been held, that where a suit has been properly tried, there need not be any fresh inquiry as to the character of the document already found to be false. But I am not aware of any case in which it has been held, that when a suit has not been tried at all, sanction may be granted for the prosecution of the plaintiff in respect of a document filed by him in Court without its being found on proper inquiry held for the purpose that there are sufficient grounds for holding the document to be a forgery. On this ground the sanction ought, in my opinion, to be set aside, and it is, therefore, unnecessary for me to consider the question whether the District Munsif is right in holding, on the authority of *Ambika Prasad Singh* v. *Emperor* (1), that there has been no user in this case within

(1) 35 C. 820; 8 Cr. L. J. 398.

MUTHUVARAPU SESHIAH v. GATRAM RAMIAH.

the meaning of section 471, Indian Penal Code.

SPENCER, J.—The promissory-note alleged to be forged in this case bore the signature of the promisee over a postal and revenue stamp of a kind which was not introduced into circulation until after the date of the document upon which it was used. *Prima facie*, an offence of forgery was committed by some one in respect of it.

As a suit was brought on the promissory-note and the note was put into Court with plaint, it was "produced" in a proceeding in a Court within the meaning of clause (*c*) of section 195, Criminal Procedure Code. The words 'produced or' in the section were added when the Code of Criminal Procedure was amended, and have to be read apart from the words "given in evidence" which follow.

It was, no doubt, the intention of the party to use the document in evidence in his suit, though owing to the withdrawal of the suit before issue of notice to the defendant, it was not actually put in evidence. There was, therefore, ground for the Court which had the matter brought to its notice in the course of a judicial proceeding [vide *Akhil Chandra De* v. *Queen-Empress* (2)] to consider that an offence under section 471, Indian Penal Code, had been committed.

The case of *Ambika Prasad Singh* v. *Emperor* (1) was a case in which the person producing the document was not a party but a third party who merely filed certain rent receipts in Court through his *Mukhtear*, and the High Court held that the evidence that he had anything to do with them was very weak.

It is contended that the Court according sanction should have held some preliminary inquiry before passing orders under section 195. The section does not require any inquiry as a necessary antecedent to the grant of sanction. The connected section 476, which has not been applied to this case, speaks of the Court "making any preliminary inquiry that may be necessary". In *Baperam Surma* v. *Gouri Nath Dutt* (3) it was held, that "although it may sometimes well be that a preliminary inquiry ought to be held, the adoption of a rigid rule to that effect would simply introduce into the criminal procedure in this country a new stage as a matter of imperative necessity.

* * * * * *

* * * * * *

We do not think that such a practice is rendered imperative by the law and it is not desirable that it should be necessary and in every case indroduced". In making these observations, their Lordships dealt with the case as one under section 476. Taking the order to be a sanction under section 195, they found no reason for interfering at all.

In the present case, the District Munsif who heard the application was of opinion that this was not a case in which a preliminary inquiry would serve any purpose, and I consider, that in the exercise of his discretion he was entitled to form that opinion.

There was nothing to prevent him from taking judicial notice of the fact that the promissory-note alleged to be forged was filed in his Court along with the plaint, and he had also before him the affidavits and petitions produced by either side. Any inquiry that may be held under this section need not even be a judicial inquiry [vide *Queen* v. *Nujum Ali* (4)]. The District Munsif and the Judge who heard the application, were also entitled to draw any inference that might arise from the documents before them and to come to a conclusion whether the explanation offered by the counter-petitioner was probable and one that might reasonably be accepted. Actual proof might be left to the trial. They had only to see if a *prima facie* case had been established.

I am of opinion that the sanction should stand and that the application should be dismissed.

ABDUR RAHIM, J.—My learned brother would uphold the order of the District Judge. Under section 36 of the Letters Patent, the order granting sanction is set aside.

The respondent will pay the costs of this application.

Order reversed.

(2) 22 C. 1004.
(3) 20 C. 474.
(4) 6 W. R. 41 Cr.

(s. c. 5 S. L. R. 153.)

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 83 OF 1910.

August 10, 1911.

Present:—Mr. Pratt, J. C. and Mr. Crouch, A. J. C.

BODOMAL KISHINCHAND—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), *ss.* 157, 520—*Bank-note—Property passes by delivery to* bona fide *purchaser for value—Erroneous disposal of currency-note—Power of superior Court to order re-payment of equivalent—"Any further order that may be just."*

Property in a bank-note passes, like that in cash, by delivery and a party taking it *bona fide* and for value is entitled to retain it as against a former owner from whom it has been stolen.

Miller v. *Race*, 1 S. L. C. 468, relied upon.

Where currency-notes or current coins have been erroneously disposed of under section 517 of the Criminal Procedure Code, a superior Court may order the re-payment of an equivalent under section 520 of the Code.

The intention of the Legislature in adding to section 520 the words "and make any further orders that may be just" was to enable a superior Court to give effect to an order setting aside the order of the Court of first instance, by directing the restitution of the property if the order of the Court of first instance has been carried out.

Mr. *Tahilram Maniram*, for the Applicant.

JUDGMENT.

CROUCH, A. J. C.—This is an application to revise an order passed by the Sessions Judge, Hyderabad, under section 520, Criminal Procedure Code.

The applicant had produced some notes stolen from Lieutenant Porteous, and alleged that he had changed them, in all good faith for the accused. The Magistrate when convicting the accused had ordered that the notes should be given to Mr. Porteous.

The applicant then applied to the Sessions Court, but that Court dismissed the application on the ground that the notes were no longer in Mr. Porteous' possession or under his control.

I am of opinion that the learned Sessions Judge has misunderstood the law.

Property in a bank-note passes, like that in cash, by delivery, and a party taking it *bona fide* and for value is entitled to retain it as against a former owner from whom it has been stolen. [*Miller* v. *Race* (1)]. If, therefore, the learned Judge was satisfied

(1) 1 S. L. C. 468.

that applicant had given consideration for the notes, and secured them honestly, he should have modified or altered the order of the lower Court.

He should also have made "any further order that might be just." Possibly, an order for restitution against Mr. Porteous might be necessary if complete justice was to be done to the applicant. The intention of the Legislature, in adding to section 520, Criminal Procedure Code, the words, "And make any further orders that may be just" was obviously to enable a superior Court to give effect to an order setting aside the order of the Court of first instance, if that order has been carried out by directing the restitution of the property. (See notes to section 520, Agnew and Henderson's Criminal Procedure Code). But, in making an order for restitution, the Court is not restricted by the terms of section 517, or by any limited definition that may be given to the word "restitution:" it can make any order that may be just; and, where Currency-notes, or current coin, have been erroneously disposed of under section 517, the re-payment of an equivalent might, in justice, be ordered.

I would reverse the order of the Sessions Court, and return the case with instructions to hear the application and decide the same according to law

PRATT, J. C.—I concur.

Order reversed.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 248 OF 1911.

November 13, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

LAKSHMINARAIN APURAM SUBRAMANYA PATTAR KRISHNIER—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), *ss.* 409, 477*A*—*Separate breaches of trust and falsifications of accounts on different dates—Joint trial—Illegality—Crimina Procedure Code (Act V of* 1898), *s.* 234.

The accused was charged at one trial under section 409, Indian Penal Code, for criminal breach of trust in respect of Rs. 432 made up of five sums of money entrusted to him at different dates in 1910 and of five separate falsifications of accounts on different dates under section 477A, Indian Penal Code:

Held, that each breach of trust and falsification was a distinct offence and the trial of these five distinct offences at one trial was illegal.

CHANGAL HALAPOTO v. BASARMAL.

Subramanya Aiyar's case, 25 M. 61 and *Kari Viswanathan* v. *Emperor*, 30 M. 328; 5 Cr. L. J. 341, 2 M. L. T. 177, 17 M. L. J. 141, referred to.

Appeal against the order of the Court of Sessions of the South Malabar Division, in Case No. 14 of the Calendar for 1911.

Mr. *T. Subramanaya Aiyar*, for the Appellant.

Mr. *C. F. Napier*, Public Prosecutor, for the Crown.

JUDGMENT.—In this case the appellant has been convicted under section 409, Indian Penal Code, for criminal breach of trust by a Public servant in respect of Rs. 432, made up of five sums of money entrusted to him at different times during the year 1910, and he has also been convicted of five separate falsifications of accounts, under section 477 A, Indian Penal Code, each falsification being in respect of one of the five sums misappropriated. We are of opinion that each of these five separate falsifications was a distinct offence and that the trial of these five distinct offences (to say nothing of the criminal breach of trust) was illegal with reference to section 234, Criminal Procedure Code, and vitiates the whole trial by *Subramania Iyer's* case (1).

The present case is in all essentials exactly on all fours with the case of *Kasi Viswanathan* v. *Emperor* (2), in which reasons for the decision are fully stated that the proper course to be followed in cases like the present is clearly pointed out.

The appellant's Vakil argues that on the merits the appellant could not be convicted under section 409, Indian Penal Code, as it was not his duty to receive the money and he relies on the cases reported in 1 Weir's pages 465 to 466. He contends that, in these circumstances we ought not to order a re-trial. We do not think it necessary at this stage to decide whether a conviction under section 409, Indian Penal Code, could be sustained, as the objection, even if valid, would not prevent the accused being punishable under sections 406 and 403, Indian Penal Code.

We, therefore, set aside the conviction as the trial was illegal and we direct the appellant to be re-tried by the Sessions Judge in accordance with law.

Case remanded.

(1) 25 M. 61.
(2) 30 M. 328; 5 Cr. L. J. 341; 2 M. L. T. 177; 17 M. L. J. 141.

(s. c. 5 S. L. R. 122.)

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATIONS NOS. 37, 39 40, 41 AND 42 OF 1911.

July 13, 1911.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

Haji CHANGAL HALAPOTO AND OTHERS —APPLICANTS

versus

BASARMAL CHANGOOMAL—RESPONDENT.

Penal Code (Act XLV of 1860), s. 378—Theft—Fish in open water—Feræ naturæ—*Incapable of possession.*

Fish in open and unenclosed water are *feræ naturæ*. They are not capable of possession and hence cannot form the subject of theft.

Bhagiram Dome v. *Abar Dome*, 15 C. 338, followed.
Queen v. *Sheikh Adam*, 10 B. 139, distinguished.

Only such moveable property which is capable of possession can be the subject of theft.

Mr. *Wadhumal Udharam*, for the Applicants.

The *Public Prosecutor*, for the Crown.

JUDGMENT.

PRATT, J. C.—This is an application praying that this Court will reverse the order of the Honorary Magistrate, 2nd Class of Moro, taking cognizance of a complaint of theft as against the applicant.

The allegation in the complaint is that the accused stole fish from the Indus and from Dhands connected with the Indus, in respect of which the accused had received a license to fish from Government.

Now, the complainant admits that the fish are in open and unenclosed water, and, therefore, do not fall within the ruling in *Queen* v. *Sheikh Adam* (1), which lays down that when restrained of their natural liberty fish are capable of being possessed, being no longer *feræ naturæ*, but *feræ domitæ*.

The Indian Penal Code, no doubt, makes no express distinction between animals *feræ naturæ* and those that are domesticated, but under the definition of theft the property which is the subject of theft is only moveable property which is capable of possession. The very fact that the fish in this case were *feræ naturæ*, *i.e.*, free to go of their own accord, shows that no one could be in possession of them. This was so decided in

(1) 10 B. 139.

Bhagiram Dome v. *Abar Dome* (2), where it was held that the owner of a fishery right in Public River is not in possession of the fish in that river and that the infringement of his fishing right is not theft.

The complaint discloses no offence and we, therefore, reverse the order made under section 204 by the Magistrate.

Order reversed.

(2) 15 C. 388.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 500 OF 1911.
CRIMINAL REVISION PETITION No. 374 OF 1911.
November 27, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Abdur Rahim.

ISMAIL GHAMI AMMAL—PETITIONER

versus

KATIMA ROWTHER AND OTHERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 145—Dispute as to possession—Possession of Receiver.

When a Receiver has been appointed by Court for certain properties, his possession should, for the purposes of section 145, Criminal Procedure Code, be regarded as possession on behalf of the party who might ultimately be found by the Magistrate to be in possession immediately before the date of the Receiver's appointment.

Rajah of Venkatagiri v. *Isakapaili Subbiah*, 26 M. 410 and *Joyanti Kumar Mukherjee* v. *Middleton*, 27 C. 785; 4 C. W. N. 526, referred to.

Criminal Revision petition against the order of the Sub-Divisional Magistrate of Karur, dated 30th June 1911.

Mr. *W. Barton*, for the Petitioner.

Dr. *S. Swaminathan*, for the Respondents.

ORDER.—We think, that in the state of facts which are founded in this case the possession of the Receiver appointed on the 4th April 1909, may, for the purpose of section 145 of the Criminal Procedure Code, be properly regarded as possession on behalf of the party who should ultimately be found by the Magistrate to be in possession immediately before the 4th April, just as, for purposes of limitation, the possession of the Receiver is held to be the possession of the party entitled to possession, *Rajah of Venkatagiri* v. *Isakapalli Subbiah* (1) and *Joyanti Kumar Mookerjee* v. *Middleton* (2).

(1) 26 M. 410.
(2) 27 C. 785; 4. C. W. N. 562.

To hold otherwise would be to hold that neither of the parties nor the Receiver is in possession and this would lead to the very scramble for possession and probable breach of peace which it is the purpose of the law to prevent. We must, therefore, dismiss this petition.

Petition dismissed.

(s. c. 5 S. L. R. 129.)

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 54 OF 1911.
July, 19 1911.

Present:—Mr. Pratt, J. C.

IMPERATOR

versus

Haji ALU AND ANOTHER—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 233, 239—Joint trial of persons charged with giving false evidence in same judicial proceedings is illegal—"Same transaction"—Penal Code (Act XLV of 1860), s. 193—Perjury—Contradictory statements not absolutely irreconcilable—Oaths Act (X of 1873), ss. 8, 9, 10, 11—Criminal trial.

The joint trial of two or more persons charged with giving false evidence in the same judicial proceedings is not permissible under section 239 of the Criminal Procedure Code.

The false evidence given by one witness is a transaction complete in itself and not connected with false evidence given by another witness even though in the same case and on the same point.

Queen-Empress v. *Moharaj*, 16 W. R. Cr. 47; *Queen-Empress* v. *Anant Ram*, 4 A. 293, *Queen-Empress* v. *Kotha Subha Chatti*, 6 M. 252; *Queen-Empress* v. *Nathu Shaikh*, 10 C. 405, *Emperor* v. *Krishnarao*, 4 Bom. L.R 53, followed.

Such a joint trial is more than an irregularity; it is an illegality which vitiates the whole trial.

Subramaniya Iyer's case, 25 M. 61, followed.

A person should not be convicted under section 193 of the Penal Code for making contradictory statements when the statements are not absolutely irreconcilable.

Queen-Empress v. *Bankatram*, 28 B. 533, relied upon.

The provisions of sections 8, 11 of the Oaths Act do not apply to criminal proceedings.

Queen-Empress v. *Murarji Gokaldas*, 13 B. 389, relied upon.

Mr. *Mulchand Maghanmal*, for the Appellant.

The *Public Prosecutor*, for the Crown.

JUDGMENT.—The two accused were examined as witnesses before the Sub-Divisional Magistrate in a proceeding under section 110, Criminal Procedure Code.

In re ADALA YERRIVADU.

They are alleged to have made contradictory statements and have been tried and convicted for offences under section 193, Indian Penal Code.

The joint trial of the two accused could only be legal under section 236, Criminal Procedure Code.

That section requires that the offences should have been committed in the same transaction. But as said in the case of *Queen-Empress* v. *Moharaj* (1), "The lie told by a witness is none-the-less his own particular lie because other witnesses have about the same time told similar lies; and it is each man's own lie and not his neighbour's that can alone be used against him." The false evidence given by one witness is a transaction complete in itself and not connected with false evidence given by another witness even though in the same case and on the same point. This had been decided in many cases and by all the High Courts—

Queen-Empress v. *Anant Ram* (2), *Queen-Empress* v. *Kotha Subba Chetti* (3), *Queen-Empress* v. *Nathu Sheikh* (4), *Emperor* v. *Krishnarao* (5).

The procedure adopted was, therefore, in contravention of the provisions of section 233 and, under the ruling of the Privy Council in *Subramania Iyer's* case (6), this is more than an irregularity—it is an illegality which has vitiated the trial.

I do not order a re-trial as the statements do not appear to me absolutely irreconcilable, see on this point *Queen-Empress* v. *Bunkatram* (7). The first statements seem to refer to what the accused knew by repute and the second statements to what the accused knew of their own personal knowledge.

I would also remark for the guidance of the Magistrate that the provisions of sections 8—11 of Oaths Act do not apply to criminal proceedings; see *Queen-Empress* v. *Murarji Gokuldas* (8).

I reverse the conviction and sentences and direct the accused to be released from their bonds.

Conviction and sentence reversed.

(1) 16 W. R. Cr. 47.
(2) 4 A. 293.
(3) 6 M. 252.
(4) 10 C. 405.
(5) 4 Bom. L. R. 53.
(6) 25 M. 61.
(7) 28 B. 533.
(8) 13 B. 389.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 569 OF 1911.
CASE REFERRED No. 119 OF 1911.
December 14, 1911.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

In re ADALA YERRIVADU—ACCUSED.

Criminal trial—Accused of poor wits—Lunacy, inquiry into—Criminal Procedure Code (Act V of 1898), Ch. XXXIV.

Where a Magistrate finds an accused to be of poor wits and wanting in apprehension of the serious consequences of his acts, he should hold an inquiry under Chapter XXXIV, Criminal Procedure Code, into the question whether the accused is a lunatic either at the time of the trial or was a lunatic when he committed the offence of which he is charged.

Case referred for the orders of the High Court under section 438, Criminal Procedure Code, by the District Magistrate of Vizagapatam, in his letter, dated 6th September 1911.

Mr. *M. D. Devadass*, for the Accused.

Mr. *John Adam*, Crown Prosecutors in support of the Reference.

ORDER.—The Sub-Divisional Magistrate, in his order, says the accused is a youth of poor wits, clouded all the more by his born infirmity, and never knew or apprehended that such serious consequences would ensue. And, again, in his letter of reference, he says that he was not able to make the accused understand anything or to understand anything from him, and that he appeared to be utterly ignorant of the grave consequence of his act.

These observations make us doubt whether, as a matter of fact, the accused was not a lunatic at the time of the trial and also at the time that he committed the act which is charged as an offence against him.

The Sub-Divisional Magistrate should hold an inquiry into the question whether the accused was a lunatic at either of these times under Chapter XXXIV, Criminal Procedure Code. If he finds that he was not a lunatic on either of the occasions, he will then, as required by section 341, Criminal Procedure Code, try the accused or commit him to the Sessions Court for trial.

If he convicts him, he will then make a report to this Court under that section.

Case remanded.

MR. MCGILL *v.* MR. BYRNE.

(s. c. 5 S. L. R. 133.)

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 7 OF 1911.

July 26, 1911.

Present:—Mr. Pratt, J. C.

MR. McGILL—APPLICANT

versus

MR. BYRNE—OPPONENT.

Penal Code (Act XLV of 1860), *s.* 499, *exception* 9—*Defamation—Allegation made in a petition of divorce—Absolute Privilege, rule of, inapplicable in India—English cases not to be referred for guidance—Practice—Evidence Act (I of* 1872), *s.* 122, proviso.

In construing the provisions of the Indian Penal Code, the Code is not to be frittered away by reference to English cases laying down a different principle.

Bank of England v. *Vagliano*, (1891) A. C. 107; 60 L. J. Q. B. 145; 64 L. T. 353; 39 W. R. 657; 55 J. P. 676, *Norendra Nath* v. *Kamal Basini*, 23 C. 563; 23 I. A. 18, relied upon.

The English rule of absolute privilege in cases of defamation does not apply *proprio vigore* in India.

Where a certain statement made in a petition for divorce filed in Court is alleged to amount to defamation, the case must be decided not with reference to the rules of English law but with reference to section 499 of the Indian Penal Code.

Isuri Prasad Singh v. *Umrao Singh*, 22 A. 234; *Emperor* v. *Ganga Prasad*, 29 A. 685; A. W.N. (1907) 235; 4 A. L J. 605; 6 Cr. L. J. 197, followed.

Allegations which are made in a petition for divorce filed by the accused after his wife has left his house, and in the truth of which he has a reasonable belief, fall within the 9th exception to section 499.

Mr. *Dipchand Chandhumal*, for the Applicant.

The Assistant Public Prosecutor, for the Crown.

JUDGMENT.—Byrne, the accused in this case, had filed a petition of divorce from his wife in which he had made the complainant Mc'Gill, the co-respondent.

The petition was withdrawn and Mc'Gill then filed a complaint in the Court of the City Magistrate charging Byrne with defamation in respect of statements in his petition alleging acts of adultery between Mrs. Byrne and himself.

The Magistrate without recording evidence has held that the statements are absolutely privileged and has, therefore, discharged Byrne.

In this application McGill prays that this Court will order further inquiry into the case.

The rule of absolute privilege on which the Magistrate has relied is one extracted from English case law. It finds no place in the Indian Penal Code. And, though the Magistrate's judgment displays great industry and learning, it is affected with the vice condemned in the remarks of Lord Herschell in the *Bank of England* v. *Vagliano* (1) and cited with approval by the Privy Council in *Norendra Nath* v. *Kamal Basini* (2). The Penal Code is not to be frittered away by reference to English cases laying down a different principle for such a practice would, as pointed out by Lord Herschell, have the effect of frustrating the very object for which the Code was enacted.

That the English rule of absolute privilege does not apply *proprio vigore* in India is apparent from the provisio to section 132 of the Indian Evidence Act; for if it did, that proviso would be superfluous. On this point I agree with the statement of the law contained in the judgment of Aikman, J., in *Isuri Prasad Singh* v. *Umrao Singh* (3) and in *Emperor* v. *Ganga Prasad* (4).

The case must be decided with reference to section 499 of the Indian Penal Code and, in my opinion, the complaint makes it so clear that the case falls within the 9th exception that there is no reason for this Court to interfere.

The allegations were made in a petition for divorce filed by the accused after his wife had left his house. It was clearly made for the protection of the accused's interests. The issue then is, were the allegations made in good faith? Section 105, Indian Evidence Act, puts the *onus* of showing this on the accused but he may discharge this by pointing to facts admitted in the complaint. The accused on the strength of the facts alleged took divorce proceedings against his wife. It is fair to presume that he would not have done this unless he had a reasonable belief in the truth of those facts. This shifts the *onus* back to the complainant and the complaint makes no suggestion of express motive beyond the somewhat ridiculous statement that the

(1) (1891) A. C. 107; 60 L. J. Q. B. 145; 64 L. T. 353; 39 W. R. 657; 55 J. P. 676.

(2) 23 C. 563; 23 I. A. 18.

(3) 22 A. 234.

(4) 29 A. 685; A. W. N. (1907) 235; 4 A. L. J. 605; 6 Cr. L. J. 197.

accused was a a friend of his mother-in-law.

I refuse the application.

Application refused.

(s. c. 16 C. W. N. 46.)

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 211 OF 1911.

April 19, 1911.

Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.

MEHER SARDAR AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Misdirection—Trial by jury—Right of private defence, when commences—Trespassers carrying away crop—Police Station of distance of nine miles—Rulings cited to jury.

The right of private defence of property commences when reasonable apprehension of danger to the property commences; and if persons have begun to cut and carry away one's crop, it cannot be said that he is bound to go nine miles to fetch the Police. It was, therefore, misdirection on the part of the Judge to leave it to the jury to say whether the fact that the *thanah* was only nine miles distant from the place of occurrence, did not take away the right of private defence. The same consideration applies to the remedies in the Civil Court if the Judge refers to them.

No rulings or authorities are even to be cited by the Judge to the jury, nor are they to be asked to differentiate or form any opinion whatever on any authorities. Such procedure constitutes misdirection.

Appeal against the conviction and sentence passed upon the accused by the Sessions Judge of Khulna, dated February 13th, 1911.

FACTS.—The case for the prosecution was that the complainant and his brother Barkatulla went to cut paddy from a certain plot of land, when the seven accused with others came to the field with *lathis*; that the accused asked complainant to desist from cutting the paddy; that the complainant did not mind their request; that an altercation ensued, and that under order of Meher, the other accused struck the complainant's men and the complainant's brother was so much beaten that he fell down and shortly after died.

The Police Station was at a distance of nine miles. The accused having been sentenced under sections 147 and 326, Indian Penal Code, appealed to the High Court.

Babu *Jyotish Chandra Hazarah*, for the Appellants.

Mr. *Sultan Ahmed*, for the Crown.

JUDGMENT.—This is an appeal from the conviction and sentence passed by the learned Sessions Judge of Khulna upon seven persons. Agreeing with the unanimous verdict of the jury, he found them guilty under section 147, Indian Penal Code, and directed that they be rigorously imprisoned for one year and six months each under that section. The accused Kader Sardar and Kobil were further found guilty by the jury under section 326 and they were sentenced to be rigorously imprisoned for three years under that section, the sentences were to run concurrently with those passed under section 147.

The jury found incidentally that possession whether rightly or wrongly was with the first accused Meher Sardar and, therefore, following the direction of the Judge they must have found that Meher Sardar and his party had the right of private defence against the taking of their crops. They were, therefore, justified in using sufficient force to get rid of these people and prevent their stealing their crops and the learned Judge clearly misdirected the jury when he left it to them to say whether the fact that the Police Station was only nine miles off the place of occurrence did not take away their right of private defence; for the right of private defence of property commences when reasonable apprehension of danger to the property commences and if persons have begun to cut and carry away your crop it cannot be said that you are bound to go nine miles to fetch the Police. The reasonable apprehension of danger to the property having commenced the right of private defence has also commenced. The same consideration applies to the remedies in the Civil Court to which the learned Judge referred. The cutting and the removal could not have been prevented at the moment by the institution of any suit, and the learned Judge practically directed the jury that by taking the law into their own hands they formed themselves into an unlawful assembly and it is on this misdirection that the jury have found them all guilty under section 147. We notice that he has cited and commented on a number of rulings of this Court and told the jury that it was for them to say whether any of those rulings are exactly on all fours with the circumstances of the present case. This is also a misdirection. No rulings or

authorities are ever to be cited to the jury nor are they to be asked to differentiate or form any opinion whatever on any authorities. It is for the Judge and the Judge only to tell the jury what the law is, and before he tells them what it is he may consult as many authorities as he pleases and those authorities are, no doubt, binding upon him. The minds of the jury should never be confused by having a number of conflicting authorities or indeed any authorities laid before them. In this case the Judge not only confused the jury by laying before them a number of conflicting authorities and leaving it to them to choose between them but as we have seen he has misdirected them as to the law of the right of private defence. We have no doubt that the accused persons had the right of private defence in this case and that they did not exceed it except in so far as certain persons fractured the skull of one Barkatulla with *lathis*. This was a wholly unnecessary proceeding and quite unjustified. But as the assailants were exercising the right of private defence they cannot have formed members of an unlawful assembly.

The convictions and sentences under section 147, Indian Penal Code, against all the appellants must, therefore, be set aside and they must all be acquitted and released with the exception of appellants Nos. 3 and 4, Kader Sardar and Kobil *alias* Kobeluddi, who have been further convicted by the jury under section 326 on the finding that it was they who struck Barkatulla the two blows on the head which the medical evidence shows fractured his skull. In so doing, they undoubtedly exceeded the right of private defence and the verdict of the jury must be upheld. But we think the sentence must be reduced to one of eighteen months' rigorous imprisonment in each case.

We accordingly direct that the accused Kader Sardar and Kobil *alias* Kobeluddi be sentenced to eighteen months' rigorous imprisonment under section 326, Indian Penal Code. The other appellants will be discharged.

Appeal allowed.

(s. c. 5 S. L. R. 135.)

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REPORT No. 52 OF 1911.

July 27, 1911.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

IMPERATOR—COMPLAINANT

versus

ABDUL LATIF—ACCUSED.

Penal Code (Act XLV of 1860), *ss.* 441, 447—*Criminal trespass—Entry on land in exercise of* bona fide *right.*

If a person enters on land in the possession of another in the exercise of a *bona fide* claim of right but without any intention to intimidate, insult or annoy the person in possession or to commit an offence, his act does not amount to criminal trespass although the accused may have no right to the land.

Emperor v. *Budh Singh*, 2 A. 101, followed.

Mr. *Tahilram Maniram*, for the Complainant.

The Public Prosecutor, for the Crown.

JUDGMENT.—This is a report by the District Magistrate requesting this Court to interfere in revision with an order of the 2nd Class Magistrate, Matiari, taking cognizance of a case of criminal trespass against one Abdul Latif.

The facts are that the accused who had for the last year and a quarter been claiming the right to take water from the complainant's land made an entry thereon for the purpose of exercising that right. The complainant then filed a complaint charging the accused with an offence under section 447. The complaint nowhere alleges that the accused was actuated with the intention referred to in section 441, nor does the Magistrate state this in his order issuing process on the complaint. The case clearly falls within the rule laid down in *Emperor* v. *Budh Singh* (1), that "if a person enters on land in the possession of another in the exercise of a *bona fide* claim of right but without any intention to intimidate, insult or annoy the person in possession or to commit an offence then, although he may have no right to the land, he cannot be convicted of criminal trespass."

We reverse the order of the Magistrate taking cognizance of the case.

Order reversed.

(1) 2 A. 101.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 1134 OF 1911.

December 9, 1911.

Present:—Mr. Justice Shah Din.

PIR BAKHSH—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), *s.* 411—*Stolen property produced by accused from a* jungle—*Whether such production sufficient to sustain conviction—Evidence—Proof.*

Where an accused produced the stolen property from a *nullah* in a *jungle*, which was neither in his possession nor under his control: *Held*, that such production was insufficient to establish his guilt under section 411, Indian Penal Code.

Petition for revision under section 439, Criminal Procedure Code, of the order of the Sessions Judge at Rawalpindi, dated 15th July 1911, upholding the order of the Magistrate, 1st Class, Murree, dated 26th June 1911, convicting the petitioner.

Mr. *Badr-ud-Din*, for the Petitioner.

JUDGMENT.—In this case the stolen property, consisting of rolls (*thans*) of cloth is alleged to have been produced by the petitioner from a hole in a *nullah* in a *jungle* not far from his house in *Mauza* Mussiari, but the evidence on this point is, in my opinion, interested and unsatisfactory, and I am not prepared to believe it. Besides the complainant himself, three constables have been produced in support of this story, but their evidence cannot be considered as independent. Of the two villagers, Nur Ahmad and Gama, who support the Police in this respect, the former was considered unreliable by the Magistrate (see the note recorded by him at page 87 of the record) and the latter is a witness of an ordinary type. Mir Khan, *Lambardar*, who was admittedly present at the time when the alleged production of the stolen property took place, but who was not produced by the prosecution, was summoned and examined by the Magistrate *suo motu*, and his evidence is in direct contradiction of that given by the complainant and the constables, as he clearly says that the petitioner never produced any stolen property at all. The Magistrate disbelieved him, but I can see no reason whatever why he should be disbelieved, and no reason has been assigned by the Magistrate in support of his view. I hold, therefore, that it is not proved that the petitioner produced the stolen property as alleged by the prosecution.

Even, however, if the petitioner did produce the property as alleged, the fact that he produced it from a place in the *jungle* which was neither in his possession, nor under his control, is sufficient for holding that his guilt under section 411, Indian Penal Code, is not established. [See *Ala Bakhsh* v. *Emperor* (1) and *Queen-Empress* v. *Gobinda* (2)]. The petitioner's house was searched twice, but nothing incriminating was found therein.

I accept this revision, set aside the conviction and sentence of the petitioner and acquit him. He will be discharged from his bail.

Revision accepted.

(1) 92 P. L. R. 1902. (2) 17 A. 576.

(s. c. 5 S. L. R. 136.)

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 56 OF 1911.

July 27, 1911.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

BAKSHALI—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), *s.* 193—*Perjury—Accused charged with making a particular false statement—Conviction on the strength of accused's previous contradictory statements—Secondary evidence of statement made by a person not called as witness.*

Where the prosecution undertakes to prove that a *particular statement* made by a person accused of an offence under section 193 of the Penal Code, is positively untrue, the accused cannot be convicted merely on the strength of contradictory statements previously made by him.

A fact in issue cannot be held proved by secondary evidence of statements made by a person who is not called as a witness and who is held by the Magistrate himself to be a liar.

Appeal from the decision of the First Class Magistrate, Mirpur Bathoro.

Mr. *Wadhumal Oodharam*, for the Appellant.

The Public Prosecutor, for the Crown.

JUDGMENT.—Appellant has been convicted under section 193, Indian Penal Code, of making the following false statement on solemn affirmation in the course of the trial of Umar *walad* Jakhio Dario, for the offence of escaping from unlawful custody. "We (meaning himself and Jaro) did not recognise the other."

"The other" referred to is the said Umar Jakhio, and the questions in issue are,—

In re ARULANANTHAM.

(1) Was the other thief seen by appellant Umar Jakhio?

(2) Did appellant recognise him ?

The evidence in this case is precisely similar to that in the case of *Imperator* v. *Jaro* (1). For the reasons given in my judgment in Jaro's appeal, I hold the first fact in issue not proved.

As to the 2nd issue Ghulam states:—"I can't say how long Bakshali knew Umar Dario. Bakshali has never told me that he knew Umar Dario before. I cannot say if Bakshali knew Umar Dario before or not. I can't say if Bakshali saw the faces of the thieves or not." This is the only direct evidence on record.

The evidence upon which appellant is convicted is frankly admitted by the trying Magistrate to be the "accused's own statements made at different times." That is to say, the facts in issue are held to be proved by secondary evidence of statements made by a person who is not called as a witness, and who is held by the Magistrate himself to be a liar. Even if we treat all these statements as admissions and strictly relevant, what weight can fairly be attributed to them? It must be urged that the appellant has been certainly shown to have made a false statement in one or other of his contradictory depositions, but the prosecution took on itself to prove that a particular one of these statements was positively untrue. Proof that such statement was false must consist of reliable evidence, and the Court is not justified in treating obviously unreliable evidence as good merely because the accused was himself responsible for it.

Had the original order under section 476 been in proper form, setting out clearly the statement alleged to be false, the Magistrate would have probably discovered, either that a clear case could be made out by including in the charge two contradictory statements and alleging that one or other was false, or else that there was no reasonable chance of proving the case against the accused at all. If the proper procedure had been followed, either there would have been no trial at all, or a conviction would have resulted as a moral certainty.

The appellant is acquitted.

Appeal accepted.

(1) 5 S. L. R. 54; 12 Ind. Cas. 646.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 537 OF 1911.

CASE REFERRED No. 96 OF 1911.

November 23, 1911.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

In re ARULANANTHAM PILLAI—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 250—Information of offence to Village Magistrate—"Institution of proceedings"—Compensation.

Information given to a Village Magistrate cannot be regarded as information given to the Police of an offence within the meaning of section 250, Criminal Procedure Code, even where the Village Magistrate is bound to report the offence to the Police.

King-Emperor v. *Thammana Reddi*, 25 M. 667; *Sessions Judge of Tinnevelly* v. *Sivan Chetti*, 32 M. 258; 5 M. L. T. 269 (F. B.); 9 Cr. L. J. 170; 1 Ind. Cas. 187, explained and followed.

Where a person who gave information to the Village Magistrate of theft was directed to pay compensation to the accused, who was acquitted of the charge:

Held, that the award of compensation was wrong as the case was not instituted by complaint or on information within the meaning of section 250, Criminal Procedure Code.

Case referred for the order of the High Court under section 438, Criminal Procedure Code, by the Sessions Judge of Ramnad, at Madura, in his letter, dated 7th September 1911, No. 8507.

Mr. *P. R. Grant*, in support of the Reference.

ORDER.—In this case the second class Magistrate awarded compensation to the accused, who was acquitted on a charge of theft. The complainant gave to the Village Magistrate information of the theft, and the Village Magistrate made a report to the Police. The 2nd class Magistrate took congnizance of the offence on the report of the Police. The Sub-Divisional Magistrate set aside the order awarding compensation on the ground that the case was not instituted by "complaint" as defined in the Criminal Procedure Code or upon information given to a Police officer or to a Magistrate, the Village Magistrate not being a Magistrate within the meaning of section 250 of the Criminal Procedure Code (see sub-section 1). In this view, the Sub-Divisional Magistrate was, in our opinion, right. The only person to whom the complainant gave information was the Village Magistrate. He cannot be regarded as having given information to a Police officer, although the Village Magistrate was bound to report the occurrence to

the Police. *King-Emperor* v. *Thammana Reddi* (1) is exactly in point. Its authority is, in no way, affected by the case of the *Sessions Judge of Tinnevelly Division* v. *Sivan Chetty* (2). That case decided only that when information is given to a Village Magistrate, it might, in certain cases, amount to an institution of criminal proceedings on a charge of an offence. That has no bearing on the question whether information given to a Village Magistrate can be regarded as information given to the Police to whom he was bound to report. We are of opinion, therefore, that there is no ground for interference. The record will be returned to the Sessions Judge.

Record returned.

(1) 25 M. 667.
(2) 32 M. 258; 5 M. L. T. 269 (F. B.); 9 Cr. L. J. 170; 1 Ind. Cas. 187.

(s. c. 5 S. L. R. 137.)

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 84 OF 1911.

August 3, 1911.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

IMPERATOR—PROSECUTOR

versus

BHOJRAJ CHELLARAM—APPLICANT.

Criminal Procedure Code (Act V of 1898), ss. 437, 556—Section 556 applicable to proceedings under section 437—"Try any case"—"Personally interested"—Magistrate presiding at meeting of Municipal Board sanctioning prosecution—Jurisdiction—Order for further inquiry.

The expression "try any case" in section 556 of the Criminal Procedure Code is wide enough to include any stage of a judicial proceeding in which the question of the guilt or innocence of an accused is finally adjudicated on. Consequently, the section applies to the proceedings under section 437 of the Code.

Emperor v. *Mohan Lal*, 27 A. 25, distinguished.

A Magistrate who presided at a meeting of the Municipal Board which directed the prosecution of the accused, is disqualified from making an order for further inquiry against the accused under section 437 of the Code. The Magistrate must be deemed to be personally interested within the meaning of section 556 of the Code.

Mr. *Achalsing M. Advani*, for the Applicant.

The *Public Prosecutor*, for the Crown.

JUDGMENT.

PRATT, J. C.—This is an application for revision of an order made by the District Magistrate, Upper Sind Frontier, directing further inquiry into the case of the applicant who had been discharged by a Subordinate Magistrate.

The charge against the accused-applicant was of an offence of criminal breach of trust of Municipal monies and the prosecution had been instituted by order of the General Board of the Municipality.

One of the grounds urged before us is that the District Magistrate having presided at the meeting of the General Board which directed the prosecution had no jurisdiction to make an order for further inquiry under section 437, Criminal Procedure Code.

The Public Prosecutor contends, in the first place, that the disqualification under section 556, Criminal Procedure Code, applies only to a Magistrate who tries or commits the case for trial; and, in the second place, that if the section applies the case is covered by the explanation.

In the case of *Emperor* v. *Mohan Lal* (1) it was doubted whether the word 'try' could be applied to proceedings under section 435 where the Magistrate was not empowered to pass orders, but merely to report the case for the order of the High Court. The distinction there suggested does not arise in the present case for the Magistrate's order under section 437 has the effect of setting aside the order of discharge. The Magistrate has held a judicial proceeding which has ended in an order prejudicial to the accused. The expression "try any case" is, in my opinion, wide enough to include any stage of the judicial proceeding in which the question of the guilt or innocence of the accused is finally adjudicated on. The construction does not force to the words of the section and is in accord with the intention of the Legislature which was to enact the rule that no man can be Judge in his own cause.

I would, therefore, hold that the section does apply; and the question then arises whether the explanation covers the case. Under that explanation a Magistrate is not deemed to be a party as personally interested in any case by reason only that he is a Municipal Commissioner or otherwise concerned therein

(1) 27 A. 25.

in a public capacity. But the illustration makes it clear that the effect of the section is only partially to relax the rule that no man is to be a judge in his own cause. A Collector who *qua* Collector is interested in the protection of the *fisc* may as Magistrate try an offence against the Excise Laws. He is not disqualified "by reason only" that he is a Collector. But if in his capacity as Collector he has directed the prosecution, he is disqualified from trying the case not by reason of the fact that he is the Collector, but by reason of the further fact that he has constituted himself the Prosecutor. So in the case of *Emperor* v. *Risheshar* (2), where the Magistrate as President of the Octroi Sub-Committee directed the prosecution of an accused for evading the payment of Octroi, it was held that the Magistrate was disqualified from trying the case even though the accused had consented to be so tried.

Here the Magistrate presided at a meeting of the Municipal Board which directed the prosecution. It may be that he did not speak or vote at the meeting—but the fact remains that he attended a meeting where the question was debated and the prosecution ordered and he has, therefore, placed himself personally to some extent in the position of a prosecutor. The case is on this point on all fours with the cases of the *Queen* v. *Milledge* (3), and the *Queen* v. *Lee* (4), where it was held that the mere presence of a borough justice at the meeting of the Town Council which resolved upon the prosecution disqualified him from trying the case. Section 258 of the Public Health Act, 1875, enacts that no Justice of the Peace shall be deemed incapable of acting in cases arising under this Act by reason of his being a member of any Local Authority and Field, J., said as to this section that it had not the effect of enabling a person to act as Prosecutor and Judge in the same matter.

I would, therefore, reverse the order of the Magistrate as being made without jurisdiction.

CROUCH, A. J. C.—I concur.

Order reversed.

(2) 32 A. 635; 7 A. L. J. 749; 7 Ind. Cas. 291; 11 Cr. L. J. 447.
(3) (1879) 4 Q. B. D. 332; 48 L. J. M. C. 139; 40 L. T. 748; 27 W. R. 659.
(4) (1882) 9 Q. B. D. 394; 30 W. R. 750; 47 J. P. 118.

(S. C. 5 S. L. R. 179.)

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION NOS. 22, 23 AND 24 OF 1911.

August 25, 1911.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

KARAM BAHADIN AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 423 (c), 439, 514, 515—Order forfeiting bond—Revision—High Court—Jurisdiction to revise District Magistrate's order under section 515—Interpretation of Statutes—Curtailment of the jurisdiction of a Superior Court.

The jurisdiction of a Superior Court cannot be taken away except by express words or necessary implication.

Tulsidas v. *Virbussapa*, 4 B. 624, followed.

The general power of revision vested in the High Court is not taken away by the power of revision given to the District Magistrate under section 515 of the Criminal Procedure Code.

The High Court has, under sections 439 and 423 (*c*) of the Code, power to revise an order passed by a District Magistrate under section 515 or by any Magistrate under section 514 of the Code.

Mr. *Isarsing Hazarising*, for the Applicants.

The *Public Prosecutor*, for the Crown.

JUDGMENT.—This is an application to revise an order of the District Magistrate, Karachi, dismissing an appeal against an order of the Sub-Divisional Magistrate forfeiting, under section 514, Criminal Procedure Code, applicant's bond for appearance in his Court and confirming the penalty to the extent of one-half the amount stated in the bond.

Reference has been made to the cases of *In re Nilmadhub Gopal* (1) and *In re Nurul Huqq* (2), where it has been held that the High Court has power to reverse such orders. These cases, however, were decided with reference to the provisions of the Codes of 1861 and 1872 and are no longer of any authority.

Our jurisdiction under the present Code is very wide, and sections 439 and 423 (*c*) give us power to revise this order. This general power is not taken away by the power of revision given to the District Magistrate by section 515. As said in *Tulsidas* v. *Virbussapa* (3), the jurisdiction of

(1) 19 W. R. Cr. 1.
(2) 3 C. 757.
(3) 4 B. 624.

DUR MAHOMED *v.* ALLAHDINO.

a superior Court canot be taken away except by express words or necessary implication. Here there is no implication against our jurisdiction for it might be concurrent with that conferred on the District Magistrate.

It is not necessary, however, for us to consider the merits of the case for it is not denied that the District Magistrate dismissed the appeal of the applicant without giving him the hearing to which he was entitled under the proviso to section 421 (1) of the Criminal Procedure Code.

We, therefore, reverse the order of the District Magistrate and direct him to re-hear and dispose of the appeal according to law.

Order reversed.

Advocate High Court
Jammu & Kashmir
Srinagar

(s. c. 5 S. L. R. 190.)

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 112 OF 1911.

September 21, 1911.

Present:—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

DUR MAHOMED *valad* MITHO—APPELLANT

versus

ALLAHDINO *valad* ALIM KHAN—OPPONENT.

Criminal Procedure Code (Act V of 1898), s. 528—Notice, necessity of—Order without notice not illegal—Practice.

Section 528 of the Criminal Procedure Code does not make it incumbent on a Magistrate to issue notice before making an order. But in many cases it would be improper to take action under the section without issuing notice.

Where the Magistrate himself considers that the case is a fit one to give the accused an opportunity to show cause against an order under section 528, no order should be passed unless the accused has had sufficient time to make an effective representation in the matter.

Application against the order of the District Magistrate, Larkhana.

Mr. *Achalsing M. Advani*, for the Applicant.

The *Public Prosecutor*, for the Crown.

JUDGMENT.—The applicant filed a complaint in the Court of the Resident Magistrate, Larkhana, on the 1st March and on the 3rd July made an application to the District Magistrate for transfer of the case to the *mukhtyarkar* and First Class Magistrate for reasons personal to the Resident Magistrate.

The District Magistrate recorded the following order on the 3rd July:—"Owing to allegations, which there is no time to sift, that the Resident Magistrate, Larkhana, is (largely by the force of circumstances) to some extent interested, or commonly believed to be interested in the case of *Imperator* v. *Dino* (Indian Penal Code, section 494), that case is hereby transferred to the Court of the *mukhtyarkar* and First Class Magistrate, Larkhana. As the case is fixed for July 5th, the Magistrate should inform the other side they may object on July 4th" and then on the 5th July confirmed the order, as there had been no appearance for the accused.

The complainant has applied to us under section 439 to cancel this order.

It is objected that no notice was issued to the accused before the order of transfer was made. Section 528 does not make it incumbent on the Magistrate to issue notice; but there are many cases in which it would be improper to take action under the section without issuing notice. The District Magistrate himself considered that this was such a case for he gave the accused an opportunity to show cause against the order. But it is admitted that the time allowed was too short for the accused to make any effective representation in the matter. On this ground alone we think it necessary to reverse the order of the District Magistrate and to order him to dispose of the application on its merits and after hearing the accused.

Order reversed.

MANGHIRMAL *v.* VITHAL RAM.

(s. c. 5 S. L. R. 107.)

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 34 OF 1909.

July 13, 1911.

Present:—Mr. Pratt, J. C., Mr. Crouch, A. J. C., and Mr. Fawcett, A. J. C.

Missir MANGHIRMAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Missir VITHALRAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Yajman Vritti—*Nature of property—Impartible and inalienable—Custom recognizing partition and alienation—Burden of proof—Partition, essentials of—Enjoyment of* vrit *by rotation—Will of a share of a* vrit—*Succession to* vrit.

A. and *B.*, members of a joint Brahmin family, entered into an agreement in 1805 whereby the *vritti* was declared to be common, half the produce to be taken by *A.* and half by *B.* In 1857, the descendants of *A.* and *B.* made a further agreement by which they divided up their *Yajmans* into groups and each member was to administer to each group turn by turn. The later document recited that the parties previously used to enjoy the *vrit* jointly, but from the date of the document they divided it among themselves to be enjoyed by a system of rotation according to the different quarters of the town. The proceeds of the *vrit* were enjoyed by the members of the family *per stirpes* and not *per capita*. In 1905, *C.*, the sole representative of *B.*'s branch, died bequeathing his share of the *vrit* to his sister's son and the son of his brother's daughter:

Held, (by the Court), that there had been no such partition of the *vrit* as to entitle *C.* to alienate his share. *C.* had no exclusive right in his share of the *vrit* which he could bequeath by Will to persons who would have no right to it as survivors of a joint family. Consequently, on *C.*'s death, his share devolved by succession to the surviving members of the family.

In order to effect partition, it is not sufficient that the co-parceners should alter the mode of holding their property. They must alter and intend to alter their title to it; they must cease to be joint owners, and become separate owners.

In every case of alleged partition, the question is one of intention, namely, whether the intention of the parties, to be inferred from the instruments which they have executed and the acts they have done, is to effect a division such as to alter the status of the family.

Doorga Pershad v. *Kundun Kaswar*, 13 B. L. R. 235; 21 W. R. 214; 1 I. A. 551 (P. C.), followed.

The legal effect of a document cannot be controlled or altered by evidence of the subsequent conduct of the parties.

Bulkishen Das v. *Ram Narain Sahu*, 30 C. 738 at p. 752; 7 C. W. N. 578, followed.

It is a well-recognized principle of Hindu Law that *vrit* is both impartible and inalienable.

The burden of proving a custom in derogation of ordinary Hindu Law rests upon him who asserts it.

There exists no general custom recognizing the partition of *vrit* and its restricted alienation to persons standing in the line of succession.

As a general principle, *vrit* is neither alienable nor partible. Alienation is prohibited on the ground of public policy, and because it includes a right of personal service. But a distribution of duties by a system of rotation has been recognized as permissible; so also the relinquishment of duties by one member in favour of other members of the family. The old text law has been modified by custom in particular families; but whenever such custom is alleged, it must be proved.

Rajaram v *Ganesh*, 23 B. 131, followed.

Gur Sobhraj v *Gur Chandiram*, 1 S. C. Sel. D. 353; *Sukhlal* v. *Bihari Lal*, 2 S C. Sel. D. p. 413, overruled.

Mancharam v. *Pranshankar*, 6 B. 298; *Sitaram Bhat* v. *Sitaram Ganesh*, 6 B. H. C. R. 250; *Sukhlal* v. *Biharilal*, 2 S. C. Sel. D. p. 413; *Mitta Kunth Audhicarry* v *Neerunjun Audhicarry*, 14 B. L. R. 166; 22 W. R. 437, distinguished.

Trimbak v. *Lakshman*, 20 B. 495, referred to.

Vrit has a two-fold aspect; from the point of view of the *Brahmin* who collects it may be merely money, but from the point of view of the *yajmans*, it connotes priestly services.

In dealing with the right of *vrit*, the Court must bear in mind that it is dealing not only with a right to collect fees but also with a priestly office.

(*Per Pratt, J. C.*, dissenting):—The *vrit* in suit was not only partible but had actually been the subject of partition.

It would take but slight evidence to displace the rule of Hindu Law that *vrit* is impartible and inalienable, and such evidence was supplied by judicial decisions recognizing the partition and alienation of *vrit* and by the previous agreements in the family of the parties.

Appeal from the decision of the First Class Sub-Judge, Sukkur.

Mr. *Mathradas Ramchand*, for the Appellants.

Mr. *Dipchand T. Ojha*, for the Respondents Nos. 1 to 3.

JUDGMENT.

PRATT, J. C.—The plaintiffs are the descendants of one Khanchand. Nauram, who died in 1907, was the sole surviving descendant of Khushalchand, the brother of Khanchand.

Nauram was admittedly separate in estate from the plaintiffs and he made a Will leaving his property to the first three defendants who are his sister's sons.

Part of the property so bequeathed by Nauram was a *vritti*, or religious office.

The plaintiffs claimed that the *vritti* had not been the subject of partition, that it was property that was impartible and inalienable; and that they were entitled to it by

right of survivorship. They sued for a declaration of their right, and for an injunction restraining the defendants from interfering with the *vritti*.

The lower Court found that the plaintiffs and Nauram enjoyed the *vritti* as tenants-in-common, and that Nauram was competent to bequeath his share to the defendants who were *Brahmins* like himself.

In appeal the main ground urged is that by Hindu Law *vrittis* are impartible and inalienable.

No doubt, this is the ancient rule of Hindu Law, but it is a rule that has been very largely superseded by custom and usage.

In regard to religious offices attached to temples and Inats, the Privy Council have said that the only law to be observed is that to be found in custom and usage: *Greedharee Doss* v. *Nundo Kessore Dass* (1) and *Genda Puri* v. *Chatar Puri* (2).

It would take but slight evidence, therefore, to displace the rule of Hindu Law—and such evidence is supplied in the present case (1) by judicial decisions recognizing the custom of partition and of alienation within limits in respect of similar offices; (2) by Exhibit 13-A.

These judicial decisions are *Mitta Kunth Audhicarry* v. *Neerunjun Audhicarry* (3), *Sitaram Bhat* v. *Sitaram Ganesh* (4); *Mancharam* v. *Pranshankar* (5), *Rajaram* v. *Ganesh* (6), and, lastly, the second case of *Gur Sobhraj* v. *Gur Chandiram* (7).

The last case is the most important as it refers to a similar office in the same town. The District Judge of Shikarpur made a decree for partition of this *vritti* which was not even appealed against on the ground that the *vritti* was impartible.

Further, it is clear that the parties themselves have in the past dealt with this *vritti* as if it were partible. Exhibit No. 13-A is a deed of partition made 50 years ago between Khanchand and his issue and Khushalchand and his issue by which the town is divided into parishes in which each serve in rotation. The mode of partition is very similar to that made by the decree of the District Judge in the case of *Gur Sobhraj* v. *Gur Chandiram* (7). It is contended that this is not a partition, but merely an agreement as to mode of enjoyment. There is no force in the contention, however, for the division is made not *per capita* but *per stirpes*. Nauram, at his death, was in sole possession of half the *vritti* while the other half was divided among the six or eight descendants of Khanchand.

It is clear, therefore, that the *vritti* in suit is not only partible, but that it has actually been the subject of partition.

The object of the rule of impartibility was to maintain the dignity of the office. Once that has been encroached upon and the office divided among the cadets of the family, the reason for the rule against alienation also ceases. There can be no objection to the separate sharers alienating their shares, provided the alienees are persons of the priestly caste and competent to perform the religious duties of the office. Although there is no evidence of an alienation in this particular family, there is no reason from excluding them from the custom of restricted alienation recognized in the decisions already referred to and which are relevant on this point under sections 13 and 40 of the Indian Evidence Act. The alienation in the present case has been, as in the case of *Mancharam* v. *Pranshankar* (5), to persons standing in the line of succession.

I would, therefore, confirm the decree of the lower Court and dismiss this appeal with costs.

CROUCH, A. J. C.—The parties in this case are Brahmins, and descendants of one Shangan. As far back as *Sambat* 1882 (about A. D. 1825), the family had a considerable connection of *yajmans* in Shikarpur from whom *vrit* was derived. It is not disputed that the connection belonged to the family as joint property, and would, in the ordinary course, have devolved like ordinary joint property in a Hindu family; that is to say, on the death of any one of the joint owners there would be survivorship to the still living male members.

In *Sambat* 1882, the family of Shangan was represented by two brothers, Khushalchand and Khanchand. By a written agree-

(1) 11 M. I. A. 405 at p. 428; 8 W. R. 25 (P. C.).
(2) 9 A. 1; 13 I. A. 100.
(3) 14 B. L. R. 166; 22 W. R. 437.
(4) 6 B. H. C. R. 250.
(5) 6 B. 298.
(6) 23 B. 131.
(7) (1890) 1 S. C. Sel. D. 353.

ment Exhibit No. 13-A, they partitioned all the family property. The concluding sentence of the agreement referred to the *vrit*:—"The *vrit* is common, half to be taken by *Missir* Kanumal Sobhraj and half by Khushalrai Tarachand Rupchand."

In *Sambat* 1914 (about 1857) a further agreement was made between "Kewaram Surtimal Khushaland" and "Sobhraj Kimatrai Kanchand" (by which was apparently meant Kewaram's son Surtimal and Sobhraj's son Kimatrai) the purport of which is given by the following extracts:—

"Formerly, we used to enjoy the *vrit* of Chabrias jointly between ourselves. From the above date we divided it between ourselves by quarters (neighbourhoods). Every one will go to his own quarter for the performance of any ceremonies. No one will go to the quarter of any other. After the year is over they will change turns. After every twelve-months the quarters are to be exchanged between them. If the one who has turn for that year is not present there and the one who has not got his turn for that year is there, the latter shall recover the same from the *yajman* and give it to the one who has turn for that year. For one year it is the turn of *Missir* Sobhraj for the quarter. Next year we shall get it as our turn, and we shall give our quarters. After the year is over the quarter will be exchanged between them."

In 1905, Nauram, who was then the sole representative, according to Hindu ideas, of Khushalchand's family, died leaving a Will whereby he bequeathed his share of the *vrit* to his sister's son and the sons of his brother's daughters.

The question at issue is whether Nauram had at the time of his death, such exclusive right in a half share of the *vrit* that he could bequeath it by Will to persons outside the family of Khushalchand, who would have no right to it as survivors of a joint family.

In all litigation touching *vrit*, it is usual for the parties to treat it as property. But *vrit* has a two-fold aspect; from the point of view of the Brahmin who collects it, it may be merely money, but from the point of view of the *yajmans* it connotes priestly services; and it is the duty of the Court to bear this two-fold aspect in mind, and remember that it is dealing not only with a right to collect fees, but with a priestly office.

If the right to collect *vrit* attach to a Brahmin because he belongs to a certain family—and it was thus that Nauram exercised his right—there must be a corresponding right in the *yajmans* that the person demanding the *vrit* belongs to that family. No right can be alienated unless the correlative duty can also be transferred. Hence, *prima facie*, no right to collect *vrit* can be alienated; and we start with a well recognized principle of Hindu Law that *vrit* is both impartible and inalienable. This principle is recognized in *Rajaram* v. *Ganesh* (6), where Ranade, J., refers to "the text law which admittedly prohibits both partition and alienation," and in *Mancharam* v. *Pranshankar* (5), where Melvill, J., says: "No doubt, hereditary offices, whether religious or secular, are treated by the Hindu text-writers as naturally indivisible."

Again, the right to collect *vrit* which attaches to the member of a particular family in return for religious administration is a right of personal service. Such a right is not ordinarily alienable, and "compulsory alienation of *vritti* by way of sale in execution of decrees has been disallowed in all cases as being not only opposed to Hindu Law and public policy, but as against the provisions of section 266, Civil Procedure Code, as being rights of personal service," [Per Ranade, J., *Rajaram* v. *Ganesh* (6)].

It is contended that the old text law has, in practice, been greatly modified, in many instances by custom What the custom is, in any particular case, is a question of evidence; and there can, I think, be no doubt that the person who bases his claim on allegations of custom, differing materially from the old law, must prove it. In *Genda Puri* v. *Chatar Puri* (2), their Lordships state:—"In determining who is entitled to succeed as '*mohant*,' in such a case as the present, the only law to be observed is to be found in custom and practice, which must be proved by testimony, and the claimant must show that he is entitled, according to custom." "By force of custom, a limited right of partition and alienation may be established, and the custom must be ascertained by evidence in each class of cases:" *Rajaram* v. *Ganesh* (6). "The custom or usage of the particular

MANGHIRMAL v. VITHALRAM.

family must be substantiated by evidence:" *Rajeshwar Mullick* v. *Gopeshwar Mullick* (8).

Several cases have been cited as establishing a custom that *vrit* is partible and alienable. Before dealing with these cases, it is desirable to point out that a mere distribution of the duties of priest among the living members of a family does not amount to partition. Each member is not thereby made a separate and absolute owner of a divided share in what may be termed the family practice. Nor can it, in view of the clear principles of law prohibiting partition and alienation, be presumed that any member intends, by such distribution, to permanently relinquish his duties towards a certain number of the *yajmans*, or to permanently alienate his rights of survivorship. There is an essential difference between agreeing to hold the *vrit*, when collected, in separate shares, and the permanent partitioning of all the rights and duties connected with the *vrit*.

In *Mitter Kunth Audhicarry* v. *Neerunjun Audhicarry* (3) the parties sought partition of the right to worship an idol. The Court (*per* Couch, C. J.), held that there was nothing which "compelled the Court to say that they should be obliged to perform the service jointly and to undergo the many inconveniences which might arise from such a state of things," and ordered that it be determined by lot in what order the several parties should worship the idol.

In a case reported in a note on page 168 of the same volume, partition is defined as "a right to enjoy his own right separately."

In *Mancharam* v. *Pranshankar* (5), it was said:—"No doubt hereditary offices, whether religious or secular, are treated by the Hindu text-writers as naturally indivisible; but modern custom, whether or not it be strictly in accordance with ancient law, has sanctioned such partition as can be had of such property, by means of a performance of the duties of the office, and the enjoyment of the emoluments by the different co-parceners in rotation."

In *Trimbak* v. *Lakshman* (9), the right of the several members of a family to exercise a religious office in turn was recognised.

(8) 34 C. 828 at p. 833; 11 C. W. N. 782.
(9) 20 B. 495.

In *Gur Sobhraj* v. *Gur Chandiram* (7), it was held that the enjoyment of *vrit* by certain Gurs in Shikarpur should be by rotation, the priests forming each class holding the different parishes in yearly rotation.

None of the cases above cited support the contention that the right obtained by a particular member of the family on so-called partition by a system of rotation gives him a divided share which he can alienate to a stranger.

In *Sitaram Bhat* v. *Sitaram Ganesh* (4), the sale of an hereditary priestly office to one next in succession from the vendor to such office was recognized, it being held that "the grandfather did nothing more than relinquish his right in their favour."

In *Sukhlal* v. *Biharilal* (10), no right to partition was in issue; there was a question of succession only. It was held, that among the Thakurs of Shikarpur, daughters and daughters' sons might inherit *vrit* and have the priestly duties performed by deputy. It appears that these duties could be performed by any *banya* who took to a religious life.

I have now, I believe, dealt with all the leading cases which have been relied on as showing that *vrit* can be partitioned and alienated. We find that the law may be thus summarised. As a general principle *vrit* is neither alienable nor partible. Alienation is prohibited on the ground of public policy, and because it includes a right of personal service. But a distribution of duties by a system of rotation has been recognized as permissible; so also the relinquishment of duties by one member in favour of other members of the same family. The old text law has been modified by custom in particular families; but wherever such custom is alleged, it must be proved.

Mr. Dipchand contends that the history of Shangan's family shows that they have been living as separated members for over half a century, and he relies on *Murari Vithoji* v. *Mukund Shivaji* (11) to support the contention that long enjoyment in separate shares is evidence of an agreement to partition. He relies on the two documents above abstracted.

Now the first document, Exhibit No. 13-A,

(10) (1902) 2 S. C. Sel. D. 413.
(11) 15 B. 201.

states in clear terms, that the *vrit* is common, and that a further document was necessary 32 years afterwards, sufficiently proves that there was no final partition in 1825. By the second document the parties did nothing more than divide up their *yajmans* into groups, and agree that each member should administer to each group turn by turn. No member entirely abandoned his rights as regards a single *yajman* and no *yajman* lost his general right to demand priestly services from the family generally. It was expressly declared, that in the absence of any member whose turn it was to attend a particular *yajman*, some other member of the family should attend. So far as the priestly duties were concerned, they were merely distributed among those who had a right, and were under an obligation, to perform them. The only thing that became the absolute separate property of any member was the *vrit* that he actually recovered. Such agreement is perfectly good, it is in the interests of the *yajmans*. But I can find nothing in the document which in any way supports the theory that Nauram acquired rights which he could alienate to strangers. Enjoyment for many years under this agreement in no way proves that he had such rights.

There can be no doubt that the devisees under Nauram's Will are technically strangers, and the devise cannot be upheld unless it be conceded that the rights which the Will purported to deal with were absolutely within the testator's power of disposal.

It may be urged that some of the reported cases seem to assume that after a partition by a system of rotation, the turn of each member would devolve by succession on his sons. This may be so, and there would be nothing contrary to the spirit of the Hindu Law of succession to joint property, and nothing in conflict with the interest of the *yajmans*, if such rights of succession were recognized.

The right of plaintiffs to an injunction, in the event of their claim being allowed, was not disputed in the lower Court. In *Mancharam* v. *Pranshankar* (5), the right to injunction in such cases was recognized. And see also *Vithal Krishna Joshi* v. *Anant Ram Chandra* (12).

I would, therefore, reverse the decree of the lower Court. I would hold that the *vritti* was enjoyed by plaintiffs, defendants Nos. 4, 5 and 6 and Naoo jointly, that plaintiffs and defendants Nos. 4, 5 and 6 had a right of survivorship to it, that Naoo was not competent to devise the *vrit* by Will to defendants Nos. 1, 2 and 3 and would grant an injunction to plaintiffs against defendants Nos. 1, 2 and 3 in the terms prayed for. I would order defendants Nos. 1, 2 and 3 (respondents Nos. 1, 2 and 3) to pay all costs in both Courts.

PRATT, J. C.—Referred for decision to Mr. Fawcett, Additional Judicial Commissioner, under the Proviso to section 9 B.

FAWCETT, A. J. C.—In this case the main point for determination seems to me to be not whether the *vritti* in question is partible or impartible, but whether (assuming it to be partible) there has in fact been an actual partition under which Nauram was entitled to devise by Will his right to appropriate a half share of the produce of the *vritti* as if it were his own exclusive property. The learned Judicial Commissioner holds that there has been such a partition under the deed Exhibit No. 38, whereas Mr. Crouch says, he "can find nothing in the document which in any way supports the theory that Nauram acquired rights which he could alienate to strangers."

In the previous deed of 1825, Exhibit No. 13-A, the *vritti* is expressly declared to be common, half the produce to be taken by Sobhraj who is now represented by the plaintiff's branch of the family, and half by Khusalchand, of whom Nauram was the sole surviving descendant in the male line. The main question is whether Exhibit No. 38 converts this joint tenancy into a tenancy in common, so that there was a separation in interest and in right, or whether it simply alters the mode of enjoyment of the *vritti* half and half, without any definite discontinuance of the joint interest.

The document itself does not contain anything which necessarily indicates a separation in interest and in right. It merely provides for a division of *yajmans* into groups to be administered to alternately year by year, in such a way that each of the two co-sharers would get an approximately equal amount of produce in each consecutive series of two years. It does not by this arrangement necessarily do more than provide for the particular mode of enjoyment by which the two co-sharers should share half and half in

(12) 11 B. H. C. R. 6.

accordance whith the provision in Exhibit No. 13-A.

At the same time, it *might*, of course, amount to a partition and separation in interest and in right. But, as said in Mayne's Hindu Law, 6th Edition, section 495, at page 651, "it is not sufficient that they (the co-parceners) should alter the mode of holding their property. They must alter, and intend to alter their title to it. They must cease to become joint owners, and become separate owners." As laid down by the Privy Council in the case of *Doorga Pershad* v. *Kundan Koowar* (13), the question in every case like this is one of intention, namely, whether the intention of the parties to be inferred from the instruments which they had executed and the acts they had done, was to effect a division such as to alter the status of the family. On this point the document Exhibit No. 38 is unfortunately ambiguous. There is nothing in it which says in clear terms that the joint tenancy of the *vritti* under Exhibit No. 13-A was to cease and each party was in future to have a separate share in it. All that is said on this matter is as follows: "Formerly, we used to enjoy the '*vritti*' of Chabrias jointly between ourselves. From the above *Miti* and *Sambat* we divided it between ourselves by quarters (neighbourhoods). For this purpose this agreement is written." I do not think that this can be taken as an implied agreement that the joint tenancy was to cease. The antithesis is, I think, only intended to be between (1) a division of the proceeds of the *vritti* "between ourselves" by halving them in the ordinary way, and (2) a division of them by dividing the *yajmans* into two separate groups as it is done by the document: and is not intended to distinguish between a joint and a separate enjoyment. If the latter had been intended, I think, that having regard to the status and education of the parties, clear language to that effect would have been used. In the absence of such language, or of any other clear indications to the same effect, I think the ordinary presumption in favour of the continuance of a personal relation or state of things continuous in its nature [illustration (*d*) to section 114, Evidence Act] should be given effect to.

(13) 13 B. L. R. 235; 21 W. R. 214; 1 I. A. 551 (P. C.).

If the *yajmans* had been divided into two groups and one allotted for the exclusive administration of each co-sharer, there would have been more ground for assuming that a complete separation in interest and right was intended. But in this case, as pointed out in Mr. Crouch's judgment, "no member entirely abandoned his rights as regards a single *yajman*," and the arrangement is quite consistent with the continuance of the previous joint tenancy. This also meets the contention of respondents' Pleader that the *vritti* could not have been partitioned in any other way than that adopted in Exhibit No. 38.

The document also clearly does not purport to partition the *vritti* of out-stations, (*i. e.*, of *yajmans* residing in the villages of Khanpur and Rustom), as to which it is distinctly provided that "one who receives it will divide it half and half." The joint tenancy, therefore, continued as regards this part of the *vritti*: and this strengthens the presumption that it continued in respect of the Shikarpur *vritti*. The Will also recites that the produce of the Amritsar *vritti* when both parties are at Amritsar together, "is appropriated half and half by each one of us." Again, as regards the Shikarpur *vritti*, the testator himself says in the Will that "I, the executant, and the progeny of the deceased *Missir* Sobhraj (*i. e*, the plaintiffs), have a *joint claim* to the moiety of the produce of the *vritti*." It does not, therefore, seem that the deceased really thought the joint tenancy had ceased, but only, that in spite of it he had an exclusive right to a half share in the produce, which he could devise by Will.

The fact that the division of the income of the *vritti* is made not *per capita*, but *per stirpes* does not, in my opinion, suffice to show that an actual separation in interest and estate was intended. I think I am right in saying that this is a common basis on which co-parceners in a joint Hindu family divide the family income, and the first deed Exhibit No. 13-A, which expressly declared the *vritti* to be joint, also enjoins a distribution on the same basis.

No doubt, under Exhibit No. 13-A, there was a partition of the rest of the family estate, but the recital therein as to the *vritti* rebuts any presumption that might

otherwise arise in favour of the *vritti* also being partitioned.

The Sub-Judge in his judgment relies on the fact that the plaintiffs have made a further division of the *vritti inter se* by assigning certain *yajmans* to each branch, but it is quite clear that no such act on their part can affect the status of the parties under Exhibit No. 38. As laid down in the Privy Council case of *Balkishen Das* v. *Ram Narain Sahu* (14), the legal effect of such a document cannot be controlled or altered by evidence of the subsequent conduct of the parties.

I, therefore, concur with Mr. Crouch in holding that there has been no such partition of the *vritti* as to entitle the deceased Nauram to bequeath his share of the proceeds to the defendants Nos. 1 to 3. Upon his death his share, as being joint property, devolved by succession on the plaintiff and defendants Nos. 4 to 6.

In this view of the case it is not necessary to decide the issue, discussed in the other judgments, as to whether a *vritti* like the present one is partible and alienable, or not. As, however, the point has been fully argued before me, I may briefly express my views for what they are worth. With due deference, I do not think the decisions cited in the learned Judicial Commissioner's judgment can be taken as authorizing the recognition by the Courts of a general custom of partition and restricted alienation, (*e. g.*, to persons standing in the line of succession), in the case of *vrittis* or other priestly offices. This is directly contrary to the conclusion, arrived at by Ranade, J., in *Rajaram* v. *Ganesh* (6), after reviewing all the cases in question, that "in the case of private alienations.....no general custom can be pleaded in such matters," and that "by force of custom, however, a limited right of partition and alienation might be established, and the custom must be ascertained by evidence in each class of cases" pages 136-7). It is also opposed to the general rule that the *onus* of proving a custom in derogation of ordinary Hindu Law rests upon him who asserts it. No doubt, some of the cases on the subject go a long way towards recognition of such a custom, especially the case of *Mancharam* v. *Pranshankar* (5). But that case is distinguishable on the ground that the widow of the testator, who was his next heir, expressed her acquiescence in the bequest to his sisters' son, and it would seem from the preamble of the report that it had been found as a fact that there had been a prior partition of the priestly office [*cf. Rajeshwar Mullick* v. *Gopeshwar Mullick* (8)]. In any case, the rule laid down by Ranade, J., in *Rajaram* v. *Ganesh* (6) seems to me the proper one to follow. No doubt, in the cases reported in *Gur Sobhraj* v. *Gur Chandiram* (7) and *Sukhlal* v. *Biharilal* (10) *vrittis* were held to be partible and inheritable by daughters and daughters' sons: but the point of law now under consideration is not discussed and they cannot be treated as authorities against the adoption of the views taken in *Rajaram* v. *Ganesh* (6). There is an old case, reported in the Sadar Court Reports for 1870, Civil Rulings, page 77, in which the Court of the Commissioner in Sind held (at page 91) that there was no ground for distinguishing between *vritti* and other family property. But this is based on an opinion of Sir Thomas Strange, which at any rate, as regards the partibility and alienability of religious offices, is now admitted to be against the Hindu text law. And that case shows that the Soomace *Punchayet* of the Thakoors at Shikarpur did distinguish between '*vritti*' or income arising from religious fees and other property (page 87), so that the distinction does not appear to be a novel one in Sind. On general grounds, I think that the Courts should lean against rather than in favour of, the partibility and alienability of *vrittis* like that in the present suit,

(1) because this is in consonance with the rule in Hindu Law on the subject.

(2) because of the two-fold aspect of *vrit* referred to in Mr. Crouch's judgment, and

(3) because, as stated in *Trimbak* v. *Lakshman* (9) the process of partition and alienation "might go on with each generation, frittering away the income and rendering the service wholly ineffective."

For the above reasons, I concur in the order proposed by Mr. Crouch.

Appeal allowed.

(14) 30 C. 738 at p. 752; 7 C. W. N. 578.

VARADAYYA CHETTY *v.* MUNUSAMI CHETTY.

(s. c. 10 M. L. T. 514.)

MADRAS HIGH COURT.

CIVIL SUIT No. 140 OF 1911.

November 2, 1911.

Present:—Mr. Justice Bakewell.

M. VARADAYYA CHETTY AND ANOTHER —PLAINTIFFS

versus

C. MUNUSAMI CHETTY AND ANOTHER—DEFENDANTS.

Civil Procedure Code (Act V of 1908), s. 92, scheme suit —Parties—Suit by two worshippers of temple—Petition by other worshippers to be made parties—Jurisdiction.

A suit brought by two worshippers of a temple under section 92, Civil Procedure Code, for removal of trustees and framing a scheme is a representative suit. The fact that the sanction of the Advocate-General has been obtained does not change the character of the suit and it is open to the Court to add other worshippers as parties if it be shown that the plaintiffs are not prosecuting the suit to the advantage of the persons they profess to represent.

The plaintiffs as two worshippers of Srinivasa Perumal temple at Choolai, Madras, brought this suit under section 92, Civil Procedure Code, with the sanction of the Advocate-General, for the removal of trustees for framing a scheme and other reliefs. Three other worshippers took out this notice of motion to be made parties on the ground that the plaintiffs do not represent them and that the suit was instituted in collusion and at the instance of one of the defendant-trustees and that, therefore, they should be on the record to conduct the suit in the interests of the temple.

Mr. *P. Venkataramana Rao*, for the Applicants.

Mr. *T. Ethiraja Mudaliar*, for the Plaintiffs.

Messrs. *Venkatasubba Rao* and *Radhakrishnaiya*, for the 1st Defendant.

Mr. *A. Suryanarayana*, for 2nd Defendant.

Mr. *T. Ethiraja Mudaliar*, for 2nd Plaintiffs.—I take a preliminary objection that this application does not lie. The suit having been instituted with the sanction of the Advocate-General under section 92, Civil Procedure Code, the applicants cannot be made parties. There is no provision of law under which they come in. I refer to Order I, rule 8, clause (2), Civil Procedure Code, and no such provision is made in section 92, Civil Procedure Code. The decision in *Abdul Rehman* v. *Cassum Ebrahim* (1) is in point. There a fresh defendant was added after the institution of the suit and the suit against the added defendant was held not to be maintainable. [Bakewell, J. Were there any reliefs prayed for against him?] Yes. This application is also premature. The proper time for the application to come in, is when the suit is decided and it is referred to Chambers for a scheme. The Court can allow them to intervene if it thinks necessary to do so. Till then they have no voice in the suit I rely on the following passage in *In re Hyde Park Place Charity* (2):—"I think it is of the extremest importance that in these charity cases that which I believe has been the uniform practice should be maintained, namely, that when in a matter of this kind the trustees apply to the Court by originating summonses for a scheme and make the Attorney-General a party, that is the properly constituted proceeding and no application to be added as a party ought to be listened to before an order has been made for the scheme."

[Bakewell, J.—There the Attorney-General was a party. The Advocate-General is not a party here.] He has given the sanction. [Bakewell, J.—That would not make him a party.] Even after the suit is referred to Chambers for a scheme leave to intervene is granted sparingly; 52 E. R. 187.

Mr. *P. Venkatramana Rao*, for the Applicants. A suit instituted under section 92, Civil Procedure Code, by two worshippers of a temple is a suit of a representative character. Before the enactment of the present Civil Procedure Code, suits of this nature could be brought by all the persons interested in the temple or by two or more under section 30 of the old Code corresponding to Order I, rule 8 of the present Code or under section 539 of the old Code corresponding to section 92 of the present one. *Monmotha Nath Das* v. *Harish Chandra Das* (3).

[Bakewell, J.—What do you say to clause 2 of section 92, Civil Procedure Code?] That does not alter the character of the suit. For the position that the suit is representative I refer to *Budree Das Mukin* v. *Choonee Lal Johwry* (4). Also Best, J., in *Subbayya* v. *Krishna* (5). In a representative suit it has

(1) 13 Bom. L. R. 583; 11 Ind. Cas. 726.

(2) (1911) 1 Ch. 678 at p. 685; 80 L. J. Ch. 593.

(3) 33 C. 905; 10 C. W. N. 867.

(4) 33 C. 789; 10 C. W. N. 581.

(5) 14 M. 186 at p. 209.

always been the practice to add parties if they say that the plaintiff does not represent them or for any sufficient reason. In (1910) Yearly Practice, Volume I, page 159, the rule is stated thus:—"In a representative action brought by one or more persons purporting to represent a class, any member of that class who objects to such representation and for that or other reasons desires to intervene may apply by summons to be added as a co-defendant and may be so added without the plaintiff's consent." The decision in *Abdul Rehman* v. *Cassum Ebrahim* (1) has no application to this case. Besides, it has overlooked a decision of a Division Bench of that Court in *Dhanjibhoy Raghoo* v. *Meherally Morarji* (6).

[Bakewell, J.—You can read the affidavits]

ORDER.—The learned Vakil for the plaintiffs has argued that this application does not lie, and is premature, on the ground that the suit has been instituted with the sanction of the Advocate General and that the proper time for the applicant to intervene is when a scheme for the management of the charities is before the Court. I think that the suit is a representative suit brought by two of the worshippers on behalf of the whole body of worshippers of the temple, that the fact that sanction has been obtained for its institution does not change the character of the suit in any way and that such an application as the present will lie if it be shown that the plaintiffs are not prosecuting the suit to the advantage of the persons they profess to represent.

The applicants have failed to show that the plaintiffs are not prosecuting the suit *bona fide* and in the interests of the applicants and other worshippers. All that appears from the affidavits is that the 1st defendant has his own party which the applicants represent. As regards the desire of the applicants to be present at the settlement of a scheme, the present application is premature and my order is without prejudice to any application that parties may be advised to make when a scheme is before the Court.

Application is dismissed with costs of plaintiff and 2nd defendant (two sets).

Application dismissed.

(6) 9 Bom. L. R. 901.

(S. C. 10 M. L. T. 526.)

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 330, 331 AND 334 OF 1906.

February 26, 1909.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sankaran Nair.

KARIPPALA *alias* VARIPAYUR MANAKKAL NARAYANAN NAMBUDRIPAD AND OTHERS—DEFENDANTS—APPELLANTS

versus

MUCHAI MANAKAL SANKARAN NAMBUDRIPAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Malabar law—Temple—Uraima of Karnavan of a tarwad—Renouncement of Karnavanship—*Renewal of lease*—Bona fides.

When the *Karnavan* of a tarwad is as such the Uralan of a Devasom, and he renounces his Karnavanship, he ceases to be the Uralan also. The Uraimaship is incident to the *Karnavanship* and unless the Uraimaship is expressly reserved in such cases it passes to the next *Karnavan*.

A renewal of a lease of Devasom properties is not binding on the Devasom if it is not granted *bona fide* in the usual course of management.

Second appeals against the decrees of the District Court of South Malabar in Appeal Suits Nos. 461, 462 and 465 of 1905 presented against the decrees of the Court of the District Munsif of Alatur, in Original Suits Nos. 62, 61, and 71 of 1904.

Messrs. *C. R. Sundara Iyer*, and *Kunjunni Nair* for the Appellants.

Messrs. *J. L. Rozario* and *C. V. Ananthakrishna Iyer*, for the Respondents.

JUDGMENT.—The father of the second plaintiff has renounced the Karnavanship of the family of which he was the head, and we are of opinion that when he ceased to be Karnavan of his family he ceased to be Uralan of the Devasom of which the Karnavan was always the trustee. The Uraimaship is incident to the Karnavanship and unless the Uraimaship is expressly reserved in such cases it passes to the next Karnavan.

The second plaintiff as the Karnavan of the family is, therefore, also a trustee of the Devasom.

The renewals of the leases are not binding on the Devasom as they were not granted *bona fide* in the usual course of management.

These second appeals are dismissed with costs.

Appeals dismissed.

[s. c. (1911) 2 M. W. N. 537.]

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 733 OF 1910.

November 14, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

MALAPPURATH PARAMADHATHIL NARAYANA NAMBI AND OTHERS—DEFENDANTS—APPELLANTS

versus

CHANNAZHI KRISHNAN MOSSAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1—Suit for redemption of trust properties—Parties—Non-joinder of trustees—Bad and fatal to the suit—Agreement between trustees vesting management in one—Effect on the capacity of other trustees.

One of three Uralas alone cannot institute a suit for redeeming a Kanom without making the other two parties to the suit.

Although by agreement the ordinary management of the trust is vested in one trustee, the agreement does not deprive the other trustees of their office of trustees.

Ramanathan v. *Marugappa*, 27 M. 192, referred to.

Second appeal against the decree of the Subordinate Judge's Court of South Malabar at Calicut, in Appeal Suit No. 677 of 1909, presented against the decree of the Court of the District Munsif of Parapanangadi, in Original Suit No. 306 of 1908.

Mr. *K. P. M. Menon*, for the Appellant.—The arrangement among the Uralers does not affect their right as trustees and the other Ularers are necessary parties. *Ramanathan* v. *Murugappa* (1). The suit is, therefore, bad for non-joinder of parties and should be dismissed.

Mr. *M. Kunjunni Nair*, for the Respondents:—The objection was not taken in the lower Court and so should not be allowed to prevail. If necessary, we are prepared to make them parties now and the suit may be remanded with the necessary directions to the lower Court.

JUDGMENT.—The plaintiff, one of three Uralers of a temple, instituted the suit for redeeming a Kanom without making the other two Ularers parties. The defendant raised the objection of non-joinder of the other trustees, besides contesting the suit on the merits. The pleas relating to the merits of the case have been decided in favour of the plaintiff, but we are of opinion that the suit was badly framed by the other Uralers not being made parties. Order XXXIV, rule 1, Code of Civil Procedure, is quite clear on the point. It is contended that by a *karar* entered into between three trustees, the plaintiff was entitled to the sole executive management at the time of the plaint and that the *karar* expressly authorised the executive trustee for the time being to institute suits on behalf of the temple. The effect of such a *karar* has been fully explained in the judgment of this Court in *Ramanathan* v. *Murayappa* (1). The *karar* does not deprive the other trustees of their office of trustee though the ordinary management is confided to one only. This being so the provision authorising one of several trustees alone to represent the temple in suits cannot be given effect to. The other trustees are certainly interested in the property sought to be redeemed and are necessary parties. The plaintiffs now ask that they may be made parties. We accede to this request. The decrees of the lower Courts are set aside, and the suit remanded to the Court of first instance for trial *de novo* after making the other Uralers defendants in the suit. The plaintiff must make the necessary amendment of the plaint within two weeks after the order reaches the Court. The plaintiff must pay all costs of defendants Nos. 2 and 4 up to date.

Suit remanded.

(1) 27 M. 192.

(s. c. 5 S. L. R. 125.)

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL SUIT No. 108 OF 1910.

July 17, 1911.

Present:—Mr. Fawcett, A. J. C.

Haji MANSOOR—PLAINTIFF

versus

MIN SAHEBDIN AND ANOTHER—DEFENDANTS.

Limitation Act (XV of 1877), Sch. II, Art. 158—Application to set aside award—Limitation runs from date of submission of award and not from date of notice—Civil Procedure Code (Act V of 1908), Sch. II, para. 15—Interpretation of statutes—Plain meaning—Assumption as to fixity of law—Hardship.

The period of limitation under Article 158 of the Limitation Act, 1908, for making an application to

MANSOOR *v.* MIN SAHEBDIN.

set aside an arbitration award is 10 days computated from the time when the award is submitted to the Court, and not from the time when the notice of the submission of the award is served on a party.

Bulli v. *Gianchand*, (1897) Sind S. C. R. 1, overruled.

Gulam Khan v. *Mahomed Hassan*, 29 C. 167, followed.

The language of a codifying enactment must receive its natural meaning, without any assumption as to its having probably been the intention to leave unaltered the law as it existed before.

Norendra Nath Sircar v. *Kamal Basini Dasi*, 23 C. 563; 23 I. A. 18, followed.

The argument of hardship resulting from a plain interpretation of a Statute is always a dangerous one to listen to. If, in all cases of ordinary occurrence, the law, in its natural construction, is not inconsistent or unreasonable or unjust, that construction is not to be departed from merely because it may operate with hardship or injustice in some particular case.

Ram Narain Roy v. *Baij Nath Malla*, 29 C. 36, *Edalji Shaporji* v. *Talsidas Sunderdas*, 2 B. H. C. R. 270 at p. 275, referred to.

Mr. *Tarachand*, for the Plaintiff.

Mr. *Kalumal*, for the Defendant.

JUDGMENT.—The matters in difference in this suit were referred to the sole arbitration of Haji Baharudin Haji Dilawarkhan, under clause 3 of Schedule II of the Civil Procedure Code, by an order of this Court on the 26th September 1910.

The arbitrator submitted his award to the Court on the 4th October 1910, and notice thereof was issued to the parties on the 10th *idem* in accordance with clause 10 of the same Schedule II. Plaintiff's Pleader admits receipt of this notice on the next day.

On the 18th October 1910, the plaintiff filed objections to the award on the ground of alleged misconduct of the arbitrator, and on the 26th October 1910 he put in some additional objections on the same ground. The question, therefore, arises whether this application to set aside the award under clause 15 of Schedule II of the Civil Procedure Code is not time-barred under article 158 of the Indian Limitation Act, 1908, which prescribes a period of ten days from the time "when the award is submitted to the Court."

The plaintiff's Pleader contends, that in spite of the clear words of column 3 of Article 158, limitation begins to run only from the time of giving of notice (*i. e.*, the 10th October 1910), and in support of this cites the decision to that effect of Whitworth, J., in *Buli* v. *Gianchand* (1).

That decision proceeds mainly on the ground that in the Limitation Act of 1871, the corresponding article (155), in prescribing the time when the period of limitation should begin to run, added the words "and notice of the submission has been given," etc., and though those words were omitted in Article 158 of the Limitation Act of 1877, (as also in the present Act of 1908), this was explained by the new provision in the Civil Procedure Code of 1877, requiring the Court to give notice of the filing of the award, so that "the change made in 1877, appears to have been merely a transfer of the provision as to notice from the Limitation Act to the Procedure Code."

With due deference, I think that such a construction of the plain words in column 3 of Article 158, is entirely inadmissible and erroneous. It virtually adds words to the Article, which not only are not there, but (as already pointed out) have been deliberately omitted since 1877. And, had this omission been merely due to oversight, it would presumably have been corrected in the Act of 1908, since attention has been called to the point by reported cases like those at *Ram Narain Roy* v. *Baij Nath Malla* (2) and *Ghulam Khan* v. *Mahomed Hassan* (3), *Sm. Nobin Kally Dabee* v. *Ambica Churn Banerjee* (4). Thus, in Article 169, regarding an application for the re-hearing of an appeal heard *ex parte*, the Limitation Act of 1908, adds words allowing limitation to run not only from "the date of the decree in appeal," as before, but also "where notice of the appeal was not duly served, when the applicant has knowledge of the decree" (*cf.* also Article 164).

Again, such a construction is opposed to the ruling of the Privy Council that "the language of a codifying enactment must receive its natural meaning, without any assumption as to its having probably been the intention to leave unaltered the law as it existed before," *Norendro Nath Sircar* v. *Kamal Basini Dasi* (5). It may be added that the Privy Council have also (although this exact point was not then before them) held that under Article 158, "the period of limitation for an application under the Code to set aside an award is a period of 10 days

(1) (1897) Sind S. C. R. 1.

(2) 29 C. 36.
(3) 29 C. 167.
(4) 5 C. W. N. 813.
(5) 23 C. 563; 23 I. A. 18.

only from the time when the award is submitted to the Court exclusive of the time requisite for obtaining a copy of the award (Limitation Act section 12)," *Ghulam Khan* v. *Mahomed Hassan* (3).

In this case no question arises as to the exclusion of the time required for obtaining a copy of the award, as the plaintiff did not apply for such copy until the 18th October 1910, *i.e.*, after the period of limitation prescribed by Article 158 had expired. It is further argued that a strict construction of Article 158 may lead to hardship and virtually deprive a litigant of the right which the law gives him of applying to set aside the award, *e. g.*, if he only receives notice after the period of 10 days from its submission has expired. It may be that in such a case the maxim "*lex non cogit ad impossibilia*" might be applied, so as to avoid a strict construction of the Article; but it is sufficient to say that in the present case no such consideration arises, as, had the plaintiff acted with due diligence, he had sufficient time to enable him to apply to set aside the award within the prescribed period of limitation. And, as stated in Maxwell on the Interpretation of Statutes, 3rd Edition, pages 286, 287, "the argument of hardship is always a dangerous one to listen to," and "if, in all cases of ordinary occurrence, the law, in its natural construction, is not inconsistent, or unreasonable, or unjust, that construction is not to be departed from merely because it may operate with hardship, or injustice in some particular case." This rule applies with all the more cogency in this instance, seeing that the Legislature has deliberately omitted words formerly in the Article, which would obviate the possibility of such hardship. The Legislature has probably considered a speedy and final termination of the dispute of sufficient importance to outweigh this consideration of hardship, for the reasons given in *Edalji Shaporji* v. *Talsidas Sunderdas* (6) and *Ramnarain Roy* v. *Baijnath Malla* (2).

It may be added that, if necessary, the possibility of any such hardship can probably be obviated by a rule under sections 125, 126 and 128 (2) (*i*), of the Civil Procedure Code delegating to the Registrar the power of issuing notices under clause 10 of Schedule II, to the Code, on his own authority and directing him ordinarily to issue such notices on the same day that the award is submitted to the Court.

(6) 2 Bom. H. C. R. 270 at p. 275.

I accordingly hold on the first issue that the objections raised by the plaintiff to the award are time-barred, and his application to set it aside is refused. In accordance with the award, I pronounce judgment in favour of plaintiff for the recovery of Rs. 150 from the defendant (I omit the qualifying words in the award "within one month from the date hereof" under clause 12 (*b*) of Schedule II, as that date has already expired), subject to the payment therefrom to Government of the sum of Rs. 100 due as Court-fees under Order XXXIII, rule 10, and dismiss the suit as regards the plaintiff's claim to partition. Each party to bear his own costs.

Copy of the decree to be forwarded to the Collector under Order XXXIII, rule 14.

Objections disallowed as time-barred.

[s. c. (1911) 2 M. W. N. 538.]

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 775 OF 1910.

November 15, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

PERINCHERI KOVUMMAL PACKRICHI—DEFENDANT—APPELLANT

versus

PERINCHERI KOVUMMAL KEENHACHA—PLAINTIFF—RESPONDENT.

Muhammadan Law—Marumakkatayam Law—Marriage gifts—Effect of death or divorce of the wife.

Among the Marumakkatayam Moplahs of Malabar, gifts are often made to the husband of a girl given in marriage, as a contribution for the maintenance of herself and her children and on her death or divorce such gift becomes void.

Under the Muhammadan Law, the members of the natural family are under no obligation to maintain a girl after marriage even if she is divorced. And the above rule of Marumakkatayam Law as to such gifts would not apply when the parties are governed by the Muhammadan Law.

Second appeal against the decree of the District Court of North Malabar, in Appeal Suit No. 32 of 1909, presented against that of the Court of the District Munsif of Badagara in Original Suit No 811 of 1903.

Mr. *V. Ryru Nambiar*, for the Appellant.

JUDGMENT.—The plaintiff claims to recover one-half of the property which was

given to the defendant's husband under Exhibit I by the plaintiff's mother and the plaintiff. The ground on which the plaintiff's title is based is that prior to the death of the defendant's husband, he divorced her and that according to the law by which the parties are governed, the gift became void in consequence of the divorce. The contention apparently is that the property then reverted to the donors, and as they held it as the heirs of the plaintiff's father, the plaintiff and the defendant, who is her sister, are entitled to it in equal shares. The document says that the property is given to the donee as *stridhanam*, though the word means woman's property and the gift was to a man. It would appear that amongst the Marumakhatayam Moplas of Malabar, gifts are often made to the husband of a girl given in marriage, apparently as a contribution towards the maintenance of the girl and her future children. It was held in Second Appeal No. 1746 of 1895, that such gift became void on the death or divorce of the girl. Now according to Marumakatayam Law, the tarwad is bound to maintain the woman of the tarwad even after the marriage, and, if property is given to a husband for the support of his wife, it stands to reason that, when he divorces her he should give back the property of the donor. The parties in this case are governed by the Muhammadan Law, not by the Marumakhatayam Law. A girl when married passes over to her husband's family under the Muhammadan Law. There is no obligation on the members of her natural family to maintain her after her marriage, even if she is divorced. There is no reason, therefore, for presuming that a rule of construction applicable to a *stridhanam* gift to a husband where the parties are governed by the Marumakkatayam Law is applicable to such an instrument where the parties are governed by the Muhammadan Law. The plaintiff did not allege any usage amongst Moplas governed by the Muhammadan Law according to which the gift would become void on the defendant's divorce. There is nothing in Exhibit I itself restricting the interest of the decree in any manner. If the gift was really intended for the benefit of the defendant herself and not her husband, the plaintiff would still have no title.

No doubt, it appears that a *stridhanam* gift in favour of the plaintiff's husband was held to convey only a limited estate to him. But the document is not before us and we do not know what its terms were. The result is that we must hold that the plaintiff has not succeeded in proving her title. We reverse the decree of the Courts below and dismiss the suit. The parties will bear each her own costs throughout.

Decree reversed.

(s. c. 5 S. L. R. 140).

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL SUIT No. 297 OF 1908.

August 7, 1911.

Present:—Mr. Fawcett, A. J. C.

MATHRADAS RAMCHAND—PLAINTIFF

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT

Railways Act (IX of 1890), s. 109—Railway Administration—Power to reserve separate accommodation for particular classes of passengers—Power to remove passenger trespassing into a reserved compartment—Interpretation of statutes—Express powers granted to a Company—Exclusion of other powers by implication—Master and servant—Servant acting outside the scope of his authority—Liability of master—Secretary of State for India—Liability for illegal removal by Railway servant—Assault—Removal by threat of force—Forcible removal.

A Railway Administration has power to reserve separate compartments for European and any person who is not a European is not entitled to travel in such reserved compartment There is nothing inherently illegal in the provision of separate accommodation for Europeans and Indians. Section 109 of the Railways Act implies a general power of reservation of a compartment for passengers of a particular class, community or race

A mere verbal threat to use force if the person threatened persists in a particular course of conduct does not amount to an assault.

Birbul Khatifa v. *Emperor*, 30 C. 97 at p. 100, relied upon.

The removal of a person by a threat to use force is 'a forcible removal.'

The Railway authorities have no power to remove a passenger from a compartment which is reserved for the use of another passenger or class of passengers.

Where a statute confers powers upon a Company, which the Company as owner of property could have exercised without statutory power, the powers expressly given should be treated as defining and limiting the right conferred and as implying a prohibition of the more extensive rights which the Company might have by virtue of its ownership of property.

MATHRADAS *v.* SECRETARY OF STATE.

Pratab Daji v. *Bombay, Baroda and Central India Railway*, 1 B. 52 at p. 56, referred to.

Great Northern Railway Company v. *Horrison*, (1854) 23 L. J. Exch. 308 at p. 310; 10 Ex. 376; 2 C. L. R. 1136; 2 W. R. 626; *London Association of Shipowners* v. *London and Indian Docks*, (1893) 3 Ch. 242; 2 R. 23; 67 L. T. 238; 7 Asp. M. C. 195, relied upon.

Where the servants of a Government Railway Administration have no power to remove a passenger and in removing him have acted outside the scope of their authority, the passenger has no cause of action against the Secretary of State for India who is not liable for such acts of his servants.

Pulton v. *The London and South Western Railway Co.*, (1866-67) 2 Q. B. 534; 8 B. and S. 616; 36 L. J. Q. B. 294; 17 L. T. 11; 16 W. R. 309, followed.

For the previous stages of this litigation see 2 Ind Cas. 273; 3 S. L. R. 59 and 11 Ind. Cas. 58; 5 S. L. R. 82. The suit was at first dismissed by Pratt, A. J. C. as not maintainable against the Secretary of State. On appeal the order of dismissal was set aside and the cases remanded for trial on the merits.

Mr. *Isarsing Hazarasing*, for the Plaintiff.

R. B. *Teck Chand Oodhavdas*, for the Defendant.

JUDGMENT.—The plaintiff who is a Pleader at Hyderabad sues the Secretary of State for India in Council for damages for his forcible removal by a Sergeant of Police, acting under the instructions of the Station-Master at the Karachi Cantonment Station, from a compartment, reserved for Europeans only, on the train by which he was travelling as a second-class passenger to Hyderabad on the 25th May 1908. The plaintiff alleges that such reservation was wrongful, and that "by inflicting upon the plaintiff the indignity of forcible removal by reason of his nationality from one compartment to another, the North-Western Railway Administration have acted *ultra vires* and illegally and have caused annoyance and pain of mind to the plaintiff, for which he claims Rs. 1,000 damages." (Plaint, paragraph 7).

The defendant in his written statement denies the alleged forcible removal, alleging that the plaintiff moved voluntarily on being requested to do so and arrangements made for his luggage to be removed by a licensed *cooly*. It is also denied that the action of the Railway Administration in providing separate accommodation for Europeans and Indians was illegal, or that the plaintiff was caused the annoyance or pain of mind alleged. The defendant further pleads that if there was any wrongful removal by the Railway Police under the orders of the Assistant Station-Master, the defendant is not responsible for such acts of their servants.

Certain allegations are made in the plaint as to the inferiority in fittings and comfort of the compartment reserved for Indians to the one reserved for Europeans; but at the time of framing the issues, plaintiff's Pleader dropped any claim he might have for damages for the discomfort of travelling in an inferior carriage and stated that he confined his cause of action to the alleged assault by the Police Sergeant acting under the instructions of the Station-Master. The following issues were accordingly settled.

1. Is the assault proved?
2. Was the board reserving the compartment affixed at the City Station or at the Cantonment Station?
3. Was the plaintiff not entitled to travel in the carriage which he entered at the City Station *i. e.*, had the Administration power to reserve the carriage for Europeans?
4. Was the assault justifiable?
5. Is the defendant liable for an assault committed by the Station-Master or the Sergeant of Police or both?
6. To what damages, if any, is the plaintiff entitled?

As to the first issue, I do not think any actual assault by the Police Sergeant is proved. Plaintiff's own account is that the Police Officer in question "asked me to vacate saying he was authorized to evict me by force. I asked him if he was prepared to use force. He said 'yes.' He then took up a small bag of mine, and I had no other go but to follow him to the compartment, which he said was reserved for Indians. He was close to me when he said he was prepared to use force. He had also a small cane in his hand" (Exhibit No. 6, L 61-70). Assuming this to be what actually occurred, it does not amount to an assault as defined either in section 351 of the Indian Penal Code or in the ordinary English Common-law. There was no actual attempt or preparation to use immediate force on the person of the plaintiff, nor any gesture showing an intention to use such immediate force; there was merely a verbal threat to use force, if the plaintiff persisted in a particular course of conduct. And this is clearly laid down not to amount to an "assault" [Underhill's Law of Torts, 7th Edition, article 102

at pages 291-2; explanation to section 351, Indian Penal Code; *Birbal Khatifa* v. *Emperor* (1)].

But, I think, it is really immaterial whether the act of the Police Sergeant amounts to an assault or not. The word "assault" is not used in the plaint, where the cause of action is spoken of as a "forcible removal;" and I take it that at the time of framing issues, the former word was intended merely as a synonym, without any idea of plaintiff's being tied down to prove an assault, in the strict legal sense in which that word is used. On the pleadings, there is no doubt that plaintiff bases his claim to damages on the alleged tort committed by his being wrongfully compelled to move from the one compartment to the other, and defendant has joined issue on that basis. I accordingly think the words "compulsory removal" should be substituted for "assault" in issues Nos. 1 and 4, and proceed to decide them as if such substitution had been made.

Was the plaintiff, then, compelled by threat of force to move, from the compartment reserved for Europens into that reserved for Indians? This I find in the affirmative. The Police Sergeant, Mr. Lincoln, no doubt, denies having told the plaintiff that he was authorized and prepared to use force (Exhibit L. 1. 77). But it is difficult to believe that the plaintiff, who had persisted in declining to vacate the compartment, although requested to do so by the Station Masters at both the City and the Cantonment Stations and who, as the former says, was evidently "bent on travelling in this European compartment" (Exhibit B. 1. 75), at once climed down on the mere appearance of the Police Sergeant and raised no objection when the latter requested him to move. The fact that the Police Sergeant had armed himself with a written order from the Station-Master to remove the plaintiff also renders it probable that he would express his readiness to use force, if necessary, and goes to contradict his assertion that, if the plaintiff had persisted in refusing, he would not have removed him, but merely taken his name and address (Exhibit L. 1. 58). The plaintiff is also corroborated by the two witnesses, Messrs. Naigamwalla and Sukhramdas (Exhibits Nos. 6 and 9), as to the Sergeant telling him that, if he did not move, he would use force. In all the circumstances, I cannot accept Mr. Lincoln's account of what happened, which is, I think, tainted by a desire to exculpate himself and the Railway Co., and I hold it proved that he did threaten to use force, should the plaintiff persist in declining to move from the compartment.

A good deal of evidence has been given on the point whether the Police Sergeant himself moved the plaintiff's hand-bag from the one compartment to the other (as the plaintiff alleges) or whether this was done by a station cooly (as the defendant asserts). The evidence on the point is directly conflictory and it is somewhat difficult to decide which side is telling the truth. But it seems to me quite immaterial who removed the bag. Even if the Police Sergeant did it, this would not constitute an "assault" on the plaintiff and the point is only relevant as a possible indication whether plaintiff's removal was voluntary or compulsory. On the whole, I do not think it is proved that the Police Sergeant did in fact take the bag himself. The probablities are against it and it is noticeable that plaintiff's witnesses Naigamwalla and Sukhramdas only say they *think* the Sergean took the bag (Exhibit Nos. 6, L. 24) (Exhibits Nos. 8, 1, 42), while his witness, Mr. C. P. Mehta says he saw his luggage taken out by coolies (Exhibits Nos. 14, 1, 17). On the other hand, there is little doubt that the plaintiff was anxious to get his luggage personally removed by some responsible officer, probably because he thought this would be a visible sign of forcible removal. Thus, the Station-Master at the Cantonment Station says the plaintiff told him he would not move into the other compartment, unless he (the Station-Master) removed his bag (Exhibits Nos. 6, 1. 17, and the witness Rustomji (Exhibits Nos. 15, 1. 18) says the plaintiff told him that he had refused to come out until the Police Sergeant had moved his bag. But it does not follow that the Police Sergeant accepted this invitation of the plaintiff to "tread on the tail of his coat."

Issue No. 2.—This is not really necessary for the decision of the case, as, if the reservation of the compartment for Europeans was illegal, the affixing of a board notifying such reservation would not make it any the

(1) 30 C. 97 at p. 100.

less illegal: and, similarly, if plaintiff was informed by an authorized officer of the Railway Co., that the compartment was reserved for Europeans, the fact of a board not being affixed would not alter the case, if his occupation of the compartment was wrongful. The point seems only relevant in so far as it may affect the question of damages. But as evidence has been given on the subject, I record my finding that a board reserving the compartment for European gentlemen was in fact affixed to it before the plaintiff entered it at the City Station. The orders issued by the Traffic Superintendent of the Railway at Lahore regarding the reservation of these compartments (Exhibit C.) mention the "necessary carriage boards" and require the District Traffic Superintendent, Karachi, to "see the boards are returned on corresponding trains," *i. e.*, in this case the "7-up" between Karachi and Lahore, by which the plaintiff travelled. The District Traffic Superintendent, Karachi, in turn directed the Station-Masters, Karachi City, to see to this (Exhibit D.). Accordingly there is a presumption that the boards were affixed to the respective European and Indian compartments when the train was made up at the City Station; and the evidence does not rebut this presumption. The guard, William Lawrence, and the Assistant Station Master, Robert Samuel, who asked the plaintiff to move into the other compartment at the City Station, swear that there was a proper board on each of the two compartments. On the other hand, the evidence of the two witnesses for the plaintiff who were at the City Station with him is very indecisive. Vishindas says "I *think* no board was put on the compartment at the City Station" (Exhibits Nos. 8, 1, 68). Sukhramdas says there was a board on the Indian compartment, and he *does not remember* if there was a board on the European compartment (Exhibits Nos. 91, 103, 113); in view of this, his subsequent statement that at first there was no board and he thinks the Assistant Station-Master told his clerk to get one put on (*ib* 1. 1. 120—125) obviously cannot be relied on. Admittedly, there was a board on the compartment, when the train was at the Karachi Cantonment Station, and I entirely disbelieve the plaintiff's statement that, as soon as the train stopped at that Station, somebody came and put on the board there (Exhibits Nos. 7, 1.36). There is no other evidence in support of this assertion, and plaintiff admits that he drew no one's attention to it, although according to his account the two witnesses Vishindas and Sukhramdas were with him then in the compartment (*ib*, 1. 1. 40, 111).

Issues Nos. 3 *and* 4 can be dealt with together. In defendant's written statement, paragraph 6, there is a clear denial that the action of the Railway Administration in providing separate accommodation for Europeans and Indians was illegal; but there is no express pleading that the forcible or compulsory removal of the plaintiff was legal, and in fact Mr. Tekchand's main contention for the Secretary of State is that, it was illegal and that the defendant is, therefore, not liable in respect of it under the ordinary law of master and servant. Of course, if this is so, it is unnecessary to decide the 3rd issue, as the cause of action is the "forcible removal" and not the "provision of separate accommodation."

I think, then, it will be best to determine first whether plaintiff's compulsory removal was in fact illegal, even if he was in wrongful occupation of the European compartment. In support of this, Mr. Tekchand points out that the Indian Railways Act, 1890, confers express powers of removal in certain cases, *e. g.*, sections 110 (2), 117 (1), 118 (2), 119, 120 and 122 (2), but gives no such power of removal in the cases dealt with in section 109 (1), which includes that of a passenger, who has "entered a compartment which is reserved by a Railway Administration for the use of another passenger," refusing to leave it when required to do so by any Railway servant. This certainly does give rise to a legitimate inference that the Legislature intended to restrict the interference of a railway servant in such a case to prosecution of the offender under that section and to debar him from removing him should he persist in his refusal to leave. But this is not necessarily conclusive, because, where a statute confers powers upon a Company, which the Company as owner of property could have exercised without statutory power, the powers expressly given may either be treated (1) as superfluous, or (2) as purposely inserted in order to define, that is limit, the right conferred, and as implying a prohibition of

the exercise of the more extensive rights which the Company might have by virtue of its ownership of property: see Maxwell's Interpretation of Statutes, 3rd Edition, page 439. For instance, in this case, if the plaintiff was a mere trespasser in the European compartment and had no right to be in it, was the Railway administration debarred from removing him in exercise "of the right which the law accords to every proprietor to remove a trespasser, using only such force as may be necessary for the purpose?" I take the words in inverted commas from the judgment of Sargent, J., in the case of *Pratab Daji* v. *Bombay Baroda and Central India Railway* (2), where this very point (though in a different form) arose but was not decided. It was there said, however, that the argument against the Company being able to treat the plaintiff in that case as a "trespasser" derives some support from the remarks of Coleridge, J., at the conclusion of the judgment in *Great Northern Railway Company* v. *Harrison* (3); and in *London Association of Shipowners* v. *London and Indian Docks* (4), it was held that the latter of the two alternative modes of construction mentioned above (*i.e.*, the restrictive one) is the true mode of regarding statutory powers conferred on bodies created for public purpose, and authorized to acquire land for such purposes. A Railway Company is such a body and the fact of the rights of the Company which made this railway having been acquired by the Secretary of State in Council under the Indian Guaranteed Railways Act, 1879, (see Gazetteer of the Province of Sind, Volume A, page 345), of course, makes no difference. I think, then, that Mr. Tekchand's argument as to removal being illegal in a case falling under section 109 is sound. In this view of the law, I must decide the 4th issue (as amended by me) in the negative.

Otherwise I should have been strongly inclined to hold that plaintiff's compulsory removal, assuming him to have been a trespasser in this European compartment, was justifiable and legal. The ordinary rule under English Law is that "a trespasser, or a licensee whose license has been revoked, may be removed from the premises of a Railway Company, and if he resists, reasonable force may be used to expel him" (see Earl of Halsbury's Laws of England, Volume IV, article 106, at page 63, citing *Wood* v. *Lidbitter* (5) and *Butler* v. *Manchester, Sheffield and Lincolnshire Railway Co.* (6). As already pointed out, the Bombay High Court in *Pratab Daji's* case (2) applied the same rule to the case of the forcible removal of a passenger travelling without a ticket. The objections to a forcible entry by a rightful owner, which arise under the Statute of 5, Richard II (referred to in Pollock's Law of Torts, 7th Edition, pages 376-8) do not apply to India [*cf Bandu* v. *Naba* (7), and Mayne's Criminal Law of India, 2nd Edition, pages 528 532], unless, at any rate, the force is used by a member of an unlawful assembly as defined in section 141 of the Indian Penal Code. The case of *Bayley* v. *Manchester, Sheffield and Lincolnshire Railway Co.*, (8), on which plaintiff's Pleader strongly relies, also presupposes the power of removing a passenger from a train under a general authority to remove trespassers (see per Willes, J., at page 419).

As regards the 3rd issue, I cannot see anything inherently illegal in the provision by a Railway Administration of separate accommodation for Europeans and Indians, as was done in this case. Such a distinction may be invidious and undesirable, but that does not make it illegal. So long as sufficient accommodation is provided for both classes, and apart from any specific provision to the contrary in the Railways Act, 1890, a railway administration, as the owner of the rolling stock and Manager of the carrying business on the line necessarily has power to set apart particular compartments for the exclusive use of each class if it thinks fit to do so. Then, is there anything in the Railways Act to the contrary? Section 109 seems clearly to imply a general power of reservation of a compartment for the use of particular passengers by a Railway Administration. Mr. Isarsing for the plaintiff argued

(2) 1 B. 52 at p. 56.
(3) (1854) 23 L. J. Exch. 308 at p. 310; 10 Ex. 376; 2 C. L. R. 1136; 2 W. R 626.
(4) 1893) 3 Ch. 242; 2 R. 23; 67 L. T. 238; 7 Asp. M. C. 195.
(5) (1845) 13 M. N. W. 838; 14 L. J. Ex. 161; 9 Jur. 187.
(6) (1888) 21 Q. B. D. 207 at p. 211; 57 L. J. Q. B. 564; 60 L. T. 89; 36 W. R. 726; 52 J. P. 611.
(7) 15 B. 238 at p. 241.
(8) (1871-72) L. R. 7 C. P. 415.

that it only contemplates the case of a reservation for a passenger *who has already entered into a contract with the Railway Administration to have the compartment reserved for his use.* But I do not think there is any good ground for reading such a restriction into the section. Why should it not also cover the case of an Administration reserving a compartment for the use of a particular class of passengers, who have not been actually booked, but who, it may be anticipated, will join the train during its journey, *e.g.*, workmen, volunteers, school-children, pilgrims or passengers proceeding to a particular place? And a reservation for particular communities or races seems *prima facie* to be on exactly the same footing.

Mr. Isarsing, however, distinguishes the last case as offending against section 42 (2) of the Act, *i.e.*, he says it amounts to an "undue preference" or partiality in favour of European passengers. If, however, they are given exactly equal and similar accommodation, I do not see how this can be the case. And any how this is an objection which I am precluded from taking cognizance of by section 41 of the Act. So far as this particular suit is concerned, I must consider the legality of the act complained of under the ordinary law, apart from any objection to such legality that may be taken under any provision of Chapter V of the Railways Act, which includes section 42: for, otherwise, the suit becomes one instituted for something done in violation or contravention of such provision, within the meaning of section 41. It is, therefore, not open to me to consider whether in this particular case the Indian compartment was inferior in comforts, etc., to the European compartment, and if so, whether there was "an undue preference" in favour of the European passengers within the meaning of section 42 (2), so as to make the reservation of the one compartment for Europeans illegal. Any cause of action which plaintiff might have had in respect of this objection was also dropped at the time of framing issues and he is not, therefore, entitled to rely on this plea in support of his contention that the reservation of the compartment was illegal.

It may be added that there is nothing in section 47 of the Act which requires that the power of reservation should be exercised by or in accordance with rules under that section, though, no doubt, the power of reservation can be controlled and restricted by rules under that section. At present however, the general rules regarding the carriage of passengers contain nothing on the subject (see General Statutory Rules and Orders, Volume III, pages 1448-1462). Section 64, which requires reservation of compartments for females, also clearly does not prohibit such reservation for other classes.

I, therefore, find on the 3rd issue that the Railway Administration had power to reserve the compartment for Europeans and the plaintiff was not entitled to travel in it.

As regards the 5th issue, Mr. Tekchand contends, on the authority of *Poulton* v. *The London and South Western Railway Co.* (9) that, as the Railway Administration had no power to remove the plaintiff on the assumption that he was in wrongful occupation of a seat in the European compartment, there could be no authority implied from them to the Station-Master or Police Sergeant to remove him and defendant is, therefore, not liable for this act of theirs. That case is cited in all the leading text books on Torts, and the proposition in question appears to be still good law. I can see nothing to differentiate the present case, in view of my finding on the 4th issue. There is certainly no evidence which otherwise tends to establish any such implied authority. The instructions issued in regard to the reservation in question (Exhibits C and D) contain no directions as to the course which should be taken in the event of Indian gentlemen entering the European compartment or *vice versa* and there is nothing to show that any action in such cases beyond prosecution under section 109 of the Railways Act was intended. In the cases cited by Mr. Isarsing, such as *Bayley* v. *Manchester, Sheffield and Lincolnshire Railway Co.* (10), it was held that there was evidence from which an implied authority to remove passengers travelling in wrong compartments might be found; and were it not for the view I take as to the effect of section 103 of the Railways Act, I should unhesitatingly follow

(9) (1866-67) 2 Q. B. 534; 8 B. and S. 616; 36 L. J. Q. B. 294; 17 L. T. 11; 16 W. R. 309.

(10) (1872) L. R. 8 C. P. 148; 42 L. J. C. P. 78; 28 L. T. 366.

those cases in the present instance. For, apart from that view, and the law as laid down in *Poulton's* case (4) cited above, I think that the act of the Station-Master and Police Sergeant in removing the plaintiff was unquestionably done within the scope of their employment as servants of the defendant. But the fact that the Indian Legislature puts a prohibition on removal in such a case as the present differentiates it from the analogous English cases relating to the forcible removal of passengers and puts it on a par with *Poulton's* case (4) regarding a Railway Co.'s power to arrest. Even, however, if my view as to the effect of section 109 is erroneous, my finding that, otherwise, the removal of the plaintiff as a trespasser was justifiable leads to the same result that plaintiff is not entitled to recover any damages from the defendant.

It was argued by Mr. Isarsing that the preliminary issue decided in the Appellate Court's judgment of 27th April 1911, remanding the case for trial under Order XLI, rule 23, precluded this Court from any further consideration of the 5th issue. It is true that in his order of 2nd October 1908, Mr. Pratt directs the case to be put down "for hearing of the 5th issue," but it is quite clear from both his judgment of the 15th February 1909 and that of the Appellate Court that the only point discussed and decided on that issue was the general liability of the Secretary of State in Council in a suit for damages for the Tort of his servant, having regard to the terms of 21 and 22 Vict., c. 106, sections 42 and 65, and the question of the defendant's liability in this particular case under the ordinary law of master and servant was left entirely untouched. The latter point clearly arises on the issue and pleadings and I accordingly hold that there is no bar to my deciding it. In any case, it is involved in the general issue No. 6.

For the above reasons, I am of opinion that the plaintiff is not entitled to recover any damages from the defendant and dismiss his suit with costs, including those reserved as "costs in the cause" by the Appellate Court's decree.

In order to make this judgment complete, I think it right to give a finding on the 6th issue on the assumption that my view of the law is wrong, and that (*a*) the removal of the plaintiff by the Station-Master and Police Sergeant was wrongful, and (*b*) the defendant is liable for their acts in so removing him. No special damage as the result of this wrongful act is alleged or proved by the plaintiff. Nor do I think that the annoyance and pain of mind, on which the plaintiff bases his claim for damages, was such as to entitle him to substantial damages. Any indignity he suffered was mainly of his own seeking, and there is nothing in the evidence which points to the Railway servants and the Police Sergeant having acted towards him in a discourteous or impolite manner. Nor do I think that a Pleader like the plaintiff would really suffer much pain of mind in an encounter of this kind; and, so far as his reputation is concerned, it has probably been enhanced in the opinion of his friends by his conduct, which succeeded in getting the orders for the reservation of such European and Indian compartments withdrawn. There was no doubt, some unpleasantness caused to the plaintiff in his being publicly compelled to move from the one compartment to the other, but, having regard to all the circumstances, I think damages to the extent of Rs. 50 would amply compensate himself for this. Had I, therefore, found in his favour on the 5th issue, I should have awarded him Rs. 50, and proportionate costs. I do not think it is a proper case for full costs as the plaintiff has undoubtedly exaggerated his claim and made allegations (*e. g.*, as to the removal of his hand bag by the Police Sergeant and the overcrowding of the Indian compartment) which are not substantiated by the evidence.

Suit dismissed.

(s. c. 16 C. W. N. 44.)

CALCUTTA HIGH COURT.

CIVIL RULE No. 4784 OF 1911.

September 5, 1911.

Present:—Mr. Justice Woodroffe and Mr. Justice Teunon.

ABDUL KARIM ABU AHMED KHAN GHAZNAVI AND ANOTHER—DEFENDANTS—PETITIONERS

versus

ABDUS SOBHAN CHOUDHRY AND OTHERS—PLAINTIFFS—OPPOSITE PARTY.

Civil Procedure Code (Act of V 1908), s. 92—Power of

DOULATRAM v. HALO KANYA.

Government to authorise Sub-Judge to try suit pending before District Judge.

A notification directed by a Local Government to a particular Sub-Judge empowering him to try a particular suit pending in the Court of a District Judge is not a notification contemplated by section 92 of the Civil Procedure Code, 1908.

Rule against the order of the Sub-Judge of Mymensingh, dated the August 15th, 1911.

FACTS.—A suit under section 92 of the Civil Procedure Code was instituted in the District Judge's Court at Mymensing. The Local Government by a notification empowered Babu Behari Lal Chatterjee, Subordinate Judge of Mymensing to try that suit. The District Judge then transferred the suit to the said Sub-Judge. The defendants contended that the notification was illegal, that the Government had no power to authorise a Court to try a part-heard case not to empower a Court to try a particular suit. The Sub-Judge overruled the objections.

The defendants then obtained this Rule.

Dr. *Rash Behary Ghose* (with him Babu *Akhil Bandhu Guha*), for the Petitioners.

Mr. *B. Chakravarti* (with him Babu *Umesh Chandra Ghosh* and *Nares Chandra Sen Gupta*), for the Opposite Party.

JUDGMENT.

WOODROFFE, J.—This Rule must, I think, be made absolute, because the notification of the 12th July 1911 was not such a notification as was contemplated by section 92 of the Code of Civil Procedure. It was a notification directed to a particular Judge and purported to deal with a particular litigation, and that litigation was, at the date of the notification, already pending in the Court of the District Judge. It follows that the Subordinate Judge of Mymensingh was not competent to try or dispose of the suit and the District Judge had no power to transfer the suit to a Court which was not then competent to dispose of it. In, however, making this Rule absolute I desire to make it clear, in order to avoid any possible objection in future, that the District Judge has, notwithstanding anything that has hitherto been done, power to try this suit. The result of our holding that the Subordinate Judge was not competent to try the suit is that the District Judge effected nothing by his order of transfer and, therefore, the suit remained where it was originally instituted. The District Judge, therefore, has jurisdiction to try the suit, and we think, having regard to the circumstances of the case and also to the waste of time that has been involved by reason of the infructuous proceedings in the Court of the Subordinate Judge, that this case should be heard as soon as possible; that is to say, as soon as the Judge can conveniently hear it.

We may also say, having regard to the statements made to us, that if there is pressure of work in the Judge's Court, an application may properly be made by him for assistance in carrying on his work as District and Sessions Judge.

In the circumstances of the case, the Rule is made absolute without costs.

Let the record and this order be sent down at once.

Rule made absolute.

(s. c. 5 S. L. R. 155.)

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REFERENCE No. 27 OF 1911.

August 16, 1911.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

DOULATRAM VALABDAS—PLAINTIFF

versus

HALO KANYA AND ANOTHER—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s. 16—Civil Procedure Code (Act V of 1908), s. 15, O. XXXVII—Jurisdiction of Karachi Small Cause Court—Suit under O. XXXVII not exceeding Rs. 1,000—Exclusive jurisdiction of Small Cause Court—No jurisdiction conferred on Sind Judicial Commissioner's Court by O. XXXVII—Interpretation of Statutes—Meaning clear—Intention of Legislature.

All suits on negotiable instruments in which the plaintiff desires to proceed summarily must be filed in Courts having appropriate local and pecuniary jurisdiction.

The Karachi Small Cause Court has exclusive jurisdiction to try all suits on negotiable instruments when the subject-matter of the suit does not exceed Rs. 1,000. Even if such a suit is brought under the provisions of Order XXXVII of the Civil Procedure Code, the Small Cause Court has exclusive jurisdiction. Section 16 of the Provincial Small Cause Courts Act bars the jurisdiction of the Sind Judicial Commissioner's Court to entertain such a suit.

Ramsing v. *Kirkbride*, Sel. D. Sind Sadar Court Vol. 1, page 83, followed.

Duff v. *Fisher*, S B. L. R. Ap. 10; *Hameedoola* v. *Mohamed Asghur Hossain*, 6 C. 499; 7 C.L. R. 471, distinguished.

Order XXXVII refers only to the mode of trial it does not confer on the Courts specified therein

jurisdiction to try suits which they are not otherwise competent to try.

When the meaning of an Act is clear and free from ambiguity, it is idle to speculate as to the intention of the Legislature.

Reference made by Fawcett, A. J. C., under Order XLVI, Civil Procedure Code.

ORDER OF REFERENCE.

FAWCETT, A. J. C.—Plaintiff sues upon a promissory-note for Rs. 65 passed by the defendants at Karachi on the 8th January 1911, and claims Rs. 77 (including interest to date of suit) and his costs of the suit and interest from date of suit to payment.

Such a suit is cognizable by the Small Cause Court at Karachi, which, under Government Notification No. 5237, dated 27th July 1894, Bombay Local Rules and Orders, Volume I, page 493, has jurisdiction upto Rs. 1,000 (Act IX of 1887, section 15). I have, therefore, raised an issue whether the suit is cognizable by this Court in view of the terms of section 16 of the Provincial Small Cause Courts Act, 1887, which enacts that,—

> "Save as expressly provided by this Act or by any other enactment for the time being in force, a suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable."

Mr. Ferro, who argued the point for the plaintiff with great clearness and conciseness, relies mainly on the words "*all* suits upon bills of exchange, *hundis* or promissory-notes may, in case the plaintiff desires to proceed hereunder, be instituted," &c., which appear in rule 2 (1) of Order XXXVII of the Civil Procedure Code. The question, then, is whether the use of the word "all" amounts to an *express* provision that the Court of the Judicial Commissioner of Sind may take cognizance of such suits even though they may be cognizable by the Small Cause Court at Karachi.

The following considerations seem to me conclusive against this view:—

(*a*) Section 15 of the Code provides that "*every* suit shall be instituted in the Court of the lowest grade competent to try it." There is no exception in favour of suits falling under Order XXXVII. (The Small Cause Court is, of course, of a lower grade than the Judicial Commissioner's Court, both because it is subordinate to the latter (section 3 of the Code) and has a less extensive jurisdiction: *Mohanlal* v. *Viru Punja* (1).

(*b*) Similarly, section 20 makes no exception in favour of such suits. The words "subject to the limitations aforesaid" refer to "the pecuniary or other limitations prescribed by any law" mentioned in section 16, and these limitations would include section 15 of the Code and section 16 of Act IX of 1887.

(*c*) Section 4 of the Code enacts, that "in the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction ..... conferred ..... by or under any other law for the time being in force." The mere use of the word "all" in Order XXXVII, rule 2, cannot reasonably be construed as "a specific provision to the contrary" according to the specific provisions of section 16 of Act IX of 1887.

(*d*) The last consideration applies with still greater force, now that the provisions in the Code regarding summary procedure in certain suits such as the one in question are placed in the First Schedule as "rules" which can be altered under Part X of the Code. Section 128 (1) provides that any new rules "shall be not inconsistent with the provisions in the body of this Code;" and, though this does not affect Order XXXVII, which under section 121 has effect "as if enacted in the body of this Code," yet the natural presumption is that the rules in Schedule I were not considered to contain anything inconsistent with the general provisions in the body of the Code. Order XXXVII, it may be noted, merely contains rules falling under clause (*f*) of section 128 (2), which impliedly brings such rules under the bar against inconsistency enacted in section 128 (1).

(*e*) Order XXXVII, rule 7, which enacts that "save as provided by this Order, the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner," clearly points to the Order being intended merely to regulate the procedure in suits otherwise within the jurisdiction of the Court, and not to extend that jurisdiction or rather to remove any bar to its jurisdiction

(1) 12 B. 169.

such as that contained in Act IX of 1887, section 16.

(*f*) The Legislative history of Order XXXVII is also opposed to any such intention as the last. It clearly shows, for instance, that the use of the word "all" in Order XXXVII, rule 2(1), is of a purely accidental nature, so to speak, and cannot have been intended to have the special significance now sought to be attached to it. The Order is derived, through Chapter XXXIX of the Codes of 1877 and 1882, from the Act V of 1866, which in turn is based on the English Summary Procedure on Bills of Exchange Act, 1855, (18 to 19 Vict. c. 67), section 1 of the last named Act says "from and after the 24th of October 1855 *all* actions upon Bills of Exchange or promissory-notes..... may be by writ of summons," &c. Section 2 of Act V of 1866 adopts the same language with slight changes to adapt it to the circumstances in India, *viz.*, "from and after the first day of May 1866, *all* suits upon Bills of Exchange, *hundis* or Promissory-Notes.....may," etc. And the words "*all* suits upon Bills of Exchange, *hundis* or Promissory-Notes" have accordingly reappeared in the Codes of 1877, 1882 and 1908, just as the words "*all* actions" survive in the corresponding Order III, rule 6, of the Rules of the Supreme Court in England. In the circumstances, there does not appear to be any sufficient ground for attaching a hidden significance to the word "all." The expression is merely equivalent to "an action" or "a suit," and does not affect the question of jurisdiction.

(*g*) It is also to be noted that when Act V of 1866 was enacted, Act XI of 1865 was in force and had only been passed under a year previously. Section 12 of this Act contains a provision in even more sweeping terms than section 16 of Act IX of 1887, *viz.*, "Whenever a Court of Small Causes is constituted under this Act, no suit cognizable by such Court shall be heard or determined in any other Court having jurisdiction within the local limits of the jurisdiction of such Court of Small Causes." If, therefore, the Legislature had intended to over-ride this provision as regards suits upon negotiable instruments, they would surely have done so in some clear and specific language, and not by the mere introduction of the word "all" in section 2 of Act V of 1866.

In my opinion, therefore, rule 2 of Order XXXVII cannot be construed as enacting an exception to section 15 of the Code and section 16 of Act IX of 1887. And, even if it can be so construed, it only does so *impliedly* and not *expressly*, as must be done in order to bar the operation of the latter enactment.

Two extraneous arguments by which it was sought to support the suggested construction of the words "all suits" in Order XXXVII, rule 2, may be briefly noticed. First, it was said that the Legislature in the Code of 1877, as in that of 1882, authorized this summary procedure in suits on negotiable instruments "in the Court of the Judge of Karachi," probably in view of the commercial activity and importance of Karachi, and that it can scarcely have intended to exclude all suits in which the claim amounted to Rs. 1,000 or under. Against this, however, there is the fact that section 12 of Act XI of 1865 was on the Statute book *prior* to the conferment of this power on the Court of the Judge of Karachi, and from the Government Notification of 23rd June 1866, Bombay Local Rules and Orders, Vol. I., page 489, fixing the territorial limits of its jurisdiction, it appears that a Court of Small Causes at Karachi with exclusive jurisdiction in suits of this kind up to Rs. 500 at any rate (sections 3 and 12 of Act XI of 1865) was also in existence *prior* to the conferment of such power. The rule enacted in section 15 of the Civil Procedure Code has also been in force since the Code of 1859, see paragraph 1 of section 6 of that Code. In these circumstances, the general presumption against ousting an established jurisdiction (*cf.* Maxwell on the Interpretation of Statutes, 3rd Edition, page 178) obviously has no application. It may also be pointed out that the Legislature left it open to the Local Government to confer similar powers on the Small Cause Court at Karachi [section 538 (*e*) of the Codes of 1877 and 1882], should that be considered desirable: and, so far as I am aware, it is still possible to confer such powers on that Court by an amendment of rule 1 of Order XXXVII under section 125 of the Code. The words "have been already applied" in clause (*d*) of that rule were

clearly necessary in order to limit the rule to the particular Courts in which the order had effect at the time of its enactment, and do not presumably affect the power of altering the rule I conferred by sections 122 and 125.

Then, reliance was placed on the established practice existing for many years of this Court exercising jurisdiction in such cases, and the maxim "*optimus interpres rerum usus.*" But, as pointed out by Lord Watson, cited in Hardcastle on Statutory Law, 3rd Edition, page 92, in *Trustees of Clyde Navigation* v. *Laird* (2), this maxim has little, if any, application to the construction of a recent Statute, which he says he feels bound to construe "according to its own terms, when these are brought into controversy, and not according to the views which interested parties may have hitherto taken." In this case, the Pleaders and parties who prefer having such suits tried in this Court under the summary procedure, are really "interested parties" of the kind referred to by Lord Watson, and the practice has presumably been established, because the point of jurisdiction was never raised before the Court. Even now the defendant's Pleader supports Mr. Ferro's arguments and does not seek to have the suit decided against the plaintiff on this point. And as pointed out by Jenkins, C. J., in *Manilal* v. *Vanmaladas* (3) the principle of *stare decisis*, while of undoubted value in its bearing on the law of property, is not of the same importance in the department of procedure.

As a matter of fact, however, the only reported decision of the Sadar Court on this point is in favour of the view taken above. In *Ramsing* v. *Kirkbride* (4), Birdwood, J., holds that the provisions of Chapter XXXIX of the Code of Civil Procedure (corresponding to Order XXXVII of the present Code) "seem to affect matters of procedure only. It was not apparently the intention of the Legislature to extend the jurisdiction of any Courts or to place any limitation on the exercise of any existing jurisdiction. The special procedure seems to be provided only for cases which would ordinarily be instituted in any of the selected Courts, if there were no such procedure." That was a case in which the bar to the District Judge's jurisdiction arose under section 5 of Bombay Act XII of 1866, read with sections 15 and 17 of the then Code of Civil Procedure: but the reasoning applies equally (or rather *a fortiori*) to the bar so strongly enacted in section 16 of Act IX of 1887.

The case of *Duff* v. *Fisher* (5), from which Birdwood, J., dissented, is not necessarily a ruling to the contrary, because the High Court of Calcutta has, under section 12 of its Letters Patent, full original jurisdiction except "in cases falling within the jurisdiction of the Small Cause Court at Calcutta, in which the debt or damage, or value of the property sued for, does not exceed one hundred rupees," and there was no provision in Act XXVI of 1864 corresponding to section 12 of Act XI of 1865. But, in any case, it is not a ruling to which much weight can be attached, in view of the facts that the suit was undefended and no reasons are given for the decision. The Judge also, in allowing the plaintiff his costs, seems clearly to have overlooked the provisions of section 9 of Act XXVI of 1864.

The case of *Ko Shoay Doon* v. *Shoay Gan* (6) may also be referred to as showing that the Small Cause Court at Rangoon, constituted under Act XI of 1865, was held to deprive the Recorder's Court at Rangoon of jurisdiction in suits cognizable by the Small Cause Court under that Act, in spite of an unrepealed enactment that "save as in this Act provided, no Court other than the Recorder's Court shall have or exercise any Civil jurisdiction whatever within the limits" of its jurisdiction.

Another case which may be cited in support of the construction put by Birdwood, J., and myself on Order XXXVII and the words "all suits", as in no way affecting or extending jurisdiction, is *Re Mill's Estate* (7). Order LV, rule 1, of the Supreme Court Rules provides that "the costs of or incident to *all pro-*

(2) (1882-83) 8 App. Cases 658 at p. 673.
(3) 29 B. 621; 7 Bom. L. R. 644 (F. B.).
(4) Sel D. Sind Sadar Court Vol. I page 83.
(5) 8 B. L. R. App. 10.
(6) 6 B. L. R. 196; 14 W. R. 331.
(7) 34 Ch. D. 24; 55 L. T. 465; 35 W. R. 65; 51 J. P. 151; 56 L. J. Ch. 60.

DOULATRAM *v.* HALO KANYA.

ceedings in the Supreme Court..... shall be in the discretion of the Court or Judge," and in that case it was held that the rule was intended only to regulate the way in which costs were to be dealt with *in cases which the Court had, either by statute or independently, jurisdiction* to deal with costs, and that it gave the Court no jurisdiction to order payment of costs in cases where, before the Judicature Acts, it would have had no jurisdiction to do so.

For the above reasons, I am of opinion that the jurisdiction of this Court in this suit is barred by section 16 of Act IX of 1887, as also by section 15 of the Code of Civil Procedure, but as there is room for possible doubt in the matter, and in view of the long standing practice under which such suits have been dealt with by this Court and the desirability of an early authoritative decision on the point, I submit the record to the Judicial Commissioner's Court in its High Court capacity for decision of the point of jurisdiction raised.

In continuation of my reference of 17th instant, under Order XLVI, rule 6, Civil Procedure Code, in Suit No. 140 of 1911, and with reference to paras. 4 (*g*) and 6 thereof, I beg to submit the following observations regarding the establishment of the Karachi Small Cause Court, which (I said) appears to have been in existence at any rate in 1866. As a matter of fact, it is stated in Hughes' "Gazetteer of the Province of Sindh" (1874) to have been "established in August 1861, for the adjudication of suits of the value of Rs. 500 and under" (page 354). This was under Act XLII of 1860, section 1, but as the previous sanction of the Governor-General in Council had not been obtained, a special Act to validate prior proceedings in the Court had to be passed, *viz.*, Act IV of 1864. The preamble of this shows that the actual date on which the order constituting the Court was passed was 5th July 1861. Under section 3 of Act XLII of 1860, the Small Cause Court had jurisdiction in suits of the kind now in question of a value not exceeding Rs. 500 and the jurisdiction of the Court under section 4 of that Act, as to the residence of the defendant within the local limits of the Court's jurisdiction, was specially enlarged by section 1 of Bombay Act VIII of 1863 to the extent subsequently adopted in section 8 of Act XI of 1865. Act XLII of 1860 also contains a section 6 in almost identical language with that of section 12 of Act XI of 1865, excluding the jurisdiction of other Courts in any suit cognizable by a Small Cause Court within the same jurisdictional local limits. The arguments in my reference based on the fact that the Small Cause Court at Karachi had exclusive jurisdiction in suits such as this one (No. 140 of 1911), if of a value not exceeding Rs. 500 *prior* to the enactment of Act V of 1866, are, therefore, considerably strengthened.

Mr. *L. P. Ferro*, for the Plaintiff.

Mr. *Rupchand Bilaram*, Amicus Curiæ.

JUDGMENT.

PRATT, J. C.—This suit was filed for the recovery of Rs. 65 in this Court in its District Court Jurisdiction under Order XXXVII. The learned Additional Judicial Commissioner feeling a doubt as to whether the suit was not cognizable by the Court of Small Causes has referred the question to this Court in its High Court jurisdiction under Order XLVI, rule 6.

The Small Cause Court of Karachi has jurisdiction up to Rs 1,000 and the suit is not one of the classes of suits enumerated in the Second Schedule of the Provincial Small Cause Courts Act, IX of 1887.

Under section 15, therefore, the Small Cause Court, Karachi, has, "subject to the provisions of any enactment for the time being in force" jurisdiction to try the suit.

It is contended that Order XXXVII is an enactment which deprives the Small Cause Court of the jurisdiction which it would otherwise have under section 15.

Order XXXVII is applied by rule 2 to certain specified Courts; and rule 2 enacts that all suits on negotiable instruments may, in case the plaintiff desires to proceed summarily, be instituted by presenting a plaint in the usual form and by taking out a summons in a special form adapted to the summary procedure which is described in clause 2 of the rule. This rule gives jurisdiction to the Courts to which the order applies to try the specified class of suits by a summary procedure. The jurisdiction refers to the mode of trial and no jurisdiction is conferred to try suits that the specified Courts are not otherwise competent to try. In this interpretation of the rule I concur with that put by Birdwood, J., on the corresponding

provisions of the Code of 1882 in the case of *Ramsing* v. *Kirkbride* (4). The learned Judge said "it was not apparently the intention of the Legislature to extend the jurisdiction of any Courts or to place any limitation on the exercise of any existing jurisdiction. The special procedure seems to be provided only for cases which would ordinarily be instituted in any of the selected Courts if there was no such procedure." Order XXXVII, rule 2, does not in any way determine in what Court the suit should be instituted and in no way controls the provisions of section 15 of the Provincial Small Cause Courts Act, 1887.

The suit being cognizable by the Court of Small Causes, all other Courts are deprived of jurisdiction by section 16 of the Act for there is no express provision restoring jurisdiction as an instance of such an express provision reference may be made to section 6 of the Deccan Agriculturists' Relief Act XVII of 1879.

Mr. Rupchand in his able arguments referred to the case of *Hameedoolah* v *Mohamed Asghur Hossein* (8). It was there held that the following words in section 7 of the Copyright Act as amended by Act XII of 1876—"if any person shall infringe any copy-right the offender shall be liable to a suit in the highest local Court exercising original Civil Jurisdiction" had the effect of transferring jurisdiction in such suits from the Court of Small Causes. But here the section designates the particular Court in which the suit will lie and in so doing expressly confers jurisdiction on that Court. On the other hand, Order XXXVII does not designate any Court for the purpose of conferring jurisdiction to try or to take cognizance of a particular class of suit, but merely for the purpose of exercising a special procedure. The very fact of its position in the first Schedule to the Code of Civil Procedure shows that the Legislature regarded it as a minor matter of procedure not affecting the competency or jurisdiction of the Courts.

It was also urged that Act V of 1866—from which Order XXXVII and the corresponding provisions of the Codes of 1882 and 1877 were adopted—was enacted after the constitution of the Courts of Small Causes; that the object of the Act was to provide for suits on negotiable instruments a more expeditious remedy than that available in the Small Cause Courts; and that, therefore, the Legislature must have intended to withdraw such suits from the cognizance of the Courts of Small Causes. But when the Acts are clear and free from ambiguity it is idle to speculate as to the intention of the Legislature. There are, moreover, many fallacies in this argument. Act V of 1866 makes no reference to Small Cause Courts either in the preamble or the body of the Act. It merely enacted for the Presidency Towns the procedure of the English Bills of Exchange Act, 1855. The Act, therefore, scarcely affected the Small Cause Courts, for in the Presidency Towns the Small Cause Courts Acts of 1864 and 1882 do not exclude the jurisdiction of the High Courts to which alone Act V of 1866 at first applied. The jurisdiction of the High Courts in the Presidency Towns is only excluded as to Small Cause Court suits of the value of Rs. 100 and under by their Letters Patent. This fact probably explains the case of *Duff* v. *Fisher* (5) where the Calcutta High Court tried a suit on a promissory-note for Rs. 500. Again, the summary procedure is not necessarily more expeditious than the procedure of the Small Cause Court—for if leave to defend is given the suit is tried in the regular form and the decree is not final, but is subject to appeal. Again, the Act was extensible to Small Cause Courts. So there could have been no design to exclude their jurisdiction. As to this, it is said that the very fact that Act V of 1866 was applied to the District Court and not to the Small Cause Court, Karachi, shows that the Legislature did not consider the latter Court to have jurisdiction. But, so far as I can ascertain, Act V of 1866 was never applied to Sind at all. It certainly did not apply in 1874,—see section 3 and Schedule I of the Laws Local Extent Act XV of 1874; and it was superseded in 1877 by the Code of Civil Procedure. That Code applied the procedure to the High Courts to which Act V of 1866 applied and to the Courts to which it had already been extended. The Court of the Judge of Karachi was apparently added, as that was the highest Court of original Civil jurisdiction in Karachi. Ever since then the District Court seems to have assumed exclusive jurisdiction in all suits on negotiable instruments and so the question of extending

(8) 6 C. 499; 7 C. L. R. 471.

the procedure to the Small Cause Court was never raised.

Lastly, Mr. Rupchand referred to the practice in England where the County Courts exercise the summary procedure under the Bills of Exchange Act while the High Court exercises a similar procedure under Order III, rule 6 and Order XIV, rule 1 of the Rules of the Supreme Court of Judicature. But no useful inference can be drawn from the practice of the English High Court because its jurisdiction is not excluded by the County Courts.

For these reasons, I would order the referring Court to return the plaint for presentation to the Small Cause Court, Karachi.

CROUCH, A. J. C.—I, also, am of opinion that this Court has no jurisdiction to try a suit on a negotiable instrument for an amount less than Rs. 1,000, even though the suit be filed under Order XXXVII, and that the plaint should be returned for filing in the Court of Small Causes.

It is beyond dispute that such suits of which the value does not exceed one thousand rupees are cognizable by the Court of Small Causes, Karachi. Unless, therefore, there be some express provision in the Civil Procedure Code or some other enactment, no such suit of which the value does not exceed one thousand rupees can be tried by this Court in its original jurisdiction. (Sections 15 and 16, Provincial Small Cause Courts Act, 1887).

Order XXXVII, rule 2, states that all suits upon negotiable instruments may, in case the plaintiff desires to proceed thereunder, be instituted by presenting a plaint in the form prescribed; but the summons shall be in form No. 4 in Appendix B.

Now, "prescribed" means "prescribed by Rules and Forms contained in the First Schedule, or made under section 122, or section 125, Civil Procedure Code," [section 2 (16) and (18), Civil Procedure Code]. There is no special form of plaint prescribed for suits filed under this order, and the "form prescribed" must mean, therefore, the ordinary Form. In Act V of 1866 section 2, also, the plaint had to be "in the Form prescribed by the Code of Civil Procedure." The summary procedure commences with a special Form of summons. The disjunctive 'but", following "in the Form prescribed," in rule 2, marks the commencement of the explanation how the summary procedure under this order differs from the ordinary procedure. The suit commences in the ordinary way by a plaint in the prescribed Form being filed, but, if the plaintiff so desire and request, the Court will proceed with that suit in a particular way. The operation of the rule does not commence until after the institution of the suit; all questions affecting the actual institution of the suit are left unaffected by it.

Taking rule 2 by itself, it has absolutely general application. The order is silent as to where a suit should be instituted; it does not purport to deal with the question; it, in no way, modifies or purports to modify the ordinary law. We must assume, therefore, that all suits on negotiable instruments in which plaintiff desires to proceed summarily must be filed in Courts having appropriate local and financial jurisdiction.

If, then, a suit on a *hundi* for Rs. 500 be filed in the Court of Small Causes, Karachi, with a request that the summons be issued in Form 4, why should not that Court comply? The answer is, of course, to be found in rule 1. So far as that Court is concerned, Order XXXVII does not exist; for rule 1 limits its application, in Sind, to the Court of the Judicial Commissioner.

If such a suit be presented to this Court, on what grounds can a plaintiff demand its admission? Under Order VII, rule 1, the plaint must contain a statement of the facts showing that the Code has jurisdiction. What facts can be alleged? *Prima facie*, the Court has no power to try the suit. Rule 2 of Order XXXVII confers none; rule 1 merely limits the application of rule 2. The bare assertion that the suit is filed under Order XXXVII cannot possibly create a right. All that plaintiff can do under the order is to file a suit in the prescribed Form and request the Court to issue a particular kind of summons. The extensive privileges given to a plaintiff by the order have as their foundation the issue of a summons in Form 4. But the right to issue such summons is conferred on the Court; hence it is that in Rule 1, which defines the scope of the order, its application is limited to certain specified Courts. The Order does nothing more than confer on certain Courts the power to proceed in a certain class of suits, after they have been filed in the ordinary way.

There seem to be no facts which a plaintiff can allege as showing that this Court has jurisdiction.

It has been urged by Mr. Rupchand that the history of summary procedure on negotiable instruments support his contention that this Court was intended to have jurisdiction over all suits on negotiable instruments irrespective of their value.

If, however, we refer to Act V of 1866, the first Legislative enactment on the subject we find nothing which serves to establish his theory. Section 2 runs as follows:—

"From and after the first May 1866, all suits upon Bills of Exchange, *hundis*, or Promissory-Notes commenced in any High Court within six calendar months after the same shall have become due and payable, may, in case the plaintiff shall desire to proceed under this Act, be commenced as hereinafter is mentioned; (that is to say) the plaint shall be in the form prescribed by the Code of Civil Procedure; but the summons shall be in the form contained in the Schedule to this Act etc."

It is clear that this Act had a very limited application; it applied only to suits of a special kind "commenced in a High Court;" it did not purport to modify ordinary law determining in what Court a suit should be commenced. It merely conferred on High Courts the power to proceed in a summary way with a certain class of suits after they had been instituted.

Plaint ordered to be returned.

[s. c. (1911) 2 M. W. N. 519.]

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 70 OF 1910 AND CIVIL REVISION PETITION No. 245 OF 1910.

November 7, 1911.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

KOMMA SOMAKKA—PLAINTIFF—APPELLANT

versus

KODIDALA PEDDA RAMIAH—DEFENDANT—RESPONDENT.

Guardians and Wards Act (VIII of 1890), ss. 24, 43—Order directing a third party to pay a certain sum to the minor's guardian, not warranted by any provision of the Act—Jurisdiction—Order not to be treated as a decree in a suit—Scope and nature of jurisdiction conferred by the Act discussed.

On an application under sections 24 and 43 of the Guardians and Wards Act by the guardian of a Hindu female minor praying for permission to give the minor in marriage to a certain person, and for an order directing the step-mother of the girl, who was in possession of her deceased father's estate, to pay Rs. 800 for the expenses of the marriage, the District Judge, without framing any issue and taking any evidence, sanctioned Rs. 300. Against this order, the step-mother presented both a Civil Miscellaneous Appeal and a Civil Revision Petition to the High Court:

Held, that so much of the order as directed the appellant to pay Rs. 300 to the petitioner for purposes of the minor's marriage was not warranted by any provision of the Guardians and Wards Act, and that it was made without jurisdiction under the said Act and, therefore, must be set aside under section 115, Civil Procedure Code.

The power vested in the District Court under the Guardians and Wards Act is totally dissimilar to its powers as a Court of ordinary Civil Jurisdiction. An order purporting to be made under, but which in fact is not warranted by, the provisions of that Act cannot be treated as a decree in a suit. The two jurisdictions are totally distinct, though exercisable by the same official. It is not a case of exercise of the same jurisdictoin by different forms of procedure.

The jurisdiction or power conferred upon the District Court by this Act is of a very special and limited character, and the procedure prescribed under the Act, which is of a summary character, is very different from the procedure laid down by the Civil Procedure Code for the trial of suits.

Sadasiva Pillai v. *Ramalinga*, 2 I. A. 219; 24 W. R. 193; 15 B. L. R. 383; *Pisani* v. *Attorney-General of Gibralter*, L. R. 5 P. C. 516; 30 L. T. 729; 22 W. R. 900; *Ledgard* v. *Bull*, 9 A. 191; 13 I. A. 134; *Gurdas Singh* v. *Rashbehary Singh*, 36 C. 193; 5 C. L. J. 611; 1 Ind. Cas. 913, distinguished.

Appeal and Petition under section 115 of the Civil Procedure Code against the order of the District Court of Cuddapah, dated 26th November 1909, in First Appeal No. 127 of 1909 (O. P. No. 32 of 1909).

Mr. *L. A. Govindaraghava Iyer*, for the Appellant.

Mr. *T. V. Seshagiri Iyer*, for the Respondent.

JUDGMENT.

ABDUR RAHIM, J.—In this case we are asked to revise, by way of appeal or under section 115, Civil Procedure Code, an order made by the District Judge of Cuddapah upon a petition presented to him under sections 24 and 43, Guardians and Wards Act, by the guardian of a certain Hindu female minor praying for permission to give the minor in marriage to a certain person mentioned in the petition, and for an order directing the appellant in this appeal, who is

the surviving widow of the father of the minor girl and in possession of his estate, to pay Rs. 800 for the expenses of the contemplated marriage. The appellant appeared in answer to the notice and pleaded, that under the circumstances mentioned in her counter-petition, she was not liable to make any payment, and that the proposed marriage was not suitable. She took no objection to the jurisdiction of the District Court to make any order against her on the petition, and after hearing the Pleaders on both sides the Court passed this order:—"The petition is allowed with costs. Rupees 300 is sanctioned; Fees Rs 5." The order, having regard to the prayer in the petition, has the effect of directing the counter-petitioner to pay Rs. 300 and costs to the guardian. No issues were framed and no evidence appears to have been taken and apparently none was adduced by either party.

The first question argued is, that the order is bad for want of jurisdiction and must be set aside on that ground. Now, there can be no doubt that so much of the order as directs the appellant to pay Rs. 300 to the petitioner for purposes of the minor's marriage is not warranted by any provision of the Guardians and Wards Act. This is conceded by Mr. Seshagiri Iyer, who appeared for the respondent. But he contends that as the District Court could have in a suit properly framed for the purpose passed a decree to the same effect, this order cannot be said to have been passed without jurisdiction but at the worst there was only an irregularity in the way the Court assumed jurisdiction, and, as no objection was taken to the course adopted at the time, it must be deemed to have been waived and the order cannot now be impeached for want of jurisdiction or on the ground of irregular exercise of jurisdiction. He does not, however, contend, and very rightly, that, if the order is without jurisdiction altogether, either waiver of objection or consent on the part of the appellant to the course followed could make the order valid. There can be no doubt that the District Court which passed the order appealed against could have in a regularly instituted suit passed a decree against the appellant to substantially the same purport. At the same time, the power vested in the District Court under the Guardians and Wards Act is so totally dissimilar to its power as a Court of ordinary Civil Jurisdiction that I think it will be going much too far to say that an order purporting to be made under, but which in fact is not warranted by, the provisions of that Act can be treated as a decree passed in a suit. The two jurisdictions are wholly distinct, though exercisable by the same official. It is not a case of exercise of the same jurisdiction by different forms of procedure.

The whole scheme of the Guardians and Wards Act, generally speaking, is to entrust to the District Court the duty of looking after the welfare of the minor's person and property, and for this purpose it gives it power to appoint a guardian to have charge of the minor's person and property as the most feasible mode of discharging its duty. The guardian is really the hand of the District Court, and is to act under its advice, control and constant supervision. The Act does not profess to give the District Court any power or authority over persons or other than the guardian or the minor except in so far as it deals with the question as to who is the proper person to be appointed guardian or whether a particular guardian should be removed or not and for the purpose of restoring the ward to the custody of the guardian. Otherwise, the enforcement of rights or claims of the ward or against the ward is left to be regulated by ordinary proceedings by suits, and the Act does not provide any machinery for deciding upon or enforcing any such claims, though so far as the guardian is concerned the District Court is vested with very wide disciplinary power over him in order that it may enforce the orders passed against him under the Act. The jurisdiction or power conferred upon the District Court by this Act is of a very special and limited character, and the procedure prescribed under the Act, which is of a summary character, though appropriate for the determination of questions arising therein, is very different from the procedure laid down by the Civil Procedure Code for the trial of suits. That being so, can we uphold an order such as this, which purports to be made under, but is not in fact warranted by, the provisions of that Act as a decree passed in a suit? After the best consideration I have been able to give to the matter, my conclusion, as already indicated,

KOMMA SOMAKKA v. KODIDALA PEDDA RAMIAH.

is that the question must be answered in the negative.

In dealing with the question certain facts must be borne in mind. In the first place, the order in question in this case is impeached in the course of the same proceedings by way of appeal and not collaterally, as when a party who has allowed a decree or order to become final impugns its validity for the first time when it is sought to be enforced in execution or wishes to re-open the question in a subsequent proceeding, treating the previous adjudication as null and void. Then, this is not a case in which the parties expressly agreed that the Court should adopt the particular course alleged to be beyond its power, or where one party by his conduct has estopped himself from raising the question of validity of a particular proceeding. Here all that happened was, the appellant failed to object to the District Court dealing with the matter by proceeding under the Guardians and Wards Act. Again, the District Court purported to make the order in exercise of a jurisdiction conferred on it by a special statute very different in its nature, scope and the way in which it is to be exercised, from its jurisdiction as a Court of ordinary Civil Jurisdiction. It is not, therefore, a case in which a Court purports to act in the exercise of a particular jurisdiction, but adopts a form of procedure prescribed for one department of that jurisdiction rather than another.

If these facts be borne in mind, the present case is easily distinguishable from the class of cases relied on by Mr. Seshagiri Iyer. For instance, in the case of *Sadsiva Pillai* v. *Ramalinga Pillai* (1) the question was whether mesne profits which accrued after the decree and were not expressly provided for in it could be recovered from the respondent in the appeal before the Judicial Committee in execution or only by a separate suit. It appeared that the respondent had executed bonds to account for mesne profits after the date of the decree in accordance with an order which was not objected to either in the first instance or by way of appeal, and their Lordships held that the liability to account was made "a question relating to the execution of the decree" or that, at all events, the respondents by their own agreement and subsequent conduct were estopped from saying that the mesne profits in question were not payable under the decree according to the principle laid down in *Pisani* v. *Attorney-General of Gibralter* (2). On the question whether the order was without jurisdiction, they observe:—"The Court had a general jurisdiction over the subject-matter though the exercise of that jurisdiction by the particular proceeding may have been irregular." The Court in that case was in fact exercising its ordinary Civil Jurisdiction, though by means of a proceeding prescribed for the execution of decrees and not for the trial of suits. The principle thus enunciated by the Privy Council has no application, therefore, to this case. Nor is this a case, as I have already pointed out, of estoppel. In *Pisani* v. *Attorney-General of Gibralter* (2) the Attorney-General had filed an information claiming for the Crown certain land which belonged to a deceased person as escheat for want of heirs. The defendants put forward their several claims to the land, and on the motion of the Attorney-General, when he found that he failed to establish the claim of the Crown, it was agreed among all the parties that the rights of the defendants as between themselves should be declared whatever might be the event of the suit regarding the claim of the Crown. By the decree it was declared that the lands had not escheated to the Crown and that a certain Will of the deceased was valid. On appeal being preferred to the Judicial Committee from that decree, a preliminary objection was taken to the competency of the appeal on the ground that the decree, so far as it declared the rights of the defendants, must be treated as an award of an arbitrator. It was held that the agreement was binding, but the preliminary objection was overruled on the ground, that though the course adopted by consent was a deviation from the *cursus curiæ*; yet, as the parties meant to keep themselves in *curiæ* and the Judge clearly so understood them, there was an appeal. The Court had jurisdiction over the subject and the assumption of the duty of another tribunal was not involved in the question. They then point out that departures from ordinary practice by consent are of frequent occurrence, and that unless there is an attempt to give the Court a jurisdiction which it does not possess,

(1) 2 I. A. 219; 24 W. R. 193; 15 B. L. R. 383.

(2) L. R. 5 P. C. 516; 30 L. T. 729; 22 W. R. 900.

KOMMA SOMAKKA v. KODIDALA PEDDA RAMIAH.

or something occurs which is such a violent strain on its procedure that it puts it entirely out of its course, so that the Court of Appeal cannot review the decision, such departures have never been held to deprive either of the parties of the right of appeal. Mr. Seshagiri Iyer has not raised any question as to our power to revise the order. Then, is not this a case of assumption by one tribunal of the duties of another? As I have tried to show, the powers and the duties of the District Court under the Guardians and Wards Act are wholly dissimilar to its powers and duties as a Court of Civil Jurisdiction, and, when it acts under such special statute, it must, in my opinion, be regarded to be acting as a tribunal other than a tribunal of general Civil Jurisdiction. When, as here, the difference between the two jurisdictions is not one merely of form but of a radical nature having regard to their scope, subject-matter, and the rules regulating their exercise, the fact that both are vested in one and the same tribunal would not make an order which is made in the exercise of one jurisdiction liable to be regarded as it was properly made in the exercise of the other jurisdiction.

In *Ledgard* v. *Bull* (3), another judgment of the Privy Council, all that is laid down is, that in a suit tried by a competent Court the parties, having without objection joined issue and gone to trial upon the merits, cannot subsequently dispute the jurisdiction on the ground of irregularity in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit. But in this case, as I view the matter, the liability of the appellant never formed the subject of trial by the District Court as a Court of general Civil Jurisdiction. The same answer applies to the case reported in *Gurdas Singh* v. *Chandrikh Singh* and *Chandraikah Singh* v. *Rashbehary Singh* (4), in which the learned Judges discuss at length the distinction between inherent absence of jurisdiction and irregular assumption of jurisdiction.

I think the proceeding in question ought also to be set aside on the ground that it is such a violent strain on the procedure that it puts it entirely out of its course, so that the Court of Appeal cannot review the decision. I may observe here that the course adopted by the District Court not being by agreement of the parties, there could be no question of its acting as arbitrator so as to deprive either party of his right of appeal. If the case had been tried as a suit under the Civil Procedure Code, it would have to be tried in the Court of the District Munsif, and the parties would then have a right of successive appeals to the District Court and to the High Court. There is no authority to which our attention has been drawn which would justify us in saying, that because the appellant did not take objection to the course adopted by the District Court, he must be taken to have waived such rights of appeal as he would have had, if the matter had been properly tried as an action. If the proceeding in question were to be treated as one under the Guardians and Wards Act, there would be no appeal, as it is not covered by section 47, and, if it be regarded as a decree in a suit tried by the District Court in its ordinary Civil Jurisdiction, then we must hold that by mere failure to object to the District Court dealing with the matter under the Guardians and Wards Act, the appellant has deprived himself of the right of second appeal, which otherwise he would have had. This I am not prepared to hold in the absence of express authority. Further, if the matter had been tried as a civil action, issues would have had to be framed and there would have been a proper judgment and a decree. As it is, there are no issues, no judgment, and no decree, and it is difficult to see how we can properly revise the order of the District Court on the merits.

All this shows that the procedure of the District Court is so completely outside the ordinary course of trial of civil actions that it must be held to be without jurisdiction. Besides, even if it were possible to treat the order as a decree in an action it would be liable to be set aside on the ground that there has been no proper trial; but as I am of opinion that the order has been made without jurisdiction under the Guardians and Wards Act, it must be set aside under section 115, Civil Procedure Code. I would, therefore, allow the Civil Revision Petition and set aside the order of the District Court in so far as it directs the counter-petitioner in that Court

(3) 9 A. 191; 13 I. A. 134.
(4) 36 C. 193; 5 C. L. J. 611; 1 Ind. Cas. 913.

to pay Rs. 300 with costs in this Court and leave each party to bear his own costs in the District Court.

SPENCER, J.—Assuming that the District Judge intended his order, "The petition is allowed with costs. Rupees 300 is sanctioned. Fees Rs. 5-0-0", to be tantamount to a money-decree for Rs. 300 and costs and executable as such against the respondent, I agree with my learned brother, whose judgment I have had the advantage of reading, that the order was irregular and without jurisdiction, although the question before us is not covered by authority and presents some difficulty.

In the petition, presented under section 10 of the Guardians and Wards Act, for the appointment of a guardian for the minor, it was stated that the property left by the minor's father devolved on his second wife, the respondent, and is in her enjoyment, and that the minor has no property whatever.

It was not alleged at the hearing of the present appeal, that the minor has any separate estate. Her step-mother has, it appears, a widow's estate and she has only an expectancy. It is possible that the District Judge in passing orders about the minor's marriage may have lost sight of the fact that there was no fund under the control of the Court out of which the marriage expenses might be defrayed, and this surmise is rendered probable by the use of the word "sanctioned" instead of "decreed." If the minor had property of her own and if the District Judge only intended to fix the amount which in his opinion was a suitable amount to spend on the minor's marriage, there would clearly have been nothing beyond his competence in the order passed. The petition under sections 23 and 47, however, contained a prayer to direct the respondent to pay Rs. 800 for marriage expenses, and both parties have construed the order as a direction to her to pay a sum of Rs. 300. Treated as such, the Guardians and Wards Act gave the Judge no power to make the order, and I agree that it should be set aside as without jurisdiction, the parties to bear their own costs in the District Court, and the respondent to bear his own and the appellant's costs in this Court.

Appeal allowed.

(S. C. 5 S. L. R. 168.)

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 23 OF 1909.

August 16, 1911.

Present:—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

SOBHOMAL KHAIRAJMAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

POHUMAL RANGALMAL AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Partnership—Partner's authority—Act of one partner when binding on the firm—Acceptance of hundi—*Transaction not incidental to business of firm—Contract Act (IX of* 1872), *s* 251—*Negotiable Instruments Act (XXVI of* 1881), *ss.* 30, 93, 106—Hundi—*Liability of drawer—Notice of dishonour—Oral demand after maturity.*

A partner's act binds the firm only if the other partners have in fact authorized or ratified it or if it is done in the course of carrying on the partnership business in the usual way.

The acceptance of a *hundi* by a partner, will in the absence of express authority, bind the firm only if it is for a transaction *incidental* to the business of the firm.

Bunarsee Doss v. *Gholam Hossein,* 13 M. I. A. 358; 13 W. R. (P. C.) 29, relied upon.

Where the business of a partnership is buying grain from *zemindars* for re-sale through commission agents and does not include lending money to *zemindars*, the acceptance of a *hundi* by one of the partners for guaranteeing a loan to a *zemindar* would not bind the firm.

The drawer of a *hundi* is not liable if due notice of dishonour is not given him.

The fact that the payee of a *hundi* met the drawer 1½ or 2 months after its maturity and demanded payment is not a sufficient compliance within the provisions of sections 93 and 106 of the Negotiable Instruments Act.

Second appeal from the decision of the First Class, Sub-Judge, Sukkur, varying the decree passed by the Sub-Judge, Jacobabad.

Mr. *Lalchand Chuharmal*, for the Appellants.

Mr. *T. G. Elphinston*, for the Respondent No. 1.

Mr. *Wadhumal Udharam*, for the Respondent No. 3.

JUDGMENT.—The plaintiff sued as holder and payee of *hundis* drawn in his favour by defendant No. 6 on the firm of the first five defendants. The *hundis* had been accepted at the time they were made by defendant No. 5, who was *gumasta* partner of the first four defendants in their shop at Vali Mahomed's village.

The first four defendants pleaded that the fifth defendant had no authority to accept the *hundis* on their behalf.

SOBHOMAL *v.* POHUMAL.

The 6th defendant pleaded payment to the 5th defendant and alleged that he had not received notice of dishonour. He also alleged an express agreement by the plaintiff not to hold him liable.

The Court of first instance decreed the suit against the fifth defendant who has not appealed but dismissed the suit as against the defendants Nos. 1—4 and 6. That Court held that defendant No. 5 had no express authority to bind the firm by his acceptance; and that he had no implied authority or the acceptance was not within the scope of the partnership business. As to the 6th defendant it held that the agreement not to hold this defendant liable had been admitted by the plaintiff.

The lower Appellate Court decreed the suit against defendants Nos. 1—4 and 6.

Defendants Nos. 1—4 have appealed to this Court and defendant No. 6 has filed cross-objections claiming to be discharged by this payment to the 5th defendant.

Now as to defendants Nos. 1—4 the only issue is whether defendant No. 5 had authority to bind them by his acceptance of the *hundi*. This authority might be either express or implied but on neither can we extract any definite finding from the judgment of the lower Appellate Court.

As to express authority, the Judge says that there is ground for presuming that defendants Nos. 1—4 were aware of the transaction from the commencement. This is apparently a finding of express authority, but in the next few lines it is argued that the suit should not fail merely because express authority is not proved.

Similarly, as to implied authority the Judge says "the plaintiff wanted security and so procured the acceptance of the firm to protect himself", and then as to the firm says, "the firm had dealings with Mahomed Ali, defendant No. 6, and his family and Radho, defendant No. 5 accommodated Mahomed Ali for reasons best known to him; for aught we know, it was an advance against future deliveries of grain". These sentences import no finding that the guarantee of the loan or the accommodation was within the scope of the partnership business—for there can be nothing more indecisive than the phrase "for aught we know."

Ordinarily, we would remand the appeal for a clear finding on the issue as to authority, but section 103 of the present Code empowers us to decide questions of fact. And as the material on record is sufficient, and as we have the assistance of the careful judgment of the Court of first instance, we proceed to give judgment on the question of authority.

The law on the point is well-settled. Every act of a partner binds the firm and the other partners if it is within (1) his actual or (2) his implied authority, *i. e.*, (1) if the other partners have in fact authorized or ratified it, or (2) if it is done in the course of carrying on the partnership business in the usual way—unless the person dealing with the partner knows in fact that he has no authority to bind the firm in the particular transaction, *i. e.*, knows that his apparent or implied authority is not his actual or express authority. This is the law as enacted in section 251, Indian Contract Act.

Now, the plaintiff sued on an averment that defendant No. 5 had express authority. Defendant No. 5 and the other partners deny this—and we cannot infer it from the mere fact of the presence of defendants Nos. 1 to 4 at Jacobabad the day before the *hundis* were drawn and accepted.

Defendant No. 5 had, therefore, no express authority and the question remains as to whether he had implied authority. This will depend upon whether the *hundis* were drawn for the business of the partnership and whether defendant No. 5 usually drew *hundis* for that business.

The business of the partnership was buying grain from *zemindars* for re-sale through commission agents. It is admitted that defendant No. 5 used to draw *hundis*, and this he would have to do in order to pay for grain purchased. But the case here was totally different. It was the guarantee of a loan to a *zemindar*. As to this, defendant No. 5 has said:—"We did not lend money to *zemindars* on interest—we adopted this policy to avoid unpleasantness with them as we live in their villages." If lending money to *zemindars* was no part of the business of the partnership, it is difficult to see how guaranteeing such a loan could be an incident of the business. Defendant No. 5 can give no instances of acceptances of *hundis* of other *zemindars*.

Mr. Elphinston contends that being a mercantile business, the defendant No. 5 had implied authority to draw and accept bills. This is true, but the leading case on the point, *Bunarsee Doss* v. *Gholam Hossein* (1), makes it clear that the acceptance must "for a transaction *incident* to the business of the firm." As to this Mr. Elphinston contends that the bill was accepted for the accommodation of a client of the partnership. But the very term accommodation implies a departure from the usual course of business for the indulgence of the client. It is doubtful, moreover, whether defendant No. 6 was really a client. His grain had been purchased by the firm "scarcely once or twice" (Exhibit No. 129).

The *hundis* were, no doubt, a renewal of old *hundis* accepted by defendant No. 5, but as these old *hundis* have not been produced and there is no evidence that defendant No. 5 was authorized to accept them—this fact makes no difference to our conclusion.

We find that the acceptance of the *hundis* was not within the implied authority of defendant No. 5, and we are fortified in this view by (1) the omission to enter the transaction in the accounts of the firm, (2) the fact that the *hundis* were payable at the Jacobabad shop where defendant No. 5 was not a partner, and (3) by the delay in filing the suit. We agree with the Court of the first instance that plaintiff's delay in filing the suit was due to his knowledge that the acceptance was not binding on the firm.

As to defendant No. 6, it is not necessary to consider the agreement set up by him for he must succeed on the ground that he did not receive due notice of dishonour. The plaintiff should have proved this notice in order to make this defendant liable under section 30 of the Negotiable Instruments Act. The only evidence on the point is that of plaintiff who says he met defendant No. 6, 1½ or 2 months after the maturity of the bills and that he demanded payment. This is not a sufficient compliance with the provisions of sections 93 and 106 of the Act.

We, therefore, vary the decree of the lower Appellate Court and confirm that of the Court of first instance. All costs in this Court and the lower Appellate Court on the plaintiff.

Decree varied.

(1) 13 M. I. A. 358; 13 W. R. (P. C.) 29.

(s. c. 10 M. L. T. 551; 16 C. W. N. 122.)

PRIVY COUNCIL.

APPEAL FROM THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN PROVINCES, ALLAHABAD.

November 1, 1911.

Present:—Lord Macnaghten, Lord Robson, Sir John Edge and Mr. Ameer Ali.

JIT SINGH AND ANOTHER—APPELLANTS

versus

MAHARAJ SINGH—RESPONDENT.

Privy Council Practice—Fresh point.

It is not usual to allow a point to be raised on appeal to the Privy Council which has not been discussed in the Court below, and upon which their Lordships have not got the assistance of the Court below.

Ex parte Appeal from a judgment and decree of the High Court at Allahabad, dated the 20th of February 1907, which set aside a decree of the Subordinate Judge of Shahjahanpur, dated the 18th March 1904, which dismissed the claim of the plaintiff (the respondent) with costs. On appeal, the High Court decreed his claim for the property in suit, a portion of which was in the possession of the defendants (the appellants).

FACTS.—The appellants stated their case as follows:—

The question for determination in the appeal is whether the father of the respondent, named Khangar Singh, died before or after the death of one Ummed Kunwar, a Hindu widow, whose name during her lifetime was recorded in the Revenue Registers in respect of the property in suit.

On the 11th September 1903, the plaintiff filed the suit (No. 119 of 1903) giving rise to the appeal and in his plaint he alleged as follows:—

Harhar Singh, Himmat Singh and Bahadur Singh were three full brothers, the sons of Nehchal Singh. They separated in the lifetime of Harhar Singh and a large property fell to his share. After his death his widow Ummed Kunwar obtained possession of his property as a Hindu widow. She died on the 15th of March, 1892, and the two sons of her daughter, named Khangar Singh and Bishun Singh became the heirs and owners of the property in equal shares.

Khangar Singh, the father of the plaintiff, died on the 20th July 1892, and his

estate devolved on the plaintiff, who asked the defendants to deliver the possession of the property left by the husband of Ummed Kunwar, but they refused to deliver possession.

The plaintiff further alleged that he was entitled to possession of half the entire property left by the husband of Ummed Kunwar, and that to meet necessary expenses he had sold half of his said half share to one *Musammat* Bed Kunwar, under a sale-deed, dated the 4th of September, 1903, and thus made her the owner thereof. He, therefore, prayed that he might be put in absolute possession of the property to which he was entitled by right of inheritance from Khangar Singh, the daughter's son of Harhar Singh, whose representative the plaintiff was.

In addition to the six original defendants who were members of the family, the defendants Nos. 7 and 8 were added as mortgagees of part of the property in suit.

In reply to the plaint, written statements were put in on behalf of most of the defendants. It is, however, now necessary to indicate only the defence put in by the first defendant Jit Singh. He pleaded *inter alia* that Khangar Singh, the father of the plaintiff, predeceased Ummed Kunwar and that, therefore, the plaintiff had no right to the property in dispute; that Himmat Singh, Bahadur Singh, Harhar Singh and Nirmal Singh were all members of a joint Hindu family; that the name of *Musammat* Ummed Kunwar had been entered in the papers only for her consolation and satisfaction on account of her being a widow, and that Harhar Singh's daughter died childless and that the father of the plaintiff was not her son. The Subordinate Judge framed the following seven issues for trial:—

(1) Is the claim bad for misjoinder of parties?

(2) Is the plaintiff a grandson of Harhar Singh's daughter?

(3) When did Khangar Singh die?

(4) Were the three brothers separate from one another and whether Harhar Singh was joint or separate from Nirmal Singh?

(5) How was Nirmal Singh in possession of the properties in dispute, and since when has he been in possession of them?

(6) Whether Jit Singh is in possession of any part of the property which belonged to Harhar Singh?

(7) How long has Dhram Kunwar been in possession of the share of *mouza* Khera Ruth, *Mahal* III, and what was the nature of her possession?

On the 18th of March, 1904, the Subordinate Judge delivered his judgment and decree by which he dismissed the suit with costs. He decided the third issue ("when did Khanger Singh die") against the plaintiff by finding that the oral evidence produced by the plaintiff did not prove that Khangar Singh died after Ummed Kunwar, and, in view of this finding, he held that it was not necessary to decide the remaining issues.

The plaintiff appealed from the decree of the Subordinate Judge to the High Court at Allahabad, and his appeal was admitted by an order, dated the 9th of July 1904. It was numbered 170 of 1904, and was heard with what the High Court in their judgment, dated the 20th February 1907, termed "connected appeals," which were numbered 263, 264, 279 and 289. The two learned Judges of the Court who heard the appeals stated that they arose out of three suits numbered respectively 119 of 1903, 45 of 1904, and 52 of 1904. The Suit No. 119 of 1903 was filed, as above stated, on the 11th September 1903. The Suits Nos. 45 of 1904 and 52 of 1904 were instituted in that year. It is not disputed that the Suits Nos. 45 and 52 were tried together by consent upon the same evidence and on the 30th August 1904, were decided by the same Subordinate Judge who on the 18th March 1904, decided the Suit No. 119 of 1903, (the present suit) but it is submitted that it is clear that the latter suit was tried independently of the other two suits.

The learned Judges of the High Court pointed out that the Subordinate Judge on the issue, whether Khangar Singh did or did not predecease Ummed Kunwar, came to the conclusion in the suit of Bed Kunwar (Suit No. 52), that "Khangar Singh survived his grand-mother," a conclusion opposed to his finding in Maharaj Singh's suit (Suit

No. 119), and with reference to the same issue they remarked later on in their judgment. "Here, too, the oral evidence is conflicting and, as mentioned above, the learned Subordinate Judge has come to two opposite conclusions on this issue. It is admitted that Ummed Kunwar died on the 15th March 1892. On behalf of Maharaj Singh and Bed Kunwar reliance is placed on the report of a *patwari*, dated 22nd September 1892, in which the date of Khangar's death is given as 29th July 1898. In his latter judgment the learned Subordinate Judge refers to this as one of the pieces of evidence which has led him to change his mind. But, in our opinion, this report of the *patwari* as to the date of Khangar's death is unreliable. There is evidence, printed at pages 18 and 19 of First Appeal No. 263, which, in our opinion, shows that Khangar Singh was dead on the 4th of July, 1892."

The learned Judges then referred to evidence not in the record of the present suit and concluded their judgment in case No. 264 of 1904, as follows: "Under these circumstances, we are unable to say that the latter conclusion arrived at by the learned Subordinate Judge as to the time of Khangar's death is wrong. Upon the findings at which we have arrived in concurrence with the Court below, that Court was justified in decreeing one half of the claim of Bishun Singh and the suit of Bed Kunwar, and the appeals filed against the decrees in these suits must fail. That Court should have decreed the claim of Maharaj Singh and his appeal must prevail."

The result of this decision was that the following order was made by the Court in the appeal of Maharaj Singh (No. 170 of 1904), the respondent in the present appeal:—

"This is the appeal of Maharaj Singh in the suit brought by him which was dismissed by the Court below. For the reasons stated by us in our judgment in First Appeal No. 264 of 1904, decided to-day, this appeal must prevail. We accordingly decree the appeal, set aside the decree of the Court below, and make a decree in favour of Maharaj Singh on the same terms as the decree made by the Court below in the suit of Bed Kunwar, No. 52 of 1904. The appellant will get his costs here and in the Court below. The costs in this Court will include fees on the higher scale."

The defendants Jit Singh and *Musammat* Dharam Kunwar, thereupon, appealed to His Majesty in Council.

Mr. *G. E. A. Ross*, for the Appellants:—

The question is whether Khangar Singh died before or after the death of Ummed Kunwar. The Subordinate Judge held that the plaintiff failed to prove that Khangar Singh died after Ummed Kunwar. But the High Court on appeal came to a different conclusion and held that the lady predeceased Khangar Singh, In arriving at this conclusion the High Court relied upon the evidence recorded in two other cases, in which both Courts in India found that Khangar Singh died after the death of Ummed Kunwar. The High Court erred in relying upon the evidence not actually recorded in this case. There is nothing to show that the parties in this case ever agreed to treat the evidence recorded in the other two cases as the evidence in this case.

[LORD MACNAGHTEN:—It seems that the findings on the question are concurrent. Their Lordships cannot hear any argument on that point.]

There is another point, *viz.*, that the plaintiff, who is the respondent here, is not entitled to bring the suit during the lifetime of his uncle Bishun Singh. It is a question of pure law and the appellants are entitled to raise it, though it is not discussed in the Court below.

[LORD MACNAGHTEN:—The point was not raised in the Court below and we cannot allow you to raise it here.]

Questions of law are sometimes allowed to be raised here for the first time. Points of limitation, for example, have been so raised.

[LORD MACNAGHTEN:—That is by statute. The Court can deal with a question of limitation, even though the parties do not raise it.]

JUDGMENT.

LORD MACNAGHTEN:—It is not usual to allow a point to be raised here on appeal which has not been discussed in the Court below, and upon which their Lordships have not got the assistance of the Court below.

MANGHANMAL v. FERNANDEZ.

On this ground their Lordships will humbly advise His Majesty that this appeal should be dismissed.

Solicitors for the Appellants:—Messrs. *Barrow, Rogers and Nevill.*

Appeal dismissed.

(s. c. 5 S. L. R. 181.)

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT NO. 311 OF 1910.

August 28, 1911.

Present:—Mr. Fawcett, A. J. C.

MANGHANMAL LALCHAND—PLAINTIFF

versus

T. A. FERNANDEZ—DEFENDANT.

Limitation Act (IX of 1908), *ss.* 2(7), 14—*Suit against Public Officer without prior notice—Dismissal of suit—Subsequent suit after notice—Exclusion of period taken up by first suit—"Good faith"—"Cause of a like nature"—General Clauses Act (X of* 1897), *s.* 3 (20)—*Civil Procedure Code (Act V of* 1908), *s.* 80.

A. brought a suit on 7th April 1909, for damages for certain acts done by *B.* in his official capacity in July and August 1908. The suit was dismissed on 30th May 1910 as not being maintainable for want of prior notice to *B.* *A.* thereupon gave *B.* the required notice and instituted the present suit for the same relief on 16th September 1910. *A.* claimed to exclude from the prescribed period of limitation the period during which the first suit was under trial:

Held, that *A.* was not entitled to the exclusion of this period under section 14 of the Limitation Act.

In view of the well-known and old standing procedure requiring previous notice to a Public Officer of an intended suit in respect of acts purporting to be done by such Public Officer in his official capacity, and the clear and unqualified terms of section 80 of the Civil Procedure Code, *A.* could not be said to have acted *in good faith* in bringing the previous suit within the strict definition of the term in section 2 (7) of the Limitation Act or even the wider sense attached to the term in section 3 (20), of the General Clauses Act.

Mathura Singh v. *Bhawani Singh*, 22 A. 248 at p. 253, doubted.

Obiter dictum.—The want of notice under section 80, Civil Procedure Code, is not a "cause of a like nature" with defect of jurisdiction within the meaning of section 14 of the Limitation Act.

Mr. *Hirdaram*, for the Plaintiff.

Mr. *E. Raymond*, for the Defendant.

JUDGMENT.—The plaintiff sues to recover Rs. 10,000 as damages on account of malicious prosecution, defamation and other injurious acts alleged to have been committed by the defendant, who was then *mukhtiarkar* and 2nd Class Magistrate, Kotri, in July and August 1908.

A previous suit brought by the plaintiff for the same relief and on the same causes of action on the 7th April 1909, was dismissed by this Court on the 30th May 1910, as not being maintainable for want of the prior notice to defendant under section 80, Civil Procedure Code.

The present suit was instituted on the 16th September 1910 after giving the prescribed notice and is admittedly time-barred, unless the period of $13\frac{3}{4}$ months during which the first suit was under trial is excluded under section 14 of the Limitation Act. The question whether it should be so excluded has accordingly been argued as a preliminary issue.

There are a good many rulings bearing on the point at issue, but I do not think it will serve any useful purpose to discuss them in detail. The main question, in my opinion, is whether the former suit, in which no notice had been given under section 80, Civil Procedure Code, can properly be said to have been "prosecuted in good faith" by the plaintiff: and on such a point each case must be mainly decided on its own merits.

Under the definition in section 2 (7) of the Act, "nothing shall be deemed to be done in good faith which is not done with due care and attention." This is a stricter definition than the one adopted in section 3 (20) of the General Clauses Act, 1897, under which "a thing shall be deemed to be done in "good faith" where it is in fact done honestly, whether it is done negligently or not." For, if a thing is done "negligently," it cannot be said to have been done "with due care and attention," even though it may be done "honestly." In view of this, it is, at least, open to question whether Strachey, C. J., is correct in saying that the principle which underlies section 14 "is, broadly speaking, the protection against the bar of limitation of a man honestly doing his best to get the case tried on the merits, but failing, through the Court being unable to give such a trial"; *Mathura Singh* v. *Bhawani Singh* (1). That would, no doubt, be so, if the definition of "good faith" in the General Clauses Act, 1897, applied to section 14, but, as pointed out above, a different and a stricter definition applies to it.

However, even giving the plaintiff the benefit of the other definition of "good faith",

(1) 22 A. 248 at p. 253.

I think it is clear that he cannot be said to have been honestly doing his best to get the case tried on its merits in the former suit. In view of the well known and old standing procedure requiring previous notice to a public officer of an intended suit in respect of acts purporting to be done by such public officer in his official capacity, and the clear and unqualified terms of section 80 of the Civil Procedure Code, the plaintiff must have known that he ran a very considerable risk of his suit being dismissed for want of such notice. The probabilities of his being successful in his contention that no such notice was required, were very small; and if he deliberately chose to run such a risk instead of giving the required notice before it became too late to bring his suit within the prescribed period of limitation he has only himself to blame and cannot be held to have acted honestly or with due care and attention. The plaintiff appears to have deliberately refrained from giving such notice because he thought this would give him an advantage in his suit, having regard to the allegations of malice made against the defendant, and this is remarked on in the following passage of Mr. Crouch's judgment dismissing the suit:—

"The Court is asked to deprive defendant of his privileges in order that plaintiff may have a chance of proving that he is not entitled to them, and in order that he may, further, in the attempt to prove it do all the mischief from which the Legislature desires to give public officer's protection."

Such conduct cannot be said to have been "honest."

It is stated that the plaintiff obtained the best legal advice available before deciding to bring his suit without prior notice under section 80, Civil Procedure Code: but even if this be so, I do not think it makes any difference in a case like this, where the law is so plain.

In view of this finding, it is unnecessary to consider whether the want of notice under section 80, Civil Procedure Code, was a "cause of a like nature" with defect of jurisdiction; but I should be inclined to hold that it was *not* such a cause, having regard to the facts that the operating cause for dismissal was due entirely to plaintiff's own laches and deliberate disregard of the provisions of that section. It is on a different footing to misjoinder of parties or of causes of action (Explanation III to section 14), where there may well be a *bona fide* mistake on the part of a plaintiff.

For the above reasons, I hold that the suit is time-barred and dismiss it with costs.

Suit dismissed.

(s. c. 10 M. L. T. 554.)

PRIVY COUNCIL.

APPEAL FROM THE COURT OF BRITISH COLUMBIA.

July 27, 1911.

Present:—Lord Macnaghten, Lord Shaw, Lord Mersey, Lord De Villiers and Lord Robson.

HADDINGTON ISLAND QUARRY Co., LTD., AND ANOTHER—DEFENDANTS

versus

ALDEN WESLEY AND OTHERS—PLAINTIFFS.

Redemption, suit for—Power of sale—Duties of mortgagee and purchaser—Inadequacy of price.

In pursuance of a power of sale in a mortgage-deed the property was sold by the mortgagee. In a suit for redemption against the mortgagee and the purchaser the mortgagor alleged that the sale was very disadvantageous but gave no hint to the defendants that they would be called upon at the trial to meet a charge of either corruption or collusion or to meet the case that the price was so low as in itself to be evidence of fraud:

Held, that under these circumstances, the failure of the defendants to produce counter-evidence as to the value of the property did not justify a finding of the lower Court in effect that the sale was fraudulent.

A mortgagee is not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his mortgage-debt. If he exercises it *bona fide* for that purpose, without corruption or collusion with the purchaser, the Court will not interfere, even though the sale be very disadvantageous; unless indeed, the price is so low as in itself to be evidence of fraud.

Appeal from a judgment of the Court of Appeal, dated January 10th, 1911, reversing a decree of Morrison, J., dated May 7th, 1910, which dismissed the respondents' action.

Sir *R. Finlay, K. C.*, and Mr. *Rowlatt*, for the Appellants.

Mr. *Higgins*, for the Respondents.

JUDGMENT.

LORD DE VILLIERS.—This is an appeal against a judgment of the Court of Appeal of British Columbia reversing a judgment of Morrison, J., in the Supreme Court, which dismissed the plaintiff's action with costs.

HADDINGTON ISLAND QUARRY CO. LD. *v.* ALDEN WESLEY.

The plaintiffs were the mortgagors and personal representatives of mortgagors of a certain quarry known as Haddington Island, and the defendants were the assignees of the mortgage and purchasers of the quarry, the sale to the latter having been effected by virtue of a power of sale conferred on the mortgagees by the indenture of mortgage. The statement of claim contained several claims, but the claims to which the arguments before their Lordships were mainly directed were for a cancellation of the conveyance to the purchasers, and for a declaration that the plaintiffs were entitled to redeem the mortgage. The grounds upon which these claims were based were that the assignment of the mortgage did not vest in the defendant Company any interest or title to the mortgage; that there had not been a due registration either of the assignment or of the conveyance; that the defendant Company had no right to exercise the power of sale; that no demand had been made on the mortgagors for payment and no notice given to them of the intended sale, and that the defendant Company did not use its best exertions, or indeed any exertions to obtain the best price for the said Haddington Island alleged to have been sold by it as aforesaid, and that the purchase price alleged to have been paid by the defendant Walker or the defendants MacDonald, Wilson, and Snider, was a very inadequate price for the said property. At the close of the trial the learned Judge made the following observations:—"The whole transactions seem to me to have been quite valid and regular, and you cannot disturb the defendant; but I have some misgivings as to the assignment to Fulton. Outside of that, I would not hesitate to give judgment. I think the same was valid and the other points I am satisfied on, but I have some misgivings on that point. There is an obvious misprint as the assignment, the validity of which is denied was made by and not to Fulton who was Commissioner of Lands. The mortgagee was one Macaulay, who had assigned the mortgage to a previous Commissioner of Lands and the point now made by the plaintiffs was that the title to the mortgage did not vest in the defendant Company as assignee inasmuch as the Commissioner had not obtained the authority of the Lieutenant-Governor in Council to assign the bond. The Judge, after considering the question, decided that it could not be raised without making the Attorney-General a party. He accordingly dismissed the action with costs. On appeal to the Court of Appeal the Chief Justice and Mortin, J., confined themselves entirely to the question whether the sale had been made by the defendant Company with due regard to the interest of the mortgagors. Galliher, J., also discussed that question but he made a few observations upon another question raised in the Court of Appeal, namely, whether an arrangement made before the date of assignment by the Government with the mortgagors under which the Government was to receive the royalty due to the mortgagors on stone taken from the quarry and apply the same in reduction of debt would have debarred the Government from exercising the power of sale. If the Government had no right to sell the property the assignees would equally be debarred from selling it. Upon this point the learned Judge said: "Taking all arrangements which finally culminated in the agreement of July 12th, 1894, and reading that agreement, it appears to me it goes no further than to provide for an application of the royalty on such stone as should be supplied thereunder on the mortgage. This was done, and although we find credit for stone supplied for the Empress Hotel, I treat that merely as a sum received and applied in due course on the mortgage. This was the last credit given and some two years before, the mortgage was assigned to the defendant Company so that even if that is treated as a payment under a special agreement the mortgagors were for a long time subsequent thereto in default and the government could deal with the mortgage as they saw fit due regard being had to the interest of the mortgagors. Their assigns could, of course, do likewise." He agreed, however, with the other members of the Court of Appeal that the sale had not been made with the due regard to the interests of the mortgagors and the sale was accordingly ordered to be set aside and the plaintiffs were allowed to redeem.

Their Lordships entirely agree with the view that what took place between the Government and the mortgagors before the assignment was not sufficient to deprive the assignees of the right to exercise the power

of the sale contained in the indenture. The real question, therefore, to be decided in this appeal is whether, in view of the findings and of the evidence given at the trial, the Court of Appeal rightly decided that there was such a reckless disregard of the interests of the mortgagors as would justify the setting aside of the sale.

The parties against whom the action was brought were not only the assignees of the mortgage, but also the purchasers of the property.

The sale was effected by virtue of a power which is in the following terms:—"If the mortgagors make default as to any of the covenants or *provisos* herein contained, the principal hereby secured shall at the option of the mortgagee, his heirs or assigns, forthwith become due and payable, and in default of payment the powers of sale hereby given may be exercised, provided that the said mortgagee, on default of payment for one month may on one month's notice, enter on and lease or sell the lands. And provided also that, in case default be made in payment of either principal or interest for two months after any payment of either falls due, the said powers of leasing or selling of any of them may be acted upon without any notice .....Provided that, in default of the payment of the interests hereby secured, the principal hereby secured shall become payable." Ostensibly, therefore, the mortgagees acted within their powers in selling the property, and the purchasers are entitled to the full benefit of their purchase unless it be alleged and proved that they acted in collusion with the vendors, or that the price was so low as in itself to be evidence of fraud or collusion. Unfortunately, from first to last there is no allegation in the statement of claim charging the purchasers with fraud or collusion or bad faith or knowledge of the existence of facts which would invalidate the sale. The allegations that the defendant Company, that is to say, the vendors, did not use any exertions to obtain the best price for the land, and that they sold it to the purchasers at a very inadequate price, are quite consistent with perfect good faith on the part of the purchasers, and yet these are the only allegations from which it could possibly have been inferred that at the trial attempts would be made to charge them with collusion or want of good faith. At the trial the evidence was mainly directed towards establising those grounds of claim which have since been practically abandoned. Incidentally, Alden House, one of the plaintiffs, was asked what the value of the property was and his answer was: "Well it is worth at least $20,000 at the very least. We were offered $ 30,000 for it once." As this amount is far in excess of the price for which the property was sold, namely, $3,250, it is contended that the sale should not be allowed to stand, but, in the absence of any notice to the defendants that the alleged inadequacy of price would be relied upon as proof of fraud or collusion on their part, they should not be prejudiced by their failure to produce counter-evidence as to value. The evidence as to the value given on behalf of the plaintiffs was of the most flimsy nature. Huson said that they had been offered $ 30,000 for the quarry, but did not produce the person who had made the offer. Nor did the plaintiffs produce any expert or, indeed, any other evidence in support of Huson's casual statement as to value. If the property was so valuable early in 1908, there is no satisfactory explanation why it was not sold and the proceeds of the sale applied towards redemption of the mortgage. It is clear from the correspondence that, as far back as January 1908, Huson knew that there was a prospect of the property being immediately sold for the amount of the original mortgage-debt, but, although he protested against such a sale, he made no attempt to find the means of paying the Government the sum of $ 1,150, which was all that was then still owing for principal and interest. Under the indenture of mortgage, the mortgagors were at liberty to pay the debt after three months' notice in writing to the mortgagee or his assigns, or upon the payment of three months' interest in lieu of notice. No such notice appears to have been given, nor interest tendered either to the Government or to the defendant Company after it had, in March 1908, obtained from the Government an assignment of the mortgage. The defendant Company accordingly sold the property for $ 3,250 and it now holds the balance after payment of capital and interest, at the disposal of those entitled thereto. The trial Judge was perfectly satisfied as to the validity of the transaction. In the notice of appeal to the

Court of Appeal, although other grounds of alleged invalidity are fully stated, not a word is said as to fraud or collusion. But the Court held, in effect, that the sale was fraudulent. Among the cases cited by Galliher, J., was that of *Warner* v. *Jacob* (1) where Kay, J., summing up the authorities is reported to have said: "The result seems to be that a mortgagee is, strictly speaking, not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his mortgage-debt. If he exercises it *bona fide* for that purpose, without corruption or collusion with the purchaser the Court will not interfere, even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud." In the present case the statement of claim alleged in effect, that the sale was very disadvantageous, but it gave no hint to the defendant that they would be called upon at the trial to meet a charge of either corruption or collusion or to meet the case that the price was so low as in itself to be evidence of fraud. Under these circumstances, their Lordships are unable to attach the same importance as was attached by the Court of Appeal to the circumstance that the defendants produced no evidence as to the value of the property, nor are they prepared to dissent from the finding on the facts by the learned Judge at the trial. They will, therefore, humbly advise His Majesty that the judgment of the Court of Appeal should be reversed and the judgment of Morrison, J., restored. The respondents will bear the costs of this appeal and the costs incurred in the Court of Appeal and the Supreme Court.

Solicitors for the Appellants: Messrs. *Gard Rook & Co.*

Solicitors for the Respondents: Messrs. *Maddison Stirling, Humm & Davies.*

(1) (1882) 51 L. J. Ch. 642; 20 Ch. D. 220; 46 L. T. 656; 30 W. R. 721.

(s. c. 5 S. L. R. 184.)

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 4 OF 1904.

September 5, 1910.

Present:—Mr. Fawcett, A. J. C.

HEMANDAS BAMRAKHIOMAL—PLAINTIFFS

versus

CHELLARAM AND OTHERS—DEFENDANTS.

Civil Procedure Code (Act V of of 1908*), s.* 151, *O. XX, r.* 3—*Interlocutory judgment—Right of successor to re-consider— Civil Procedure Code (Act V of* 1908*), s.* 92 (2), *interpretation of—Retrospective effect—Civil Procedure Code (Act XIV of* 1882*), s.* 539—*Scheme suit instituted before passing of new Code—Bar under section* 92 (2)—*General Clauses Act* (*X of* 1897), *s.* 6, *scope of—Interpretation of Statutes—Procedure Acts.*

A Judge has power to reconsider an interlocutory judgment delivered by his predecessor on any issue before the final disposal of the case, if interlocutory judgment is based on an erroneous assumption or hypothesis.

Balwant v. *Secretary of State*, 32 B. 432, at p. 437; 10 Bom. L. R. 531, followed.

Chinku v. *Utamchand*, 2 S. L. R. Civil 59 at p. 62, relied upon.

Where a provision in an enactment is in its nature declaratory, the presumption against construing it retrospectively is inapplicable.

Attorney-General v. *Theobald*, (1890) 24 Q. B. D. 557; 62 L. T. 768; 38 W. R. 527; *Steel* v. *M'Kinlay*, 5 App. Cas. 754 at pp. 781-2; 43 L. T. 358; 29 W. R. 17, relied upon.

Where the Legislature allows an interval of time between the passing of an enactment and its commencement so that steps might be taken for avoiding any hardships arising from the change of law, the inference is that the enactment was intended to have retrospective effect.

The operation of section 6 of the General Clauses Act is limited to cases in which the change in the law is the result of a mere *repeal* of the old enactment and does not extend where it is due to an addition to it.

Jagodanund v. *Amritalal Sircar*, 22 C. 767 at p. 781, followed.

Steele v. *M'Kinlay*, 5 App. Cas. 755 at pp. 781-2; 43 L. T. 358; 29 W. R. 17, relied upon.

The Code of Civil Procedure, 1908, contains no saving of pending *suits* from its operation. The general intention of retrospectivity is indicated by the special savings of pending arbitration proceedings and the present right of appeal.

The provisions of sub-section (2) of section 92 of the Code of Civil Procedure are of a declaratory nature inserted with a view to settle the point whether the provisions of the corresponding section 539 of the former Code were mandatory or not; consequently, they operate retrospectively.

Abdul Rehman v. *Kassum Ebrahim*, 13 Bom. L. R. 583 at p. 588; 11 Ind. Cas. 726, referred to.

The Ydun, (1899) B. 236, relied upon.

HEMANDAS *v.* CHELLARAM.

A suit for removal of certain trustees and for the proper administration of a trust instituted without the sanction of the Advocate-General would be barred under section 92 (2) of the new Code even if the suit was instituted in 1904.

In 1904, the point whether the provisions of section 539 of the old Civil Procedure Code were mandatory or merely directory was a most doubtful one for the province of Sind and a plaintiff cannot be said to have had in 1904, an indubitable right to bring a scheme suit without the sanction of the Advocate-General or other office authorized under section 539.

The subsequent ruling of the Judicial Commissioner's Court Sind in 1907, *Radhibai* v. *Kundanmal*, 1 S. L. R. 155, cannot properly be said to operate retrospectively so as to vest in plaintiff a right at the date of the institution of suit which he did not possess in the state of the laws then existing as interpreted by the Bombay High Court or the Sind Sadar Court.

Tricumdas v. *Khimji*, 16 B. 626, *Sayad Hussein* v. *Collector of Karia*, 21 B. 257, referred to.

Mr. *E. Raymond*, for the Plaintiffs.

Mr. *Hirdaram Mewaram*, for the Defendants.

JUDGMENT.—The plaintiff, who is a brother of the late Shewaram Ramrakhiomal, and a beneficiary under his Will, sues the four executors of the estate, alleging that they or rather the first three, have been guilty of failure to discharge their duties and acts of bad faith and misconduct, showing them to be unfit to act as executors or trustees, and seeks a decree ordering the removal of the first three defendants and directing defendant No. 4, who is also a brother of Shewaram, to administer the trust singly or appoint new trustees in place of the first three defendants, to render full and true accounts and give such other and further relief as to the Court may appear fit, fair and reasonable under the circumstances of the case.

The first three defendants deny the alleged acts of misconduct, etc., and also plead that the plaintiff has no right of suit.

The following issues were accordingly raised on the 9th February 1904:—

1. Is plaintiff entitled to sue?

2. Is his suit barred by section 539, Civil Procedure Code?

2. Have defendants Nos. 1 to 3 been guilty of the acts mentioned in paragraph 7 of the written statement?

4. Are there pecuniary circumstances as stated in paragraph 8?

5. Should they for these causes, or for failure to submit accounts be removed?

6. What further orders should be passed as regards the estate?

On the 1st June 1909, the first two issues were argued for preliminary decision. The first was, however, abandoned by defendants' Pleader. On the 2nd June 1909, Mr. Knight, A. J. C., delivered an interlocutory judgment in which he finds the second issue in the negative on the ground that, under the ruling in *Radhibai* v. *Kundanmal* (1), the provisions of section 539 of the Civil Procedure Code of 1882, which was in force when the suit was instituted, were merely directory and not mandatory. He further holds that the issue must be decided by section 539 of the old Code, not by section 92 of the new one, "for, a subsequent alteration of the law cannot deprive plaintiff of a substantive right that he enjoyed when he filed his suit."

Since then, no further progress has been made with the trial of the suit, the proceedings being stayed pending the decision of the case in which the validity of the Will is contested on the ground that the property dealt with in it was joint family property. That case was decided by the Appellate Side of the Court on the 24th June 1910, and on the 14th instant I refused to allow any further stay of the proceedings.

It seemed to me, however, that the view of Mr. Kinght as to the non-applicability of section 92 (2) of the Code of 1908 to the suit, was open to question, and I have, therefore, had the point fully argued before me.

Mr. Raymond for the plaintiff contended that I had no power to re-open an issue already decided by Mr. Knight: but it is to be noted that the issue actually decided was only, whether the suit was barred by section 539 of the Code of 1882. Strictly speaking, his remarks regarding the non-applicability of section 92 (2) of the Code are *obiter dicta*. But, even taking this point as impliedly included in the issue, I think I clearly have power to re-consider the matter, if I find that part of the interlocutory judgment to be based on an erroneous assumption or hypothesis. In support of this I would refer to the remarks of Batchelor, J., in *Balwant* v. *Secretary of State* (2); see also the case of *Chinku* v. *Utamchand* (3), where a fresh

(1) 1 S. L. R. 155.
(2) 32 B. 432 at p. 437; 10 Bom. L. R. 531.
(3) 2 S. L. R. Civil 59.

finding on a issue already decided by the Judge's predecessor was upheld by the Appeal Court. Order XX, rule 3, of the Civil Procedure Code, to which Mr. Raymond referred, does not apply to this case, because Mr. Knight's interlocutory judgment is not a judgment containing the grounds of a decree in the suit so as to constitute it a judgment of the kind referred to in that rule, see definition of "judgment" in section 2 (9) of the Code. On the other hand, it would be ridiculous for me to go into the merits of the suit and record evidence which will probably take up a large amount of time, if I thought that the suit was bad for want of the sanction prescribed by section 92 of the Code, and that all the time and trouble involved in its trial on the merits would eventually be wasted. Section 151 of the Code, applies to enable the Court to do what is necessary to prevent such an abuse of its process.

Mr. Raymond relies on the view taken by Mr. Knight that, at the date of the institution of the suit, the plaintiff had a substantive right to bring it without any such sanction as that required under section 92, and that sub-section (2) of that section cannot, therefore, operate retrospectively to deprive him of such right. But, is it the case that plaintiff really had any such definite right? At the time he brought his suit in 1904, there does not appear to have been any authoritative decision by the Sadar Court in Sind on the point whether the provisions of section 539, Civil Procedure Code, were mandatory or merely directory, as to which there has been such conflict of opinion. But, in so far as the decisions of the Bombay High Court are generally followed in this Province in preference to those of other High Courts (see per Beaman, J., at page 592 of Sind Sadar Court Selected Decisions, Vol. II; where this is stated to have "always been the practice" of the Sadar Court), the view then in force must be taken to have been that adopted by the Bombay High Court in the cases of *Tricumdass* v. *Khimji* (4) and *Sayad Hussein* v. *Collector of Karia* (5), rather than that subsequently adopted by the Calcutta High Court and followed by this Court in 1907. At any rate, the point was at most a doubtful one, and the plaintiff cannot be said to have had, or thought he had, an indubitable right to file this suit without the sanction of the Advocate-General, or other authorized officer, under section 539, Civil Procedure Code.

The fact that it was subsequently ruled that such sanction was not necessary, no doubt, removed any objection such as that raised in this case, so long as that ruling and section 539, Civil Procedure Code, remained in force. But it cannot be properly said to operate retrospectively, so as to vest in plaintiff a right at the date of the institution of the suit, which in fact he did not possess in the then existing state of the law, as interpreted by the Bombay High Court or the Sind Sardar Court. And, had the ruling in *Radhibai* v. *Kundanmal* (1) been subsequently reversed by the Privy Council, the decision would obviously operate to bar the present suit. The same principle seems to me to apply to the provisions of section 92 (2) in which the Legislature has deliberately reversed the view of the law followed in *Radhibai's case* (1) and adopted that followed by the Bombay High Court. As stated in Hardcastle on Statutory Law, 3rd Edition, page 363, "where an Act is in its nature declaratory, the presumption against construing it retrospectively is inapplicable. Acts of this kind, like judgments, decide like cases pending when the judgments are given but do not re-open decided cases." See also Maxwell on the Interpretation of Statutes, 3rd Edition, page 309, *Attorney-General* v. *Theobald* (6) and *Steele* v. *M'Kinlay* (7). In the particular case of sub-section (2) of section 92 of the Code of Civil Procedure, 1908, there can, I think, be no reasonable doubt that its provisions are of a declaratory nature, inserted with a view to settle the point on which conflicting decisions had been given by the various High Courts, as to whether the provisions of the corresponding section 539 of the former Code were mandatory or not.

Another consideration which also tells in favour of the above view is, that though the Code of 1908, was passed on the 21st March 1908, it did not actually come into force till the 1st January 1909. Attention was drawn to the change of law about to be effected by section 92 (2), of the Code in *Radhabai's case* (1) and if the plaintiff had exercised due

(4) 16 B. 626.
(5) 21 B. 257.
(6) (1890) 24 Q. B. D. 557; 62 L. T. 768; 38 W. R. 527.
(7) 5 App. Cas. 574 at pp. 781-2; 43 L. T. 358; 29 W. R. 17.

vigilance, he could have moved the Court to dispose of the case before the 1st January 1909, so as to avoid the operation of section 92 (2), in respect of pending suits. The fact that the Legislature allowed an interval of time in which plaintiff might have taken steps for avoiding any hardships arising from the change of law, is a circumstance which supports the inference that section 92 (2) was intended to have retrospective effect; see Hardcastle on Statutory Law, 3rd Edition, p. 362, and Maxwell on the Interpretation of Statutes, 3rd Edition, p. 311.

As said by Davar, J., in *Abdul Rehman* v. *Kassum Ebrahim* (8), "the object of providing that in charity suits the previous sanction of the Advocate-General should be a condition precedent to the institution of the suits is to save trustees from harassing and vexatious actions at the instance of irresponsible parties." It is, therefore, somewhat on a par with the Public Authorities Protection Act, 1893, (56 and 57 Vict. C. 61), section 1 of which provides a period of six months' limitation for actions instituted in respect of any alleged neglect or default in the execution of any Act of Parliament or of any public duty or authority. In *The Ydun* (9), it was held that this provision was retrospective; as dealing with procedure only. This is a far stronger case than the present, because, the protection there given amounted to an absolute bar of the suit; whereas here there is no bar, provided the Advocate-General's consent be obtained.

If sub-section 2 of section 92 was not intended to be retrospective, the Legislature would almost certainly have inserted the words "after the commencement of this Code" after the word "instituted," *cf.* section 1 of the Public Authorities Protection Act, 1893. It must also be noted that the Code of 1908 contains no saving of pending suits and does not even impose the limitation "so far as may be," which is contained in section 2 (3), of the Criminal Procedure Code, 1898. The general intention of retrospectivity is, on the contrary, indicated by the special saving of pending arbitration proceedings under section 89 (2); while section 154 only saves a "present right of *appeal*," and not of *suit*.

Section 6 of the General Clauses Act, 1897, does not help the plaintiff, because, as pointed out in *Jagodanund* v. *Amritalal Sircar* (10), the operation of such an enactment is limited to cases in which the change in the law is the result of a mere *repeal* of the old enactment, and does not extend where it is due (as in this case) to an *addition* to it, *cf.* also *Steele* v. *M'Kinlay* (7), where a distinction is drawn between a repealing and a declaratory Act. In any case, for the reasons already given, "a different intention appears" and section 6 of the General Clauses Act, 1897, does not, therefore, bar the retrospective operation of section 92 (2) of the Civil Procedure Code to the present suit.

I accordingly hold that the plaintiff had no vested right at the date of the institution of the suit, which can bar section 92 (2) from operating retrospectively to it, and that the provisions of that sub-section, being of a declaratory nature, do apply to the present suit. Mr. Knight has not fully considered this point and his interlocutory judgment that section 92 (2) does not apply is, in my opinion, based on an erroneous assumption, which justifies me in refusing to be bound by it. The result is, that I hold the present suit barred by section 92 (2) of the Code for want of the Advocate-General's sanction. It is admitted that the suit is one regarding a "trust created for public purposes of a charitable or religious nature;" and the plaint is not confined to the private trust under the Will, but prays for the removal of the three trustees—defendants generally.

For the above reasons, I dismiss the plaintiff's suit, with costs. I see no sufficient reason to refrain from following the ordinary rule as to costs following the event, especially as this seems to me clearly a case in which, at any rate, a reasonable suspicion arises as to the *bona fide* nature of the suit.

Suit dismissed.

(8) 13 Bom. L. R. 583 at p. 588; 11 Ind. Cas. 726.
(9) (1899) B. 236.
(10) 22 C. 767 at p. 781.

SEVUGAN CHETTY *v.* KRISHNA AIYANGAR.

(s. c. 10 M. L. T. 557.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 722 OF 1910.

October 25, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Spencer.

A. R. R. M. S. V. SEVUGAN CHETTY —PLAINTIFF—APPELLANT

versus

KRISHNA AIYANGAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI, r. 17 --Suit to recover account-books from one's servants—Amendment of plaint—Adding further relief to recover moneys.

Where a suit as originally framed is to recover the account-books of the plaintiff from his servants who were in charge of his business, an application for amendment, before any evidence was recorded, merely claiming by way of further relief the moneys due from them also on the facts stated in the original plaint is proper and should be allowed. The fact that the further relief asked for might have been barred in the interval does not by itself render the amendment improper.

Kisandas Rupchand v. *Racchappa Vithoba*, 33 B. 644 at p. 651; 11 Bom. L. R. 1042 and *Mulla Veetil Seethi Kutti* v. *Kerambath Painthuti Achutan Nair*, 21 M. L. J. 475; 10 Ind. Cas. 218, referred to.

Weldon v. *Neal*, (1887) 19 Q. B. D. 394; 56 L. J. Q. B. 621; 35 W. R. 820, distinguished.

Account-books are personal property and a suit to recover them from servants would lie.

Second appeal against the decree of the District Court of Madura, in Appeal Suit No. 551 of 1909, presented against the decree of the Court of the District Munsif of Sivaganga, in Original Suits No. 478 of 1908.

Mr. *V. C. Seshachariar*, for the Appellants.

Mr. *C. Madhavan Nair*, for the Respondents.

JUDGMENT.—We think that the Courts below were in error in refusing to allow the plaintiff to amend his plaint as prayed in his petition of the 8th July 1909. This petition was put in before any evidence had been recorded. It did not allege any new facts, but merely prayed that an additional relief might be granted on the facts stated in the original plaint.

It may be that the further relief then asked for had become barred in the interval but we do not think that this by itself necessarily renders the amendment improper. The rule applicable is that contained in Order VI, rule 17 of the new Code of Civil Procedure which enacts that the Court may at any stage allow a party to amend the pleadings "in such manner as may be just" and that "all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties." There can be no doubt that both the conditions laid down in the above rule are satisfied in the present case. The reliefs claimed by the plaintiff and the facts on which he claimed them are stated in the original plaint, though he then only asked the Court to recover his account-books from the defendants, who were alleged to be his servants, and said he would bring a separate suit for the money due by them. He afterwards thought it was desirable to claim the recovery of the money in the same suit. There is no injustice to the defendants in allowing this amendment, for the effect of it is to enable the plaintiff to prove his right to money which, before any bar by limitation had arisen he had in the original plaint claimed as due to him by the defendants (see the remarks of Batchelor, J., in *Kisandas Rupchand* v. *Rachappa Vithoba* (1) and also the recent case in this Court *Mulla Veettil Seethi Kutti* v. *Korambath Painthuti Achutan Nair* (2). The case of *Weldon* v. *Neal* (3), is very different from the present case, for in that case the proposed amendment alleged assault, malicious prosecution and other facts not stated in the original plaint, and which constituted a totally new cause of action. The Courts below not only refused to allow amendment in the present case, but dismissed the plaintiff's suit as originally framed on the ground that it was unsustainable.

We do not understand why it was considered to be so. The plaintiff alleged that the defendants were his servants on a monthly pay and had charge of his shop, and claimed that the accounts kept by them in regard to the business were his property and he sued to recover these accounts. It is difficult to see why such a suit should be unsustainable.

We set aside the decrees of the Courts below and remand the suit to the District Munsif to be restored to his file and to be disposed of according to law. He should allow the amendment desired by the plaintiff, and allow the defendants to put in a fresh

(1) 33 B. 644 at p. 651: 11 Bom. L. R. 1042.

(2) 21 M. L. J. 475; 10 Ind. Cas. 218.

(3) (1887) 19 Q. B. D. 394; 56 L. J. Q. B. 621; 35 W. R. 820.

LEKHRAJ *v.* HARPAL SINGH.

written statement if they desire to do so, and if necessary, he should revise the issues.

The costs will abide the results.

Decree set aside.

[s. c. 11 M. L. T. 1; (1911) 1 M.W.N. 16; 9 A.L.J. 40.]

PRIVY COUNCIL.

APPEAL FROM THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN PROVINCES, ALLAHABAD.

November 22, 1911.

Present:—Lord Macnaghten, Lord Robson, Sir John Edge and Mr. Ameer Ali.

Thakurain LEKHRAJ KUNWAR—APPELLANT

versus

Thakur HARPAL SINGH AND OTHERS—RESPONDENTS.

Hindu Law—Succession—Impartible estate--Rule of primogeniture—Owner devising the estate to his widow —Next reversioner disputing the Will—Probate—Compromise—Construction—Character of the estate taken by the next reversioner.

One *R. S.*, who was in possession of an impartible estate, succession to which was governed by the rule of primogeniture, died without male issue, leaving a Will by which he left his entire estate absolutely to his widow, who applied for a grant to her of Probate of the Will. The next reversioner, *S. S.* filed objections to Probate being granted, and instituted a suit against the widow claiming that the Will was null and void as against him and the estate and that absolute possession over the entire estate should be awarded to him. A decree in the suit was made in accordance with the terms of a compromise between the parties whereby it was provided, *inter alia*, that the widow should remain in possession during her life-time of the entire estate left by *R. S.* exercising the powers of a *gaddi-nashin* without the power of alienation, that *S. S.* should receive an annual allowance; that on the death of the widow *S. S.* or any representative of his should be the absolute owner of the estate and should occupy the *gaddi*, and that should it be indispensably necessary to raise any money on the estate by way of a loan the parties to the compromise should in concurrence with each other borrow an amount and re-pay the same from the profits of the estate. The Will was subsequently admitted to Probate. *S.S.* predeceased the widow of *R. S.* The widow of *S. S.* brought the suit claiming proprietary possession of the estate as against her husband's distant cousin in the male line and certain other members of his family:

Held, that the rights of the parties to the suit depended on the construction of the compromise, but not upon the Will of *R. S.* and that the fact that after the compromise the Will was admitted to Probate did not affect the rights of *S. S.*

Held, also, that the compromise did not change the character of the estate, which as an impartible estate devolved on *S. S.* on the death of *R. S.*; that by the compromise *S. S.* reserving to himself the said annual income out of the estate gave to the widow of *R. S.* a bare interest for her life in his (*S. S.*) impartible estate, and that on the death of *S. S.* the estate as an impartible estate devolved, subject to the life-interest of the widow of *R. S.*, on the heir of *S. S.* according to the rule of primogeniture, and not on the widow of *S. S.*

Harpal Singh v. *Lakhraj Kunwar*, 30 A. 406; 5 A. L. J. 405; (1908) A. W. N. 165, affirmed.

Appeal from a judgment and decree of the High Court at Allahabad, dated May 29th, 1908, reversing that of the District Judge of Jaunpur, dated February 24th, 1906.

FACTS.—The suit was instituted in the Court of the Subordinate Judge of Jaunpur, but was subsequently transferred to the Court of the District Judge of Jaunpur, who allowed the plaintiff's (appellant's) claim.

The facts of this case are fully stated in the judgment of their Lordships. For a report of the judgment of the High Court see *Harpal Singh* v. *Lekhraj Kunwar* (1).

Sir *H Erle Richards*, *K. C.*, and *Mr. B. Dube*, for the Appellant.—The estate, though impartible, is alienable, and Randhir Singh had the power to devise it to his widow.

[*Mr. De Gruyther*, *K. C*—I do not dispute that point, which was decided in *Rani Sartaj Kuari* v. *Ram Deoraj Kuari*. (2)]

Randhir Singh made a Will giving the whole estate to Sonao Kunwar, his wife, who by virtue of that gift became the absolute owner of the estate: *Musammat Surajmani* v. *Ribi Nath Ojha* (3).

The effect of such a transfer of the estate was, that the original character of its impartibility and the special custom regulating its descent by the rule of primogeniture were destroyed. That is the effect of the Will. Probate of that Will was granted to Sonao Kunwar, and the absolute gift of the estate to her is good.

Even if the estate is impartible, the appellant succeeds to it, unless it is established that the estate is impartible and also that succession to it is governed by the rule of primogeniture. But, here, by virtue of the compromise, Sheopal Singh acquired an absolute vested interest in the estate subject to the life-interest of Sonao Kunwar.

That interest of Sheopal Singh was his self-acquired property and passed to his widow on his death under the ordinary rule of

(1) 30 A. 406; 5 A. L. J. 405; A. W. N. (1908) 165.

(2) 15 I. A. 51; 10 A. 272.

(3) 35 I. A. 17; 18 M. L. J. 7; 12 C. W. N. 231; 10 Bom. L. R. 59; 5 A. L. J. 67; 7 C. L. J. 131; 3 M. L. T. 144 (P. C.).

descent of self-acquired property of a Hindu governed by the *Mitakhshara* law: *Periasami* v. *Periasami* (4) and the *Shivagunga's* case (5). Reference was also made to *Abdul Wahid Khan* v. *Musammat Nuran Bibi* (6).

Mr. *De Gruyther*, *K. C.* and Mr. *G. E. A. Ross*, for the Respondents, were not called upon, but they referred to *Khunni Lal* v. *Gobind Krishna Narain* (7) as to effect of a compromise.

JUDGMENT.

SIR JOHN EDGE.—This is an appeal by Thakurain Lekhraj Kunwar (the plaintiff) from the decree of the High Court of Judicature for the North-Western Provinces of India, dated the 29th of May 1908, which set aside the decree in the plaintiff's favour of the District Judge of Jaunpur, and dismissed the plaintiff's suit and certain objections which had been filed by her.

In the suit in which the decree now under appeal was made the plaintiff, who was the widow of Sheopal Singh, claimed proprietary possession of the *Riasat* of Singra Mau in the District of Jaunpur, and mesne profits. The defendants to the suit, who are respondents to this appeal, are Thakur Harpal Singh, a distant cousin in the male line of Sheopal Singh, Shamsher Bahadur Singh, a younger brother of the father of Thakur Harpal Singh, Raghuraj Bahadur Singh, and Rampal Singh, minors, sons of Shamsher Bahadur Singh, and Thakurain Janki Kunwar, the widow of Rudarpal Singh, who was a brother of Sheopal Singh and had died without male issue. The last common ancester of Sheopal Singh and Thakur Harpal Singh was Dammar Singh.

The District Judge of Jaunpur gave the plaintiff Thakurain Lekhraj Kunwar a decree for possession as an Hindu widow, and decreed mesne profits. From that decree the defendants, Thakur Harpal Singh and Shamsher Bahadur Singh, on his own behalf and as guardian of his sons Raghuraj Bahadur Singh and Rampal Singh appealed to the High Court, and in that appeal the plaintiff filed objections to the decree of the District Judge, claiming that she was entitled to a decree for possession of the Singra Mau Estate as an absolute owner, and not merely for the estate of a Hindu widow. The defendant Thakurain Janki Kunwar did not defend the suit; she claimed no interest.

The question upon which this appeal depends is a short one. The Estate of Singra Mau descended in the male line from Dammar Singh as an impartible estate to one Randhir Singh, who died without issue male in January 1895. In the family to which Randhir Singh, Sheopal Singh and Thakur Harpal Singh belonged the rule of primogeniture applied so far as this Estate of Singra Mau was concerned. The pedigree of the family will be found in the judgment of the High Court; it is sufficient now to say that Sheopal Singh, who was the plaintiff's husband, was the son of Jagurnath Singh, a younger brother of Randhir Singh, and that on the death of Sheopal Singh without a son in July 1899, the defendant Thakur Harpal Singh was, subject to the life-interest of Thakurain Sonao Kunwar under a compromise, the next member of the family who was entitled to the possession of Singra Mau, if the estate was then impartible. The question as to whether the estate had ceased to be impartible or had continued to be and was impartible on the death of Sheopal Singh depends upon the construction of an agreement of compromise of the 25th of April 1896, to which Sheopal Singh and Thakurain Sonao Kunwar, who was the junior widow of Randhir Singh, were the parties.

Randhir Singh, who was then 74 years of age, and in possession of the impartible Estate of Singra Mau, made a Will on the 15th December 1894, by which he left his entire estate and every kind of moveable and immoveable property of which he was then in possession to Thakurain Sonao Kunwar, his junior wife. It is admitted that if Randhir Singh was then of testamentary capacity he had power, as the owner in possession of the impartible Estate of Singra Mau, to make that Will, and by it to put an end to the impartibility of the estate, and to exclude his nephew Sheopal Singh from the succession, which was the effect of the Will as it was executed. After the death of Randhir Singh his widow Thakurain Sonao Kunwar applied for a grant to her of Probate of the Will. Sheopal Singh and others filed objections to Probate being granted; thereupon in March

(4) 5 I. A. 61; 1 M. 312.
(5) 9 M. I. A. 539; 2 W. R. 31 (P. C.).
(6) 12 I. A. 91; 11 C. 597.
(7) 38 I. A. 87; 15 C. W. N. 545; 8 A. L. J. 552; 13 C. L. J. 575; 13 Bom. L. R. 427; 10 M. L. T. 25; 2 M. W. N. 432; 21 M. L. J. 645; 33 A. 356; 10 Ind. Cas. 477.

1896 Sheopal Singh brought a suit in the Court of the Subordinate Judge of Jaunpur against Thakurain Sonao Kunwar and Thakurain Shankar Kunwar, the senior widow of Randhir Singh, a *pro forma* defendant, and Babu Soridat, also a *pro forma* defendant, in which Sheopal Singh alleged that when Randhir Singh was seriously ill and on the point of death, and quite incapable of entering into any contract or of understanding any transaction, the well-wishers of Sonao Kunwar and Shankar Kunwar, having colluded together, caused the Will to be executed. Sheopal Singh further alleged in that suit that, according to the old custom and nature of the property, and also on the strength of right of survivorship, the right to occupy the *gaddi*, and to enter into possession of the entire estate devolved upon him on the death of Randhir Singh, and he prayed for a declaration that the Will of the 15th of December 1894 was null and void as against him and the estate, and for a decree dispossessing Thakurain Sonao Kunwar and Thakurain Shankar Kunwar, and awarding absolute possession to him, Sheopal Singh, over the entire Estate of Singra Mau, together with *imalaks*, moveable and immoveable property appertaining to the said estate.

On the 25th of April 1896 Sheopal Singh and Thakurain Sonao Kunwar entered into an agreement of compromise which was executed by them and was in the form of a petition to the Court of the Subordinate Judge of Jaunpur in the suit which had been brought by Sheopal Singh against Sonao Kunwar, Shankar Kunwar, and Babu Soridat. That petition was presented to the Court of the Subordinate Judge, and on the 27th of April 1896, the Subordinate Judge made a decree in the suit in accordance with the petition giving possession of the estate to Sonao Kunwar for her life subject to the terms of the compromise.

The petition of compromise was as follows:—

"1. The name of *Musammat* Thakurain Sonao Kunwar will continue to be recorded in the Revenue papers in the same way in which it stands recorded, and she will remain in possession during her life-time of all the moveable and immoveable properties, of which Rai Randhir Singh was in possession, exercising the powers of *gaddi nashin* (occupation of *gaddi*) without the power to transfer or change the estate in any way.

"2. I, Thakur Sheopal Singh, will take the sum of Rs. 12,000 a year at the rate of Rs. 1,000 per month from *Musammat* Thakurain Sonao Kunwar for all my expenses, and I, *Musammat* Thakurain Sonao Kunwar, will pay the same. I, Thakur Sheopal Singh, will not interfere with the estate in any way in the life-time of *Musammat* Sonao Kunwar. After the death of *Musammat* Thakurain Sonao Kunwar, I, Thakur Sheopal Singh, or any representative of mine who may be living at the time, will be the absolute owner of all the moveable and immoveable properties possessed by Rai Randhir Singh, and will occupy the *gaddi*. In case of non-payment of the fixed annual allowance, I, Thakur Sheopal Singh, will have power to recover the same by instituting a suit and attaching the profits and moveable property belonging to Thakurain Sonao Kunwar.

"3. If I, Thakur Sheopal Singh, have to go to any member of the brotherhood, or any *rais* on the occasion of any ceremony or otherwise, I will have authority to take as much equipage belonging to the estate as I require, and when I go out for recreations, &c., I will take any conveyance I like for my use. Thakurain Sonao Kunwar will have no power to forbid me.

"4. If, on any particular occasion, any indispensable necessity arise in the estate, and it be necessary to take a loan, we Thakur Sheopal Singh and *Musammat* Thakurain Sonao Kunwar, will, in concurrence with each other, borrow five or ten thousand rupees, and re-pay the same gradually from the profits of the estate.

"5. I, Thakurain Sonao Kunwar, also accept all the aforesaid conditions. It is, therefore, prayed that the case may be struck off as a contested one on the basis of the compromise, and the costs incurred by the parties be charged against themselves. This compromise may be embodied in the decree. *Musammat* Thakurain Shankar Kunwar and Sridat, *pro forma* defendants, have been exempted."

Sheopal Singh died on the 27th of July 1899 without issue male, and without having made any disposition by Will or otherwise of his interest in the Singra Mau Estate. Thakurain Sonao Kunwar, who had been in possession of the estate under the compromise

of the 25th April 1896, died on the 20th of June 1904, and thereupon Thakurain Lekhraj Kunwar and Thakur Harpal Singh respectively claimed possession of the estate. On the 6th of July 1904 the Collector of Jaunpur ordered mutation of names in favour of Thakur Harpal Singh; from that order Thakurain Lekhraj Kunwar appealed to the Commissioner of Benares, who on the 2nd of September 1904 dismissed the appeal.

The District Judge of Jaunpur in his judgment in this suit held that the estate had descended to Thakurain Sonao Kunwar under the Will of Randhir Singh by an entirely new title, and had thereby lost its character of impartibility, and was no longer subject to the special custom of descent. The District Judge further held that the estate which Sheopal Singh would have taken had he survived Thakurain Sonao Kunwar, would be self-acquired by Sheopal Singh as arising out of the contract of compromise with Thakurain Sonao Kunwar. As the learned Judges in the High Court rightly observed, the District Judge went behind the compromise and held that the Will was a valid Will binding on Sheopal Singh, and determined what in his opinion were the rights of the parties before the compromise, the very thing the avoidance of which led to the compromise. The learned Judges in the appeal in the High Court held that the right of the parties to this suit depended upon the construction of the compromise, but not upon the Will of Randhir Singh. With that conclusion their Lordships in this appeal agree. They also held that:—

"Upon the language of the compromise it is not possible to hold that the character of the estate, as it had been handed down from father to son for generations was changed. As an impartible Estate Sheopal Singh laid claim to it, and the compromise provided that as an impartible estate it should devolve upon him."

And they accordingly dismissed the suit.

Their Lordships consider that the High Court put the only possible construction upon the agreement of compromise. Sheopal Singh never admitted the validity of the Will as against him, and never admitted that Thakurain Sonao Kunwar had obtained any title under the Will. It is obvious from the terms of the compromise that Sheopal Singh consistently maintained that the Will was invalid, and consequently that Thakurain Sonao Kunwar had taken no title under it, and that the estate as an impartible estate had vested in him on the death of Randhir Singh. By the compromise, Sheopal Singh, reserving to himself an income of Rs. 12,000 a year out of the estate, gave to Thakurain Sonao Kunwar a bare interest for her life in his impartible estate. Sheopal Singh in the agreement of compromise carefully provided that on the death of Thakurain Sonao Kunwar, he or his successor should be the absolute owner of the estate and should occupy the *gaddi*; that on the occasion of any ceremony, or when he should go out for recreation, he should have the right to take as much equipage and any conveyance belonging to the estate for his use as he should require, and that Thakurain Sonao Kunwar should have no power to forbid him; and that should it be indispensably necessary to raise any money on the estate by way of loan he and Thakurain Sonao Kunwar should in concurrence with each other borrow Rs. 5,000 or Rs. 10,000 and re-pay the same gradually from the profits of the estate. Under the compromise Thakurain Sonao Kunwar had no power to encumber the estate for any purpose except in conjunction with Sheoraj Singh. The terms to which their Lordships have referred are consistent only with the construction placed upon the compromise by the High Court, and there are no terms in the compromise which suggest any other construction. To these terms Thakurain Sonao Kunwar submitted. It may be mentioned that the Subordinate Judge of Jaunpur, before making his decree of the 27th of April 1896, took the precaution of ascertaining that Thakurain Sonao Kunwar understood the terms of the compromise. The High Court rightly dismissed the suit of Thakurain Lekhraj Kunwar.

The fact that after the compromise the Will of Randhir Singh was admitted to Probate did not affect the rights of Sheoraj Singh.

Their Lordships will humbly advise His Majesty that the judgment and decree appealed against should be affirmed and the appeal dismissed with costs.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *T.C. Summershays and Son.*

Solicitors for the Respondents: Messrs. *Barow, Roggers and Nevill.*

(s. c. 5 S. L. R. 174.)

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 74 OF 1911.

August 25, 1911.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

EMPEROR—COMPLAINANT

versus

ANDAL *valad* KHAMISO—ACCUSED.

Pardon, tender of—Approver—Pardon granted by District Magistrate before approver placed on trial—Forfeiture of pardon—Examination in Sessions Court not necessary—Pardon does not affect liability before perjury committed subsequently—Approver's statement on oath signed by him—Statement as witness—Perjury—Sanction to prosecute—Criminal Procedure Code (Act V of 1898), *ss.* 4 (*h*), 164, 337 (1), (2) and (4), 339 (2)—"*Inquiring into the offence*"—"*Inquiry*"—*Proceedings under section* 164—*Judicial proceedings*—*Penal Code (Act XLV of* 1860), *s.* 193.

The words "inquiring into the offence" in section 337 (1) of the Criminal Procedure Code qualify the words "Magistrate of the First Class" and not the words "District Magistrate or Presidency Magistrate."

The "inquiry" referred to in section 337 (1) is not necessarily limited to an inquiry under Chapter XVIII of the Code.

A District Magistrate can legally grant a pardon although he does not himself inquire into the offence.

Pardon may legally be tendered to a person who has not been sent up for trial by the Police or to an accused before he is placed before the Committing Magistrate.

The provisions of section 337 (2) are complied with by the examination of the approver by the Committing Magistrate. The prosecution are not bound to call him in the Sessions Court if they think him an untruthful witness. It is not necessary that the approver should be examined in the Sessions Court before he can be said to have committed breach of the condition on which pardon was granted.

Queen v. *Rana Sami*, 24 M. 321, *Aligiriswami* v. *Emperor*, 33 M. 514; 5 Ind. Cas. 831; 7 M. L. T. 121; (1910) M. W. N. 5, followed.

A pardon cannot affect a liability to be tried for perjury committed after the tender of the pardon.

Section 337 (4) only refers to those cases in which the disclosure made by the approver shows that only a minor offence triable by a Magistrate has been committed.

A District Magistrate is competent to record the deposition of the approver on oath although he may have no jurisdiction to try the offence.

The deposition on an oath made by an approver before a District Magistrate, although signed by the approver, is a statement given by him as a witness.

The statement of an approver who has forfeited his pardon may be used as the basis of a charge of perjury against him. Section 339 (2) contains no express limitation of the use of the statement to a trial for the original offence.

Empress v. *Asghar Ali*, 2 A. 260, *Reg.* v. *Hanmanta*, 1 B. 610; *Queen* v. *Alagu*, 16 M. 421; *Queen-Empress* v. *Bharma*, 11 B. 702, distinguished.

Queen v. *Nanni*, 22 A. 115; *Suppa Tewan* v. *Emperor*, 29 M. 89; 3 Cr. L. J. 370, referred to.

The proceeding in which the statement of a witness is recorded under section 164 is an investigation directed by law preliminary to the trial and is, therefore, a stage of a judicial proceeding under explanation 2 to section 193 of the Penal Code.

An approver can be prosecuted for perjury for making contradictory statements before the District Magistrate at time of tender of pardon and before the Committing Magistrate.

The *Public Prosecutor*, for the Crown.

Mr. *Wadhumal Udharam*, for the Accused.

JUDGMENT.—This is an application under section 339 (3) for sanction for the prosecution of the opponent Andal for giving false evidence in respect of contradictory statements made on the 29th July to the District Magistrate, Sukkur, and on the 22nd September before the Sub-Divisional Magistrate, Rohri.

The opponent and two other persons were suspected of murder. On the 29th July, the investigating Police placed the opponent before the District Magistrate who tendered him a pardon on the conditions stated in section 337, Criminal Procedure Code. The opponent accepted a tender and was examined by the District Magistrate under section 164, Criminal Procedure Code. He made a statement implicating himself and the others in the murder. The two others were then placed before the Sub-Divisional Magistrate on a charge of murder. The opponent was examined as a witness in the inquiry before the Committing Magistrate and denied nearly every statement of fact that he had made to the District Magistrate.

The statements are so irreconcilable that on the merits there can be no defence to the application.

Various legal defences have been raised; but before discussing them I shall proceed to consider a point that has not been raised.

It has not been suggested that the pardon was illegally tendered by the District Magistrate. Prinsep in his commentary on the Code of Criminal Procedure suggests that no pardon can be tendered unless the inquiry before commitment under Chapter XVIII has begun and then only by the Magistrate holding such inquiry. He appears to limit the scope of the section to a procedure by

which a person over whom the Magistrate is exercising jurisdiction as an accused person and who is, therefore, incapacitated by section 342 (4) from giving evidence—can be converted into a witness. There is no authority for so limiting the section and I do not think the words of the section justify the limitation. The section refers to the "offence under inquiry," but the word inquiry is not necessarily limited to an inquiry under Chapter XVIII, see the definition of the word in section 4 (*h*) of the Code and its use in section 159 where a Magistrate may make an inquiry for the purpose of assisting the Police in the discovery and arrest of the offender (section 157). The power to tender pardon is given to "the District Magistrate or Presidency Magistrate, any Magistrate of the First Class inquiring into the offence or with the sanction of the District Magistrate any other Magistrate." The words "inquiring into the offence" qualify the words "Magistrate of the First Class," but they do not qualify the words 'The District Magistrate or Presidency Magistrate.' For in the case of a sanction given by the District Magistrate to any other Magistrate it would be the latter Magistrate who would be making the inquiry and not the District Magistrate. If, therefore, the District Magistrate can sanction the grant of the pardon although he is not making the inquiry himself—*a fortiori* he can himself grant a pardon in such a case.

Further, the expression "any person supposed to have been directly or indirectly concerned in or privy to the offence under inquiry" is a very wide one and includes others besides an accused who has been sent up for trial by the Police.

The pardon was, therefore, legally tendered and that being so, the various legal defences raised are easily disposed of.

It is first suggested that the statement made by opponent to the District Magistrate was a confession and not a statement. It was, no doubt, signed by the opponent and the District Magistrate in his reasons for tendering the pardon uses the word 'confession.' But there is no doubt that the statement is that of a witness and not the confession of an accused. Section 164 provides for the recording both of statements of persons proposed to be called as witnesses and of persons whom it is proposed to charge with an offence. The former are called statements and are recorded on oath, and the latter are called confessions and not recorded on oath but in the manner presented by section 364. The pardon was tendered to the opponent with a view to obtaining his evidence and he was for that reason examined on oath. The District Magistrate used the word confession in no technical sense and the fact that the opponent signed the statement does not alter its character. I have no doubt that the statement recorded is the deposition of opponent given as a witness.

It is then said that under section 337 (4) the District Magistrate had no jurisdiction to try the offence and, therefore, could not record the deposition. Pardon can only be tendered in cases triable exclusively by the High Court or Court of Session and section 337 (4) only refers to those cases in which the disclosure made by the approver shows that only a minor offence triable by a Magistrate has been committed. In such cases this offence should not be tried by the Magistrate tendering the pardon. This is not the case here; moreover, the fact that the District Magistrate had no jurisdiction to try the offence does not affect his competency to record the deposition; see the explanation to section 164.

Then it is said that the opponent has not committed a breach of the condition on which he was pardoned as he was not examined in the Sessions Court. But I concur in the rulings in *Queen* v. *Rana Sami* (1) and *Aligiriswami* v. *Emperor* (2) that the provisions of section 337 (2) have been complied with when the approver has been examined by the Committing Magistrate and that the prosecution are not bound to call him in the Sessions Court if they think him an untruthful witness. Further, the pardon only refers to the offence committed before the tender of pardon. It cannot possibly affect a liability to be tried for perjury committed after the tender of the pardon.

It is next urged that as section 339 (2) expressly provides that the statement of an

(1) 24 M. 321.
(2) 33 M. 514; 5 Ind. Cas. 831; 7 M. L. T. 121; (1910) M. W. N. 5.

approver who has forfeited his pardon may be used in evidence against him when tried for the offence in respect of which the pardon was tendered—it impliedly forbids its use when tried for any other offence. But there is no express limitation in section 339 (2) to a trial for the original offence. No doubt that was the offence the Legislature had in its mind, for the intention was to make any admission in such statement evidence against the accused in spite of section 24, Indian Evidence Act. But there is no implication that the statement may not be used in a trial for another offence and clause (3) of the section makes it very clear that the statement may be used as the basis of a charge of perjury.

Reference has been made to the case of *Empress* v. *Asghar Ali* (3), but in that case and in the Bombay case *Reg.* v. *Hanmanta* (4) which it followed, there had been an illegal tender of pardon to a person who was an accused before the Magistrate and who was, therefore, incapacitated from giving evidence by section 342 (4). These cases have, therefore, no application. The case of *Queen-Empress* v. *Bharma* (5) was also cited but this case was prior to the enactment of the explanation to section 164, Criminal Procedure Code, and was decided on the ground that the Magistrate had not jurisdiction to record the statement. The case has been distinguished on this ground and explained in the cases of *Queen* v. *Alagu* (6) and *Queen* v. *Nanni* (7). The proceeding in which the statement of a witness is recorded under section 164 is an investigation directed by law preliminary to the trial and comes within explanation 2 to section 193, Indian Penal Code, and is, therefore, a stage of a judicial proceeding. I concur with the decision of the Madras High Court on this point in *Suppa Tevan* v. *Emperor* (8).

I would, therefore, sanction the prosecution of the opponent for an offence, under section 193, Indian Penal Code, of giving false evidence in a stage of a judicial proceeding, either on the 29th July 1910 before the District Magistrate, Sukkur, or on the 22nd September 1910, before the Sub-Divisional Magistrate, Rohri, in that he made the following two inconsistent statements:—

Statement before the District Magistrate, Sukkur, on 29th July 1910.	Statement before the Sub-Divisional Magistrate on 22nd September 1910.
I told Allahdino to then detain the *bania* so that I might give him the grain. Allahdino went after the *bania*, and I also followed him. Allahdino went running and caught the *bania*, but the *bania* abused him on his wife and sister and both quarrelled. Being provoked by abuse, he struck the *bania* with the hatchet he had in his hand. I also just arrived there. The *bania* was at that time struggling and I also struck him with a *lathi*. When we had ceased striking, my brother Raban also came afterwards, on hearing noise. Then I and Allahdino threw the corpse in the water of the *dhand* that was adjoining.	I did not tell Allahdino to bring back the *bania* so that I might settle up. I and Allahdino did not go after him. Allahdino did not stop him. I did not hear Dipo abusing Allahdino. I did not see Allahdino strike him with a hatchet, nor did I strike him with a hatchet. Neither did we kill him. Nor did Raban come there. I and Allahdino did not remove the body to the pond.

Sanction accorded.

(3) 2 A. 260.
(4) 1 B. 610.
(5) 11 B. 702.
(6) 16 M. 421.
(7) 22 A. 115.
(8) 29 M. 89; 3 Cr. L. J. 370.

[S. C. 10 M. L. T. 563; (1912) 1 M. W. N. 3].

MADRAS HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION No. 341 OF 1911.

November 29, 1911.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

THE ASSISTANT SESSIONS JUDGE OF NORTH ARCOT—PETITIONER

versus

RAMAMMAL AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 177 195 and 531—Penal Code (Act XLV of 1860), . 468—

ASSISTANT SESSIONS JUDGE OF NORTH ARCOT *v.* RAMAMMAL.

Sanction—Commitment by wrong Court—Commitment to wrong Court—Using a document as genuine—Compulsory production in Court.

As regards the necessity for sanction, an offence under section 463, Indian Penal Code, mentioned in section 195, Criminal Procedure Code, includes all cases of forgery and hence an offence under section 468, Indian Penal Code, requires as a preliminary to its trial the sanction of the Court before which it was committed.

Teni Shah v. *Bolahi Shah*, 14 C. W. N. 479; 5 Ind. Cas. 879, *Queen-Empress* v. *Tulja*, 12 B. 36, followed.

The production of a document which a person is summoned by a Court to produce does not amount to using the document as genuine. The expression 'using a document' is apparently used in the sense of its being put forward in some way for one of the purposes mentioned in section 463, Indian Penal Code.

Though the commitment of an accused by a wrong Court may only be an irregularity. A commitment to a wrong Court is an illegality and ought to be quashed.

Ledgard v. *Bull*, 9 A. 191; 13 I. A. 134; *Queen-Empress* v. *Ram Dei*, 18 A. 350; *Queen-Empress* v. *Thaku*, 8 B. 312, referred to.

Application praying that in the circumstances stated in the letter of reference, dated the 4th October 1911, and the order of reference made by the Assistant Sessions Judge of North Arcot, dated the 3rd October 1911, in the Sessions Case No. 55 of 1911, the High Court will be pleased to quash the order of the Second Class Magistrate of Tirupattur, dated the 5th September 1911, in Preliminary, Register Case No. 4 of 1911, committing the accused therein to take their trial at the Sessions Court of North Arcot.

Mr. *T. Narasimha Iyengar*, for the Accused.

The *Public Prosecutor*, for the Crown.

ORDER.—This is a reference made by the Assistant Sessions Judge of North Arcot asking this Court to quash the commitment of the accused in Sessions Case No. 55 of 1911 to the Court of North Arcot. The order of commitment was made by the Second Class Magistrate of Tirupattur. There are five accused in the case. The first accused Ramammal is the widow of one Ramakrishnier whose mother is the complainant. The second and third accused are respectively the father and brother of the first accused. The fourth accused is also a relation of accused Nos. 1 to 3. The first accused executed on the 20th July 1905, a mortgage-deed for Rs. 3,000 in favour of the third and fourth accused and the consideration for this deed is stated in it to be the amount due for principal and interest on a promissory-note dated the 10th August 1902 alleged to have been executed by the first accused's deceased husband in favour of the 4th accused for Rs. 2,400. The deed further recites that the executant, the first accused, received Rs. 1,500 out of the Rs. 3,000 from the third accused for payment to the fourth accused towards the amount due on the promissory-note. In a suit for maintenance instituted by the complainant against the first accused in the District Munsif's Court of Tirupattur No. 1062 of 1909, the first accused pleaded, apparently with reference to the extent of the property in her hands liable for complainant's maintenance, that she owed a debt of Rs. 3,000 to the 3rd and 4th accused on the mortgage mentioned above. She summoned the 4th accused to produce the mortgage-deed and the promissory-note and in obedience to the summons they were produced by him.

The case for the prosecution is that the promissory-note of the 10th August 1902, is a forged document and that no debt was due by the first accused's husband to the 4th accused. The charges against the 1st accused are abetment of forgery of a valuable security (*i.e.*, the promissory-note) and fraudulently using the same under sections 468 and 109, Indian Penal Code, and section 471, Indian Penal Code. The 2nd, 3rd and 5th accused are charged with abetment of the forgery of the promissory-note, the 2nd accused was the writer and the 5th accused the attestor of the promissory-note. And the charges against the 4th accused are forgery of the promissory-note and fraudulently using the same as genuine.

The learned Assistant Sessions Judge is of opinion that the commitment of all the accused is illegal. With regard to the 1st accused, the objection to the commitment according to him is that the prosecution was not maintainable without the sanction of the District Munsif's Court of Tirupattur as the offences of abetment of forgery and using the forged document as genuine were committed by a party to Original Suit No. 1062 of 1909, in Court in respect of a document produced in that suit. The Assistant Sessions Judge is obviously right in holding that an offence under section 463, Indian Penal Code, mentioned in clause (C) of section 195, Criminal Procedure Code, covers an offence under section 468, Indian Penal Code, the object of mentioning section 463, in section 195 (C),

Criminal Procedure Code, being to include all cases of forgery whatever the nature of the fraudulent intention may be. *Tani Shah* v. *Bolahi Shah* (1) and *Queen-Empress* v. *Tulja* (2).

The commitment of the 4th accused for forgery of the promissory-note and fraudulently using the same as genuine has next to be considered. With respect to the latter Court, it is contended that the production of the document in obedience to an order of the District Munsif's Court does not amount to using it as genuine. This contention is sound. The 4th accused was bound to produce the promissory-note and would have been punishable under section 175, Indian Penal Code, if he had failed to do so. An involuntary production of a document in Court cannot be said to amount to any user of it. It was contended for the prosecution before the Assistant Sessions Judge that apart from its production in the District Munsif's Court, the promissory-note was used for giving a colour of validity to the mortgage-deed, but we doubt whether this argument can be upheld. Assuming that the promissory-note was forged before the mortgage-deed was brought into existence, there was nothing done with the promissory-note at the time of the execution of the mortgage-deed, and it was not used in any way. If both the documents were got up at the same time then they were part of the same transaction and the promissory-note could not have been said to be used in any manner for the purpose of executing the mortgage document. The expression, "using a document" is apparently used in the sense of its being put forward in some way for one of the purposes mentioned in section 463, Indian Penal Code.

It is, however, not necessary to decide about the validity to the objection to the maintainability of the charge of user before the document was produced in Court as the commitment on this charge must be quashed on another ground which applies equally to the charge of forgery as against the 4th accused as well as against the accused Nos. 2, 3 and 5. That ground is that the promissory-note and the mortgage-bond were both executed in the village of Varatnapalli within the jurisdiction of the Sessions Court of the Salem Division. The Assistant Sessions Judge held that the commitment would be illegal as the Magistrate having local jurisdiction over an offence committed at Varatnapalli was the 2nd Class Magistrate of Kristnagiri in the Salem District in so holding. His attention was apparently not drawn to section 531, Criminal Procedure Code, which lays down that no order of any Criminal Court shall be set aside merely on the ground that the inquiry in the course of which it was passed took place in a wrong sub-division or local area, unless it appears that such error has in fact occasioned a failure of justice. An order of commitment is an order within the meaning of this section. See *Queen-Empress* v. *Thaku* (3); *Queen-Empress* v. *James Ingle* (4) and *Queen-Empress* v. *Abbi Reddi* (5). But it must be held that the commitment to the Sessions Court of North Arcot was illegal. Under section 177, Criminal Procedure Code, "every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed." The offence was, therefore, triable by the Sessions Court of Salem and not by the Sessions Court of North Arcot. According to section 213, Criminal Procedure Code, "a Magistrate may make an order committing the accused for trial by the High Court or the Court of Session as the case may be.' The expression 'the Court of Session' here can only mean the Court of Session having jurisdiction to try the case under section 177, Criminal Procedure Code. Section 63 of Act X of 1872, provided that 'Magistrates shall ordinarily commit to the Court of Session for the Sessions Division in which the District to which they are appointed is situated.' But the present Criminal Procedure Code contains no similar provision. The Bombay High Court in *Queen-Empress* v. *Thaku* (3) held that the commitment should be to the Court empowered to try the case under section 177, Criminal Procedure Code. The learned Judges in that case having to deal with a commitment made to a Court not having such jurisdiction did not quash the commitment but directed the transfer of the case to the Court having jurisdiction. But the Privy Council has pointed out in *Ledgard* v. *Bull* (6),

(1) 14 C. W. N. 479; 5 Ind. Cas. 879.
(2) 12 B. 36.
(3) 8 B. 312.
(4) 16 B. 200.
(5) 17 M. 402.
(6) 9 A. 191; 13 I. A. 134.

that a transfer from a Court having no jurisdiction would not render the proceeding legal. The Allahabad High Court in *Queen-Empress* v. *Ram Dei* (7) followed a similar course. *Ledgard* v. *Bull* (6) was apparently not brought to its notice. We do not, therefore, think that we would be justified in upholding the commitment and directing the transfer of the case to the Sessions Court of Salem. We must hold that the commitment is illegal, and set aside the order of the Sub-Magistrate of Tirupattur. As we are informed that an appeal against the judgment of the District Munsif's Court of Tirupattur in Original Suit No. 1062 of 1909 is still pending we do not consider it necessary to pass any further order in the case at present.

(7) 18 A. 350.

[s. c. 11 M. L. T. 23; (1912) M. W. N. 42.]

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 588 OF 1911.

CASE REFERRED No. 120 OF 1911.

December 14, 1911.

Present:—Mr. Justice Ayling.

In re SUBBIAH SERVAI AND OTHERS—ACCUSED.

Penal Code (Act XLV of 1860), *s.* 379—*Theft—Irrigation tank—Removal of fish—Facts of each case to be looked into.*

Whether the removal of fish from an irrigation tank amounts to theft depends upon the facts of each case. When the water is so low that the fish could not escape, the removal may be theft.

Subba Reddi v. *Munsoor Ali Sahib*, 24 M. 81, *Queen-Empress* v. *Shaik Adam* valad *Shaik Farid*, 10 B. 193, *Maya Ram Surma* v. *Nichala Kantani*, 15 C. 402, referred to.

Case referred for the orders of the High Court under section 438 of the Criminal Procedure Code by the Additional District Magistrate of Madura, in his letter, dated the 16th September 1911, R. O. C. No. 744/Mag. of 1911.

The *Public Prosecutor*, for the Crown.

ORDER.—The accused were convicted of theft in removing fish from a Government irrigation tank. They pleaded guilty but the District Magistrate, relying on the ruling in the High Court Proceedings 663, dated 10th April 1880, has referred the case on the ground that the capture of fish in an ordinary irrigation tank does not amount to theft.

The ruling quoted, which has been followed in a later case *Subba Reddi* v. *Munsoor Ali Sahib* (1), is authority for the general principle above referred to but there is a reason to doubt whether that principle is to be applied to all cases and under all circumstances or was intended to be so applied. A somewhat different view has been taken by both the Bombay and Calcutta High Courts, vide *Queen-Empress* v. *Shaik Adam* valad *Shaik Fraid* (2) and *Mayaram Surma* v. *Nichala Kantani* (3). In the former case the tank in question was an enclosed Municipal tank; but the *ratio decidendi* was that the fish being unable to escape from the tank are practically in the power and dominion of the owner so as to be capable of being the subject of theft. It has been pointed out that even in an open irrigation tank after the water has fallen to such an extent that both the supply and distribution channels are dry the freedom of the fish is equally circumscribed and the learned Judges of the Calcutta High Court in the ruling above quoted appear to clearly recognise that under such circumstances a conviction for theft might be sustainable. It was presumably in view of those considerations that Miller, J., in the latest Madras case to which I had been referred (Criminal Revision Petition No. 580 of 1909), held that each case must be decided on the particular facts thereof—in other words, that the general principle laid down in *Subba Reddi* v. *Munsoor Ali Sahib* (1) and the earlier case was not universally applicable. He accordingly refused to interfere with a conviction based on very similar facts to those in the present case.

In the view I cannot but concur though I fully realise the desirability of a more positive exposition of the law, if it were possible, and the drawbacks inevitably attendant on a state of affairs in which an act which is lawful to-day may become a criminal offence to-morrow and *vice versa*.

In the present case the judgment gives no indication of the state of the tank but the District Magistrate says that the Sub-Magistrate's statement that the water was so low that the fish could not escape is probably correct. In view of this and of the fact that the accused pleaded guilty and have

(1) 24 M. 81.
(2) 10 B. 193.
(3) 15 C. 402.

only been awarded small fines, I do not feel it necessary to call for further evidence or to interfere in any way with the conviction and sentence.

(s. c. 16 C. W. N. 69.)

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 314 OF 1911.

July 11, 1911.

Present:—Mr. Justice Caspersz and Mr. Justice Sharfuddin.

KADER SUNDAR AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 400—Association for habitual pursuit of dacoity—General criminality of tribe not to be imputed to individual members—Section to be strictly construed—Gist of offence—What must be established to convict accused—Approver's testimony—Corroboration—Acquittal—No adverse inference against accused after acquittal—Past misconduct of accused, when may be considered.

The general criminality of a tribe or caste cannot be imputed to individual members operating in gangs where the prosecution is under section 400, Indian Penal Code.

The Public Prosecutor v. *Bonigiri Pottigadu*, 32 M. 179 at p. 184; 5 M. L. T. 100; 9 Cr. L. J. 567; 5 Ind. Cas. 307, referred to.

The offence under section 400, Indian Penal Code, is one of a very special character and entirely the creature of statute. The section must, therefore, be strictly construed.

Judgment of *Phear, J.*, in *Queen* v. *Mooktaram Sirdar*, 23 W. R. Cr. 18, relied upon.

Association for the habitual pursuit of dacoity is the gist of the offence under section 400, Indian Penal Code.

Although the evidence need not show the same degree of particularity as to the commission of each dacoity as is required to support a substantive charge of that crime, it must be established, for the purpose of conviction, that the accused belong to a gang whose business is the habitual commission of dacoity. The special conspiracy must be proved.

Empress v. *Kure*, A. W. N. (1886) 65, and *King-Emperor* v. *Tirumal Reddi*, 24 M. 523 at p. 546, referred to.

Corroboration of the testimony of an approver must connect the accused with the offence, that is, association of a gang of persons for the business of habitually committing dacoity.

No adverse inference can be drawn against the accused after their acquittal. Therefore, if some of the persons accused under section 400, Indian Penal Code, had been tried on a charge of dacoity but acquitted, that fact cannot be relied on by the prosecution to prove that they were habitual dacoits.

Emperor v. *Noni Gopal Gupta*, 15 C. W. N. 593; 38 C. 559; 10 Ind. Cas. 582; 12 Cr. L. J. 286, and *Rex* v. *Plummer*, (1902) 2 K. B. 339; 71 L.J.K.B. 805; 86 L. T. 836; 51 W. R. 137; 66 J. P. 647; 20 Cox. C.C. 269, followed.

If the association for the purpose of habitually committing dacoity be made out, the past history of the accused, that they had been convicted of dacoity or had been bound down to be of good behaviour would be significant.

Bonai v. *Emperor*, 15 C. W. N. 461; 9 Ind. Cas. 555; 38 C. 408; 12 Cr. L. J. 97, relied upon.

Appeal against the conviction and sentence under section 400, Indian Penal Code, passed on February 15th, 1911, by the Additional Sessions Judge of Bogra, agreeing with the opinion of the assessors.

Babu *Monmatha Nath Mukherjee*, for the Appellants.

Mr. *Sultan Ahmed* with *Moulvi Khorshaid Hossien*, for the Crown.

JUDGMENT.—The Sessions Judge concurring with the four assessors, has convicted the 29 appellants for belonging to a gang of persons associated for the purpose of habitually committing dacoity and he has sentenced appellants Nos. 2 and 27 to transportation for life and the other appellants to rigorous imprisonment for seven or five years. The trial of the case occupied two months in the Court of Session, but the substantial question for determination is a simple one, namely, whether the approver, Bayan Sandar, has been adequately corroborated in respect of each of the appellants. Six appellants Nos. 8, 10, 14, 15, 17, 26 may be excluded at the outset, because the learned Deputy Legal Remembrancer intimated during the hearing, that he was unable to support their convictions. There remain 23 appellants including two (Nos. 2 and 18) who made confessions in the Magistrate's Court.

The case for the Crown is that the *Sandars* are a semi-criminal tribe, dwelling in boats, wandering and predatory by habit and instinct, that the appellants belonged to a gang of *Sandars* operating during the years 1891—1909, in the Districts of Bogra, Pubna, Rungpur, Mymensingh and Rajshahye, and that the numerous dacoities that took place were the work of this gang which, however, did not invariably consist of the same persons but committed dacoities in detachments.

Bayan Sandar, the approver, was convicted in the Gadakhali Dacoity case in February 1909. Subsequently, on the 11th April 1909, he made a detailed confession to a Magistrate of the crimes he had been guilty of, as a member of the gang, and this was

KADER SUNDAR v. EMPEROR.

"verified" by another Magistrate. On this basis, the 29 appellants were sent up for trial with the result we have mentioned.

The Sessions Judge, after reciting the history of the initiation of the case and stating the general effect of the evidence of Bayan, proceeds to give, in tabular form a list of the dacoities and thefts in which Bayan implicated himself and the appellants who are his relations.

The tabular form gives a list of eighteen criminal occurrences, the date of each such occurrence, the names of the persons implicated by the confession of Bayan and by his evidence in Court, and the documents (first informations, etc.) and the witnesses proving the occurrence. But the numerous witnesses mentioning the appellants merely say that they are *Sandars* that they live in boats, and that the boats congregate in *bahars* that is in flotillas, at various places in the net work of rivers which constitute a peculiar feature of that part of the country. The witnesses identify the appellants in one sense, but they do not connect them or any of them with the tabulated occurrences Identification of this kind does not carry the case for the Crown very far in a prosecution under section 400, Indian Penal Code, though no doubt such evidence and the other evidence in this case might be valuable if the proceedings had been for bad livelihood or with reference to the Criminal Tribes Act (now Act III of 1911). The general criminality of a tribe or caste cannot be imputed to individual members operating in gangs where the prosecution is under section 400, Indian Penal Code. See *The Public Prosecutor* v. *Bonigiri Pottigadu* (1). Similarly, the documents specified do not prove that particular persons were named as having been concerned in any occurrence to which they relate. In seven occurrences only, *Sandars* were suspected as having committed the offence reported. None were convicted. The utmost that can be said is that *Sandars* were seen within a distance of three miles from the scenes of the occurrences at or about the time in question. We offer these observations in this place because they have an important bearing in the matter of corroboration of the testimony of the approver, and it is as well to state, at once, the difficulty we feel in dealing with the case.

(1) 32 M. 179; 5 M. L. T. 100; 9 Cr. L. J. 567; 5 Ind. Cas. 307.

The Sessions Judge, after discussing some discrepancies in the evidence of Bayan, next proceeds to consider each occurrence from the year 1892 to 1908 when the Gadakhali dacoity in which Bayan was caught red-handed, was perpetrated. The Sessions Judge explains the nature of the corroboration, which, in his opinion, was sufficient, but we do not find anywhere that he directed his attention to what is legally adequate corroboration, that is, evidence connecting each of the appellants with each or some of the occurrences. We may mention that the Magistrate who verified Bayan's confession was not examined as a witness, but the inferior evidence of the verification witnesses was recorded and relied on. Even so, the verification does not touch the appellants.

The Sessions Judge then mentions certain other dacoities and thefts of which the Fulchari dacoity may be taken as a specimen. A Railway Booking Clerk (P. W. No. 65) says that some persons took 7 or 8 tickets, possibly, bearing consecutive numbers, at the Bogra Station for Fulchari on the day in question. We are unable to hold that this fact proves that twelve of the appellants were the dacoits—in fact, railway tickets must be issued in a consecutive series, and the clerk cannot know who the passengers are—whether dacoits or others. Moreover, Bayan said, in his confession that only eight persons committed the Fulchari dacoity. The finding of the Sessions Judge is in general terms that,—"There appears reason to think *Sandars* committed those dacoities and thefts." He also says that a large number of *Sandars* were seen staying with their boats at the different centres of their association; that thefts and dacoities increased in the quarter where they used to stay; that the *Sandars* were kept under Police surveillance, and their boats used to be regularly searched. It is a fact of importance that no stolen property was ever recovered in any of these searches.

The Sessions Judge concludes his judgment with a consideration of the case of each of the appellants, but his analysis is not conclusive and does not go beyond his previous estimate of the evidence.

In dealing with the judgment of the Sessions Judge we have inevitably expressed the views we are constrained to adopt on the essential aspects of the case. The learned Deputy Legal Remembrancer and the learn-

KADER SUNDAR v. EMPEROR.

ed Vakil for the appellants have afforded us the greatest assistance in examining the bulky record in which, it is admitted, much irrelevant matter is contained. The arguments of the learned Deputy Legal Remembrancer may now be considered in their order, and we proceed to do so.

It is argued for the Crown (1) that evidence proving an offence under section 400, Indian Penal Code, need not be of the same quality as in the case of ordinary offences; (2) that in seven dacoities, during the shorter period 1899 –1909, *Sandars* were referred to as being concerned in the same, and that their presence near the scenes of the occurrences affords sufficient corroboration of the story of Bayan; (3) that four of the appellants (Nos. 7, 9, 21, 25) were sent up but acquitted in the Fulchari dacoity (P. W. Nos. 65, 75, 204); (4) that the previous convictions of some of the appellants may be taken into consideration; (5) that the confessions of appellants Nos. 2 and 18 are sufficient to complete the evidence against them.

(1) Association is the gist of the offence punishable under section 400 of the Penal Code, that is, association for the habitual pursuit of dacoity. The subject is fully discussed by Dr. Gour in his second volume on the Penal Law of India, and he has collected all the cases under the section (pp. 1587—1590). The section is a highly penal one, and, as was said by Phear, J., in *The Queen* v. *Mooktaram Sirdar* (2), the offence is 'one of a very special character and entirely the creature of statute." The section must, therefore, be strictly construed. Although the evidence need not show the same degree of particularity as to the commission of each dacoity as is required to support a substantive charge of that crime [*Empress* v. *Kure* (3)] it must be established, for the purpose of conviction, that the accused belong to a gang whose business is the habitual commission of dacoity. The special conspiracy must be proved—see *King-Emperor* v. *Tirumal Reddi* (5). A good illustration of the kind of evidence to be adduced in such a case as this is to be gathered from the judgment of Munro, J., in *The Public Prosecutor* v. *Bonigiri Pottigadu* (1), and we think that, in the case before us, the evidence under the seven heads (at p. 181 of the report is almost entirely absent. For instance, it has not been shown that the appellants move about in batches, have been arrested in batches, and are absent from home in batches, or that the appellants have been concerned in a large number of dacoities.

(2) It follows from the principles we have just mentioned, that the implication of *Sandars* generally in the number of even seven dacoities spread over the shorter period of ten years. is not sufficient proof against the present appellants. The tribe or caste of *Sandars* contains thousands of human beings, and even one *bahar* or flotilla of fifty boats may include two hundred persons. The approver Bayan has been corroborated to some extent as to the *facts* of the dacoities, but that corroboration has no tendency to prove that the appellants were with him on each or some of the occasions. Corroboration of the testimony of an approver must connect the accused with the offence—here, the association of a gang of persons for the business of habitually committing dacoity. In this essential respect, the evidence does not sufficiently support the story of the approver, and we may add that Bayan's deposition, which has been placed before us, is not free from important contradictions which cast doubts on his veracity. We have already noticed the vital fact that no stolen property was found in the possession of any of the appellants; if stolen or suspicious property had been discovered, that would have been adequate corroboration.

(3) The third contention of the learned Deputy Legal Remembrancer may be dismissed with the observation that the acquittal of the accused in Fulchari dacoity can only mean that they had nothing to do with that crime. See the cases of *The Emperor* v. *Noni Gopal Gupta* (5), *Rex.* v. *Plummer* (6). No adverse inference can be drawn against the accused after their acquittal.

(4) The next argument concerns the previous convictions of some of the appellants. Jadu (No. 23) was twice punished for dacoity. Sabed (No. 4), Rahimuddin (No. 6), Jalla (No. 11), Jadu (No. 23) and Tomiz (No. 24) were bound down to be of good behaviour under section 110, Criminal Procedure Code. Lal

(2) 23 W. R. Cr. 18.
(3) (1886) A. W. N. 65 at p. 66.
(4) 24 M. 523 at p. 546.
(5) 15 C. W. N. 593; 38 C. 559; 10 Ind. Cas. 582; 12 Cr. L. J. 286.
(6) (1902) 2 K. B. 339; 71 L. J. K. B. 805; 68 L. T. 36; 51 W. R. 137; 66 J. P. 647; 20 Cox. C. C. 269.

In re ARUNACHELLA TEVAN.

Chand (No. 19) was convicted for theft and sentenced to three months' rigorous imprisonment. These are the previous convictions relied on. They do not carry much weight, though, no doubt, if the association for the purpose of habitually committing dacoity had been made out, the past history of some of the appellants would have been significant, as was pointed out in the case of *Bonai* v. *The King-Emperor* (7).

(5) The last contention covers the case of the appellants who confessed in the first Court (Nos 2 and 18). We have heard the confessions read out. The appellants did not admit the existence of a gang. No. 2 spoke of five thefts and five dacoities. No. 18 mentioned only one theft and one dacoity. The confessions were retracted before the Magistrate. In our opinion, such confessions cannot be deemed conclusive where the other evidence in the case is so wanting in precision.

The conclusion of the whole matter is, that all the appellants, including the six exempted by the learned Deputy Legal Remembrancer, are in the same category, and must be acquitted of the present charge under section 400, Indian Penal Code. We regret the expenditure of public time in the trial of this case in the Court of Session.

The appeal is allowed. The convictions and sentences are reversed. The appellants will be set at liberty, so far as the present proceedings are concerned.

Appeal allowed.

(7) 15 C. W. N. 461; 38 C. 408; 9 Ind. Cas. 555; 12 Cr. L. J. 97.

MADRAS HIGH COURT.

CRIMINAL APPEALS NOS. 514 AND 557 OF 1911.

December 15, 1911.

Present:—Mr. Justice Spencer.

In re ARUNACHELLA TEVAN AND ANOTHER—APPELLANTS.

Penal Code (Act XLV of 1860), ss. 392, 397—Misdirection to Jury—Absence of evidence that accused caused grievous hurt—Hurt caused by some of the robbers—Direction to convict.

Where, on a charge against the accused under sections 392 and 397, Indian Penal Code, the Sessions Judge, while pointing out to the jury that there was no evidence that the accused caused grievous hurt or used deadly weapons, directed them to convict under section 397, Indian Penal Code, because grievous hurt was caused by some of the robbers some of whom used knives:

Held, (1) that this amounted to a misdirection and the conviction under section 397, Indian Penal Code, could not be sustained;

(2) that the accused were rightly convicted under section 392, Indian Penal Code.

Criminal Appeal 315 of 1886 and *Emperor* v. *Nageswar*, 28 A. 404; 3 Cr. L. J. 322; A. W. N. (1906) 61, referred to.

Appeal against the conviction and sentence of the Court of Session of the Tinnevelly Division, in C. C. No. 61 of 1911.

Mr. *M. D. Devadoss*, for the Appellants.

Mr. *C. F. Napier*, Public Prosecutor, for the Crown.

JUDGMENT.—The appellants have been convicted by a jury of offences under sections 392 and 397, Indian Penal Code, and sentenced each to 5 years' rigorous imprisonment. This sentence, as the learned Sessions Judge himself subsequently discovered and has pointed out in a letter of reference, is less than the minimum prescribed by section 397, Indian Penal Code.

I do not find any misdirection in the charge to the jury except as regards the liability of the appellants to conviction under section 397, Indian Penal Code. The Judge, while pointing out to the jury that there is no evidence that these appellants caused the grievous hurt or (apparently) used deadly weapons has directed the jury that they may convict the appellants of an offence under section 397, Indian Penal Code, merely because grievous hurt was caused by some of the robbers and (apparently) that some of the robbers used knives. This view finds no support in the wording of the section, especially as compared with section 394, Indian Penal Code, and is opposed to the ruling of this Court in Criminal Appeal No. 315 of 1886 reported on page 450 of Vol. I of Weir's Law of Offences and Criminal Procedure and of the Allahabad High Court in *Emperor* v. *Nageshwar* (1). It is now supported by the Public Prosecutor. I hold it to be erroneous. It follows that the conviction under section 397, Indian Penal Code, was wrong and was induced by a misdirection of the Judge. It must, therefore, be set aside.

But I see no reason to interfere with the conviction under section 392, Indian Penal Code. This is fully supported by the evidence and it is impossible to see how the verdict of the jury as regards this offence could have been influenced by the misdirec-

(1) 28 A. 404; 3 Cr. L. J. 322; A. W. N. (1906) 61.

tion above referred to. I quash the conviction under section 397, Indian Penal Code, and uphold the conviction under section 392, Indian Penal Code. The sentence is reduced to 3 years' rigorous imprisonment in the case of each appellant.

Sentence reduced.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 50 OF 1911.

December 6, 1911.

Present:—Mr. Justice Tudball.

GANESH PERSHAD—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), *s.* 476—*Civil Procedure Code (Act V of* 1908), *s.* 115—*Fabrication of evidence and forgery committed by a* Patwari *in* Tahsil *records*—Patwari *appearing as a witness in District Judge's Court—Departmental inquiry made by District Magistrate—District Judge directing prosecution of* Patwari *on basis of Departmental inquiry—Judicial proceedings—No inquiry by District Judge—Material irregularity.*

A *Patwari* appeared as a witness in a Civil case in the Court of a District Judge. After the decision of the case the District Magistrate had a Departmental inquiry made which went to show that the *Patwari* had fabricated false evidence and had also forged a signature in his diary in the *Tahsil* records. Upon this the District Magistrate applied to the District Judge for sanction to prosecute the *Patwari* for the offences of perjury and forgery and along with his application for sanction forwarded the record of the Departmental inquiry.

The District Judge on perusal of this record issued notice to the *Patwari*, and after hearing him directed his prosecution on the basis of the Departmental inquiry:

Held, (1) that the District Judge had no jurisdiction to order prosecution in respect of matters which had occurred in the *Tahsil* and not in his Court;

(2) that, assuming the matters to have been brought to the notice of the District Judge in the course of a judicial inquiry, as the record of the Departmental inquiry was not evidence in the matter of the sanction applied for by the District Magistrate, the District Judge acted with material irregularity in ordering prosecution without having himself made an inquiry.

Revision against the order of the District Judge of Mirzapur, dated the 14th of January 1911.

Mr. *Haribans Sahai*, for the Appellant.

Mr. *Ryves*, for the Crown.

ORDER.—This is an application in revision under section 115 of the Code of Civil Procedure and arises out of the following circumstances:—

A civil suit was heard in the Court of the District Judge of Mirzapur in the course of which Ram Daur Lal, *Patwari*, gave evidence.

After the decision of the case the District Magistrate applied to the District Judge for sanction to prosecute Ram Daur Lal for the offences of forgery and perjury. The District Judge refused sanction in respect of the forgery on the ground that it was unnecessary and refused sanction in the matter of the alleged perjury on the ground that the words used did not amount to perjury. When applying for sanction, the District Magistrate forwarded to the District Judge the record of a Departmental inquiry made by one of his subordinates. The record of that Departmental inquiry, judging from the Judge's order in the present case, went to show that Ram Daur Lal and one Ganesh Prosad had fabricated false evidence or had attempted to do so by introducing into the *Tahsil* record room the *Patwari's* diary for 1314, also it goes to show that these persons either committed forgery or entered into a conspiracy to do so by signing the name of the superior *Kanungo* in the diary. The District Judge on perusal of this record and after refusing the sanction, for which the District Magistrate had applied, issued notice to these two persons to show cause why he should not place them on trial for the above-mentioned offences. After hearing what they had to say, he directed their prosecution and hence the present application in revision.

The first objection, and a very material one, to the action taken by the District Judge, is that he had not before him any evidence whatsoever in respect of the commission of the alleged offence, there is no basis for his order and that he has, therefore, at least acted with material irregularity. It is urged that the record of the Departmental inquiry is not evidence at all. It is clear that the Judge has ordered the prosecution in respect of matters which occurred in the *Tahsil* and not in his Court and in respect of which there was no evidence whatsoever before him. It may be assumed that the matter was brought to his notice in the course of a judicial inquiry but it seems to be materially irregular to order a prosecution for such offences without having before it at least some material in the shape of evidence which goes to show that there is reason

to believe that the offences have been committed. The District Judge has made no inquiry himself. He has acted on what is not evidence that is on the basis of a record at which he ought never to have looked it not being evidence in the matter of the sanction applied for by the District Magistrate. On the ground of what I deem to be material irregularity, if not illegality, I admit the application and set aside the order of the District Judge. I make no order as to costs.

Order set aside.

(s. c. 5 S. L. R. 173.)

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 65 OF 1911.

August 16, 1911.

Present:—Mr. Pratt, J. C.

IMPERATOR—

versus

RAJABALI SON OF ADMJI—

Reformatory Schools Act (VIII of 1897), s. 16—Detention in lieu of imprisonment—Appeal—Power of Appellate Court to alter sentence of imprisonment to one of whipping—Effect of alteration.

Under section 16 of the Reformatory Schools Act, an order substituting detention in a Reformatory for imprisonment cannot be interfered with in appeal but this does not preclude an Appellate Court from altering the sentence of imprisonment to one of whipping. When the order of imprisonment is altered to one of whipping, the order of detention in a Reformatory falls to the ground.

Queen-Empress v. *Hori*, 21 A. 391, relied upon.

Appeal against the decision of the Additional City Magistrate, Karachi.

Mr. *J. F. de Vertuil*, for the Appellant.

The *Assistant Public Prosecutor*, for the Crown.

JUDGMENT.—The accused has been convicted of theft in a dwelling house and sentenced to simple imprisonment for one year. The Magistrate has directed that the accused should, instead of undergoing the sentence, be detained for 4 years in a Reformatory. There is no question as to the propriety of the conviction for the accused has pleaded guilty.

Under section 16 of the Reformatory Schools Act, VIII of 1897, I cannot interfere with the order substituting detention in a Reformatory for imprisonment, but that does not preclude me from altering the sentence of imprisonment to one of whipping—and in that case the order for detention in a Reformatory which could not be passed in substitution of such sentence—would fall to the ground—See *Queen-Empress* v. *Hori* (1).

It is admitted that the accused is a young boy living under the control of his parents who are respectable people and as this is a first offence I think they might be allowed to retain custody of the boy and endeavour to reclaim him from the vicious tendencies that he has displayed.

I, therefore, confirm the conviction but alter the sentence to one of whipping and direct that the accused receive fifteen stripes.

Sentence altered.

(1) 21 A. 391.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 37 OF 1911.

December 20, 1911.

Present:—Mr. Justice Karamat Hussain and Mr. Justice Chamier.

AJODHIA PARSHAD—APPLICANT—APPELLANT

versus

RAM LAL AND ANOTHER—OPPOSITE PARTY—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 195 (7), cls. (b), (c)—Perjury committed in execution proceedings in a rent suit—Sanction to prosecute—"Case," meaning of—Appeal—Jurisdiction—Principal Court of original jurisdiction—District Judge.

In the course of execution proceedings of a rent decree passed under the Agra Tenancy Act of 1901, *R.* made a statement which was false. An application was made to the Assistant Collector for sanction to prosecute. The Assistant Collector rejected the application. The applicant then appealed to the District Judge who dismissed the appeal on the ground that he had no jurisdiction in the matter:

Held, that the District Judge was right in dismissing the appeal as he had no jurisdiction in the matter.

Per *Chamier, J.*—The word 'case' in clause (*b*), subsection 7 of section 195 of the Code of Criminal Procedure of 1898, may mean either the original case, out of which arose the case or proceeding in which the offence is said to have been committed, or the actual proceeding in which the offence is said to have been committed. It must be construed with reference to the context in which it appears. There being a remote connection with the original suit and an immediate connection with the execution proceeding, the case in connection with which the offence in question is alleged to have been committed is the execution proceeding.

Clause (*c*) applies to the present case and, therefore, the applicant should have applied to the principal Court of original jurisdiction.

AJODHIA PARSHAD *v.* RAM LAL.

The principal Court of original jurisdiction under the Tenancy Act of 1901, is clearly not the Court of District Judge.

Per *Karamat Husain, J.*—The word "case," in clause (*b*) of sub-section 7 of section 195 of the Criminal Procedure Code means the actual proceedings in which the offence is said to have been committed and not the original case out of which those proceedings arose.

The opening words of clause (*c*) of the section "where no appeal lies" refer to cases in which no appeal lies and not to Courts against the decision of which there is no appeal.

Wazir Muhammad v. *Hub Lal*, 31 A. 313; 6 A. L. J. 231; 9 Cr. L. J. 504; 2 Ind. Cas. 182, referred to.

Revision against the order of the District Judge of Moradabad, dated 22nd December 1911.

Mr. *Hamilton*, for the Applicant.

Mr. *Bajpai*, for the Opposite Party.

JUDGMENT.

CHAMIER, J.—A suit for arrears of rent exceeding Rs. 100 was brought in the Court of an Assistant Collector of the first class and was decreed. In the course of execution proceedings in the same Court the respondents made statements which according to the applicant were false. The applicant then applied to the Assistant Collector for sanction to prosecute the respondent. That officer refused to give sanction and the applicant then went in appeal to the District Judge who threw out the appeal on the ground that he had no jurisdiction to hear it. This is an application for revision of the order of the District Judge. On behalf of the applicant it is contended that the case is governed by clause (*b*) of sub-section 7 of section 195 of the Code of Criminal Procedure and that on a proper construction of that clause the District Judge had jurisdiction. It is contended further that he had jurisdiction even if clause (*c*) of the same sub-section is held to be applicable and that one or other of these clauses must apply to the case. As regards clause (*b*) the argument for the applicant is that the *case* in connection with which the offence is said to have been committed was a suit for rent exceeding Rs. 100 against the decree in which an appeal lay to the District Judge, therefore, the Assistant Collector who refused sanction must be deemed for the present purpose to be subordinate to the District Judge who accordingly ought to have entertained the appeal. To this the respondent's reply that the *case* in connection with which the offence is alleged to have been committed was the execution proceeding the order on which was not appealable, therefore, clause (*b*) does not apply. The applicant contends that even if clause (*b*) is held to be inapplicable clause (*c*) cannot apply because the opening words of the clause "where no appeal" refer only to cases in which no appeal lies against any decisions of the Court and that the words do not mean as contended by the respondents. "Where no appeal lies in the case in connection with which the offence is alleged to have been committed." In the alternative the applicant contends that if clause (*c*) applies the Court indicated is the Court of the District Judge. To this the respondents reply that the principal Court of original jurisdiction under the Tenancy Act is the Court of the Collector.

The word "case" has been the subject of many conflicting decisions in connection with section 622 of the Code of Civil Procedure, 1882, and section 115 of the present Code. I do not think that any useful purpose would be served by a reference to these decisions, for the word must be construed with due regard to the context in which it appears and the purpose for which the section of which it forms part was framed. It was this consideration which led the majority of the Chartered High Courts to place a narrow meaning upon the word "case" in the sections just mentioned. The object of sub-section 7 of section 195 of the Code of Criminal Procedure was to indicate the Court to which a Court giving or refusing sanction to a prosecution should be deemed to be subordinate within the meaning of sub-section (6). As originally framed, sub-section (7) provided only that the Court giving or refusing sanction should be deemed to be subordinate only to the Court to which appeals ordinarily lay. This produced a mass of conflicting rulings and clauses (*a*), (*b*) and (*c*) were added with a view to getting rid of the difficulty. Clause (*a*) provides for the case of a Subordinate Court against whose decisions appeals lie and two Courts of different grades and is plain enough. Clause (*b*) provides for the case of a Subordinate Court against whose decision appeals lie to two different kinds of Courts. Here the test is to what Court did an

In re MUTHIAH CHETTY.

appeal lie in the case in connection with which the offence is alleged to have been committed? The word *case* taken by itself may mean either the original case out of which arose the case of proceeding in which the offence is said to have been committed or the actual proceeding in which the offence is said to have been committed. It must be construed with reference to the context in which it appears. The words are "*nature of the case in connection with which the offence is alleged to have been committed.*" There being a remote connection with an original suit and an immediate connection with an execution proceeding, I am of opinion that the case in connection with which the offence is alleged to have been committed is the execution proceeding. According to the decisions of this Court no appeal lies against an order of an Assistant Collector of the first class passed in execution proceedings under the Tenancy Act. The result is that clause (*b*) does not apply. Does clause (*c*) apply? The opening words of the clause "where no appeal lies" do not appear to me to refer to a Court against none of whose decisions an appeal lies but to refer to particular cases in which no appeal lies. The whole sub-section seems to be confined to Courts against whose decisions or some of whose decisions appeals do lie, for the opening words are "For the purposes of this section every Court shall be deemed to be subordinate only to the Court to which *appeals from the former Court ordinarily lie*" (the italics are mine). The result of this construction is, possibly, that the Legislature has made no provision in section 195 for an appeal against an order of a Small Cause Court giving or refusing sanction and it may be that the only Court which can interfere with such an order is the High Court. This result may not have been contemplated but the construction advocated by the applicant seems to me to be clearly inadmissible. It would have been another matter if clause (*c*) had formed a separate sub-section. I hold that clause (*c*) applies to the present case and, therefore, the applicant should have appealed to "*the principal Court of original jurisdiction.*" I can discover no justification for reading these words as if they were "*principal Court of original Civil jurisdiction*" The clause applies to all classes of cases and it is impossible to suppose that the Legislature intended the principal Court of Original Civil jurisdiction to revise the orders of Criminal and Revenue Courts with which it has no concern as a Civil Court. The circumstance that District Judges in this Province, generally, have the power of Sessions Judges and hear appeals in Revenue cases seems to be wholly irrelevant. The principal Court of original jurisdiction under the Tenancy Act is clearly not the Court of the District Judge.

For the above reasons, I am of opinion that the District Judge was right in declining to entertain the applicant's appeal and I would dismiss this application with costs.

KARAMAT HUSAIN, J.—I am of opinion that the word "case" in clause (*b*), sub-section 7 of section 195 of the Code of Criminal Procedure (Act V of 1898) means the actual proceedings in which the offence is said to have been committed and not the original case out of which those proceedings arose. I am also of opinion that the opening words of clause (*c*), sub-section 7 of section 195 of the Code "Where no appeal lies" refer to cases in which no appeal lies and not to Courts against the decisions of which there is no appeal. It was so held by me in *Wasir Muhammad* v. *Hut Lal* (1). In that ruling it was assumed that the Court of District Judge was the principal Court of original jurisdiction. That, however, is not the case and the nature of the proceedings in which sanction is given or refused is to determine the principal Court of original jurisdiction. For the above reasons, I agree with my learned brother in dismissing the application.

BY THE COURT.—Order of the Court is that the applicant be dismissed with costs.

Application dismissed.

(1) 6 A. L. J. 231; 9 Cr. L. J. 504; 31 A. 313; 2 Ind. Cas. 182.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 567 OF 1910.

December 5, 1911.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

In re MUTHIAH CHETTY—APPELLANT.

Penal Code (Act XLV of 1860), ss. 175, 193, 471—Evidence Act (I of 1872), s. 162—Production of document in obedience to Court Summons—Document found to be forged—Using as genuine a forged document—

In re MUTHIAH CHETTY.

Giving false evidence with regard to the document—Perjury.

Accused produced a document before a Munsif in obedience to a Court summons and, when examined as a witness, stated that P. W. No. 1 delivered it to him. It was found that the document was not genuine and that P. W. No. 1 had not given it to him. Accused was tried and convicted under section 471, Indian Penal Code, for using as genuine a forged document:

Held, (1) that the conviction was wrong as the mere production by a person of a document in obedience to a Court summons is not, by itself, a user of that document by him.

Assistant Sessions Judge North Arcot v. *Ramammal*, 10 M. L. T. 563; (1912) M. W. N. 3; 13 Ind. Cas. 275, followed.

A witness who is summoned to produce a document cannot be put to the risk of having to consider whether a document answering the description contained in the summons is in fact genuine and whether there is any reason to believe it to be not genuine. The mere production of a document in answer to a command of Court cannot be regarded as fraudulent in law.

(2) That the giving of false evidence by the accused that P. W. No. 1 delivered the document to him with a fraudulent intention did not amount to a fraudulent user of the document with reference to which the evidence was given, though it might expose him to a prosecution for perjury.

Asimuddi Sheikh v. *King-Emperor*, 11 C. W. N. 838; 5 Cr. L. J. J. 351; 5 C. L. J. 454, explained.

Appeal against the sentence of the Court of Session of the Madura Division, in Sessions Case No. 39 of 1911.

Mr. *K. Sadagopachariar*, for the Appellant.

Mr. *C. F. Napier*, Public Prosecutor, for the Crown.

JUDGMENT.—In this case the accused has been convicted under section 471 of the Indian Penal Code of fraudulently or dishonestly using as genuine a document which he knew or had reason to believe to be a forged document.

The facts are that the accused was summoned to produce the document in question (Exhibit J) Original Suit No. 39 of 1910 on the file of the Subordinate Judge's Court of Madura (West). He was not a party to that suit. In answer to the Court summons he produced the document. He was afterwards examined as witness in that case, and he gave the deposition marked as Exhibit K. He then stated on oath that the prosecution first witness in that case gave the document to him. The learned Sessions Judge has found that the document was not genuine and that the prosecution first witness did not give it to the accused. We decide the case on the assumption that these findings are correct. So far as the production of the document was concerned, the accused was bound to obey the summons of the Court. Section 162 of the Indian Evidence Act lays down that every witness summoned to produce a document shall do so, and section 175 of the Indian Penal Code makes the non-production of it an offence punishable under that section. We adhere to the opinion we expressed in *Assistant Sessions Judge, North Arcot* v. *Ramammal* (1), that the production by a party of a document, which he is bound by law to produce, cannot by itself constitute a user of that document by him. He cannot be put to the risk of having to consider whether a document answering the description contained in the summons is in fact genuine, and whether there is any reason to believe it to be not genuine. The mere production of a document in answer to a command of Court can in no case be regarded as fraudulent in law. The learned Public Prosecutor argues that the accused did more than produce the document in this case because he swore, when he was examined as a witness, that the document was handed to him by the prosecution first witness, and he urges that assuming, as we are prepared to do for the purpose of deciding the question of law, that the accused had the dishonest intention when he gave his evidence of inducing the Court to give judgment in favour of the plaintiff in that suit, his giving evidence would make the act a dishonest user of the document by him. We must put entirely out of account the fact that he produced the document as that act was perfectly innocent. All that is then left is that he gave false evidence with the fraudulent intention of causing loss to one of the parties in the suit. We are clearly of opinion that the giving of false testimony by itself with a fraudulent intention cannot amount to a fraudulent user of a document with reference to which that evidence is given. Otherwise every attesting witness who gives evidence with a similar dishonest intention might also be held guilty of dishonestly using the document. It is not contended that there is any evidence in this case of user beyond the fact that he gave evidence. There is no evidence of any previous conspiracy in

(1) 10 M. L. T. 563; (1912) M. W. N. 3; 13 Ind Cas. 275.

SURYA v. LACHMI NARAIN.

pursuance of which he gave the evidence. We must, therefore, hold that the accused did not commit an offence under section 471 of the Indian Penal Code. If the evidence he gave was false he would, of course, be guilty of perjury. But he is not charged with that offence in this case.

In *Asimuddi Sheik* v. *King-Emperor* (2) Rampini and Gupta, JJ., held that a party who had produced a document before a Munsif for obtaining compulsory registration of it could not be held guilty of an offence under section 471 of the Indian Penal Code by merely declaring it to be genuine before a Deputy Magistrate to whom the document was sent over by the Munsif for an inquiry being held as to whether he was guilty of forging the document.

The statement before the Deputy Magistrate was not made by the accused on oath and he could not, therefore, be convicted of perjury. It was sought to be argued that he was guilty of using the document as genuine by declaring it to be true. The learned Judges say: "He may have used the document before the Munsif when he brought a suit to enforce registration, but he is not charged in this case with using the document before the Munsif. He is charged with using it before the Deputy Magistrate and we do not think he can be said to have committed any offence on the 21st January 1902 punishable under section 471 of the Indian Penal Code." There is, of course, a difference between that case and this. In that the statement made by the accused as a witness in this case was made on oath while in the Calcutta case the statement was made by him before the Deputy Magistrate as an accused person and not on oath. But that does not affect the general proposition that a mere statement that a document is genuine does not amount to using it as genuine. We, therefore, set aside the conviction of the accused. We do not consider it necessary to pass any further order having regard to the state of the evidence on record. The bail-bonds executed will be discharged.

Conviction quashed.

(2) 11 C. W. N. 838; 5 Cr. L. J. 351; 5 C. L. J. 454.

AJMER-MERWARA JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CRIMINAL APPLICATION No. 33 OF 1910.

February 20, 1910.

Present—Mr. Colvin, J. C.

Musammat SURYA—APPLICANT

versus

LACHMI NARAIN AND ANOTHER—ACCUSED.

Criminal Procedure Code (Act V of 1898), *s.* 367—*Points for determination, reason for the decision.*

Where the judgment of an Appellate Court does not comply with the provisions of section 367 of the Code of Criminal Procedure and omits to state the points for determination and the reasons for decision, the case should be returned for re-trial.

Petition for revision of the order of the District Magistrate, Ajmer, dated 13th October 1910, acquitting the accused on their appeal from the judgment of the Honorary Magistrate, Ajmer.

ORDER.—The order of the lower Appellate Court does not comply with the provisions of section 367 of the Code of Criminal Procedure. The points for determination are not stated, nor are adequate reasons given for the decision. The Appellate Court thinks there has been some under-hand game going on between the parties, and that the accused is at the bottom of it but nevertheless acquits the accused on the ground of some doubt, the nature of which is left unexplained. The judgment should have explained why the Court thinks there is doubt regarding the jewelry transaction; and on what evidence this doubt rests. The judgment of the Appellate Court is so unsatisfactory that I am constrained to return the case to be re-tried on the merits in that Court: ordered accordingly.

Re-trial ordered.

JOTINDRA MOHAN *v.* KEDAR NATH.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 1583 OF 1910.
December 13, 1911.
Present:—Mr. Justice Carnduff.
JOTINDRA MOHAN GHOSH—PLAINTIFF—APPELLANT
versus
KEDAR NATH GHOSH—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), *s.* 182—*Homesteads—Purchase by* raiyat *of homestead of another tenant—Cultivation of purchased homestead land—Character of such land.*

A *raiyat* purchased two parcels of land from the respective *raiyats* to whose homesteads they originally belonged. Since then he cultivated them and paid rent to the landlord, who subsequently sued to eject him:

Held, that the parcels, whatever they had been once, were now agricultural lands held by the *raiyat*, and that the Bengal Tenancy Act applied to them.

Appeal from the decree of the Sub-Judge of Hooghly, dated February 8th, 1910, confirming that of the Munsif of Hooghly, dated February 23rd, 1909.

Babu *Narendra Kumar Bose*, for the Appellant.

Mr. *N. C. Bordalai* for Babu *Jadu Nath Kanjilal*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-appellants for the ejectment of the defendant-respondent from two parcels of land in *Mouzah* Sonatakari in the District of Hooghly. It is admitted here—as it apparently was also in the lower Appellate Court—that the action was bound to fail, if the case was governed by the provisions of the Bengal Tenancy Act, 1885, but that it ought to have succeeded, if it was not. The only question for my decision, therefore, is as to whether both the Courts below were right in holding that Act applicable.

The facts, in so far as they are material and have been found, are these. The respondent is himself a *raiyat* of the village, in which he had, and has, both a homestead and an agricultural holding. The two parcels in suit are situated near his old homestead, and he acquired them separately by purchase from the respective *raiyat* to whose homesteads they originally belonged. He has since been cultivating them and paying rent to the appellants who are the landlords: and there is no local custom or usage, such as is referred to in section 182 of the Tenancy Act, to be considered in connection with the matter.

In these circumstances, I should have thought it hardly possible seriously to suggest that the law applicable is not the Tenancy Act. But the learned Vakil for the appellants contends that it is not that Act, but the Transfer of Property Act, 1882, that ought to have been applied; and the following I understand to be his argument.

The disputed parcels were homestead lands, and, as the learned Subordinate Judge has himself observed,—their cultivation by the respondent could not change their character. They are still homestead lands.

Prima facie, the Transfer of Property Act applies in the case of such lands, and it is only by virtue of section 182 of the Tenancy Act that the provisions of the latter can have any application to them.

But section 182 is of no avail to the respondent because the parcels are not "his homestead," and that is all that the section touches. "Homestead" means the steads or place of a dwelling house; and these parcels which once formed the homesteads of others, are not the respondent's homestead, though they are close to it. They are his homestead lands; but not "his homestead."

Therefore, the Tenancy Act did not govern the case, and *ex concesso*, the suit ought to have been decreed.

This argument may be ingenious, but it is certainly unsound.

In the first place, it begins with the gratuitous introduction of novel and extraordinary class of land; land, which is "homestead land," but nevertheless appertains to no-body's "homestead." The idea is somewhat elusive, and I confess it is beyond me to grasp it.

In the second place, I can find no authority either for the assumption of "once homestead, always homestead", or for the postulate that homestead lands come within the scope of the Tenancy Act only through the operation of section 185. I see no reason why even the site of a dwelling house should not, on the disappearance of the building, become an ordinary holding; and I can find nothing in the Tenancy Act to remove homestead lands generally from its operation. On the contrary, it seems to me that the test is not homestead or non-homestead, but agricultural or

non-agricultural, and that the Act applies to all lands in a village which are, as a matter of fact, for the time being held as agricultural (or horticultural) land. On the facts before me, these parcels undoubtedly are of this latter description.

Thirdly, the first and third of the learned Vakil's premises, taken together, point to a conclusion the opposite of that deduced by him. For, if the disputed parcels have remained homestead, they must be the respondent's: they are no longer his vendor's, but have become "his homestead," and consequently section 182 and the other provisions of the Tenancy Act apply.

Finally, the appellant's argument leads them in another quandary. Admittedly, the respondent is the tenant in occupation of these parcels, which, it has been found, he is cultivating: and he has an old homestead in the village. Now, either the parcels are so close to that homestead as to have become a portion of it, or they stand apart and are held separately. In other words, they must be either homestead or not homestead. If they are homestead, *cadit quæstio*. If they are not, what are they, and how are they held? I cannot accept the new classification suggested and above alluded to, and the only rational reply seems to me to be that these parcels, whatever they have been once, are now agricultural or horticultural lands held by the respondent under the ordinary tenancy law.

I have been referred to the case of *Abdull* v. *Kutban*, S. A. No. 1376 of 1895 of which a brief note is to be found in 1 C. W. N. at p. clxxi. There the plaintiff had sued to recover possession of the *basti* land and house (in other words, the homestead) of another villager, which he had purchased alone and held apart from his own *jote* (if he had a *jote*, as to which there was no finding). The learned Judge (Rampini, J.) held expressly that section 182 and the other provisions of the Tenancy Act applied; but the crucial question before him was one of limitation and he ruled that the suit was not, as had been suggested, barred by Article 3 of Schedule III (which then referred to occupancy-*ryots* only), because the plaintiff was not, and had not professed to be, an occupancy-*ryot*. In so far then as that case can be said to be in point at all, it appears to tell against the appellants.

On the other hand, the view I favour seems to be supported by the ruling in another unreported case—*Munshi Golam Mowla* v. *Abdul Sowar Mondol*, S. A. No. 1078 of 1892 decided on the 16th May 1893. That was the case of a settled *ryot* of a village who had taken a plot of homestead land in it distinct from his agricultural land, and it was held by Rampini, J., applying section 182 of the Tenancy Act, that the *ryot* had a right of occupancy in the land under section 21 of the same.

I think, then, that this appeal should be dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.
FULL BENCH.

SECOND CIVIL APPEAL No. 810 OF 1903.
November 30, 1911.

Present:—Mr. Justice Robertson, Mr. Justice Johnstone, Mr. Justice Rattigan and Mr. Justice Chevis.

Musammat RAM DEVI—DEFENDANT—APPELLANT

versus

Musammat SHIB DEVI—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Custom—Widow—Unchastity—Gift—Forfeiture by unchastity—Effect on donee—Forfeiture by re-marriage—Distinction—Succession—Daughter—No collateral—Hindu Rajputs of Dasuya Tahsil, *District Hoshiarpur—Evidence to prove agnatic relationship.*

(*By the Full Bench*):—Where an unchaste widow, belonging to a tribe by whose custom unchastity involves forfeiture of the widow's estate, gifts to her lover the propery inherited from her husband, the reversioner is entitled to immediate possession of the property. Such a case is not governed by the judgment in *Bainta* v. *Acchhar*, 188 P. L. R. 1905.

Per *Robertson, J.*—A distinction must be drawn between the nature of the forfeiture of a widow's estate by re-marriage and by unchastity. In the case of a forfeiture by re-marriage, throughout the province, the woman ceases altogether to be the widow of her deceased husband, loses all rights and every kind of interest in his estate and becomes a member of a different family. The case of forfeiture by unchastity, where it is established, is different. The woman does not cease to be the widow of her deceased husband, nor does she become a member of another family. By custom she forfeits a special form of maintenance recognized in the province, that is, the possession for life of her husband's estate.

Per *Johnstone and Chevis, JJ.*—The forfeiture which unchastity involves comes into place, as against the widow and also as against any person in whose favour she has alienated the land other than a person who is a *bona fide* alienee for consideration, with

RAM DEVI *v.* SHIB DEVI.

effect from the date of unchastity and not merely from the date of institution of a suit by the reversioner.

(*By the Division Bench, Johnstone and Chevis, JJ.*)—Among Rajputs of Dasuya *Tahsil*, Hoshiarpur District, a daughter is entitled to succeed to the property of her father in the absence of collaterals.

The mere fact that a person belongs to the same *got* as the propositus is insufficient to make that person a collateral of the latter. A claim to succeed to property on the score of agnatic relationship should be supported by evidence showing the actual relationship.

Among Hindu as well as Muhammadan Rajputs of the Hoshiarpur District, the unchastity of a widow has the effect of forfeiting her life-estate.

In the case of forfeiture by unchastity, a widow becomes a trespasser directly the act of adultery is committed and the suit of the reversioner is to be regarded as a claim to dispossess a person who has, *prior to the institution of the suit*, ceased to hold any rights and become a trespasser.

Quære.—Whether a female holding a life-estate is subject to control in her dealings with the property by another female next entitled to succeed as a similar life-tenant?

First appeal from the order of the District Judge, Hoshiarpur, dated the 30th March 1908, decreeing plaintiff's claim.

The Hon'ble Mr. *Muhammad Shafi*, for the Appellant.

Messrs. *Sukh Diyal* and *Pestonji Dadabhai*, for *Musammat* Shib Devi, and Mr *Daulat Ram*, for *Musammat* Kirpo, Respondents.

ORDER OF REFERENCE.

CHEVIS AND JOHNSTONE, JJ. (21st July 1911).—Rijha, a Bihal Rajput of Nansota village, in the Dasuya Tahsil, in the Hoshiarpur District, died on the 12th October 1892, this is the date of death as entered in the Register of Mutations—leaving a widow *Musammat* Kirpo, and a minor daughter *Musammat* Shib Devi. The widow succeeded to the property of the deceased on the usual life-tenure. It is admitted that she became the mother of at least one illegitimate child. Then, in June 1902, she gave a lease of her husband's estate for 5 years to Achar Singh, and in August 1902 she gifted to him 2,335 *kanals*, with share in *shamilat*. Achar Singh died in April 1906, and his widow *Musammat* Ram Devi now holds the gifted land. *Musammat* Shib Devi who was a minor when this suit was instituted, but has since attained majority, sues for possession, alleging that her mother's rights are extinct by reason of unchastity and that she is the person entitled to succeed next to her mother.

Musammat Kirpo supports her daughter admitting the claim and saying she had illicit intercourse with Achar Singh who got a deed of gift from her.

Musammat Ram Devi's pleas are that Achar Singh as reversioner was next heir after *Musammat* Kirpo in preference to Rijha's daughter, that *Musammat* Kirpo, though unchaste, had not forfeited her tenure, that plaintiff was not the heir, that plaintiff in any case had no right to object to her mother's alienation, and that plaintiff could not in any case get possession as long as her mother was alive. It was also alleged that *Musammat* Shib Bevi was herself unchaste, but this plea may be passed over as defendant's Counsel has admitted that even supposing the plaintiff to be unchaste, he cannot support the argument that a daughter loses her rights in her father's estate by reason of unchastity. It was also contended for the defendant (*i. e.*, *Musammat* Ram Devi, *Musammat* Kirpo is only a *pro forma* defendant) that the gift was valid on account of services rendered by the donee.

The learned District Judge seems to have been of opinion that Achar Singh was a distant collateral of Rijha, but without coming to any definite finding on this point, he has held that such a distant collateral is excluded by the daughter. He also finds that *Musammat* Kirpo has forfeited her rights, that the gift was invalid, and that *Musammat* Shib Devi has a right to contest her mother's alienations. The District Judge was personally of opinion that plaintiff was entitled to a decree for possession, but on being referred to the case reported as *Bainta* v. *Achhar* (1), he restricted the decree to a declaration that the deed of gift should not affect the plaintiff's rights after the death of *Musammat* Kirpo. The decree might well, in my opinion, have been so worded as to take immediate effect also in the case of *Musammat* Kirpo's re-marriage.

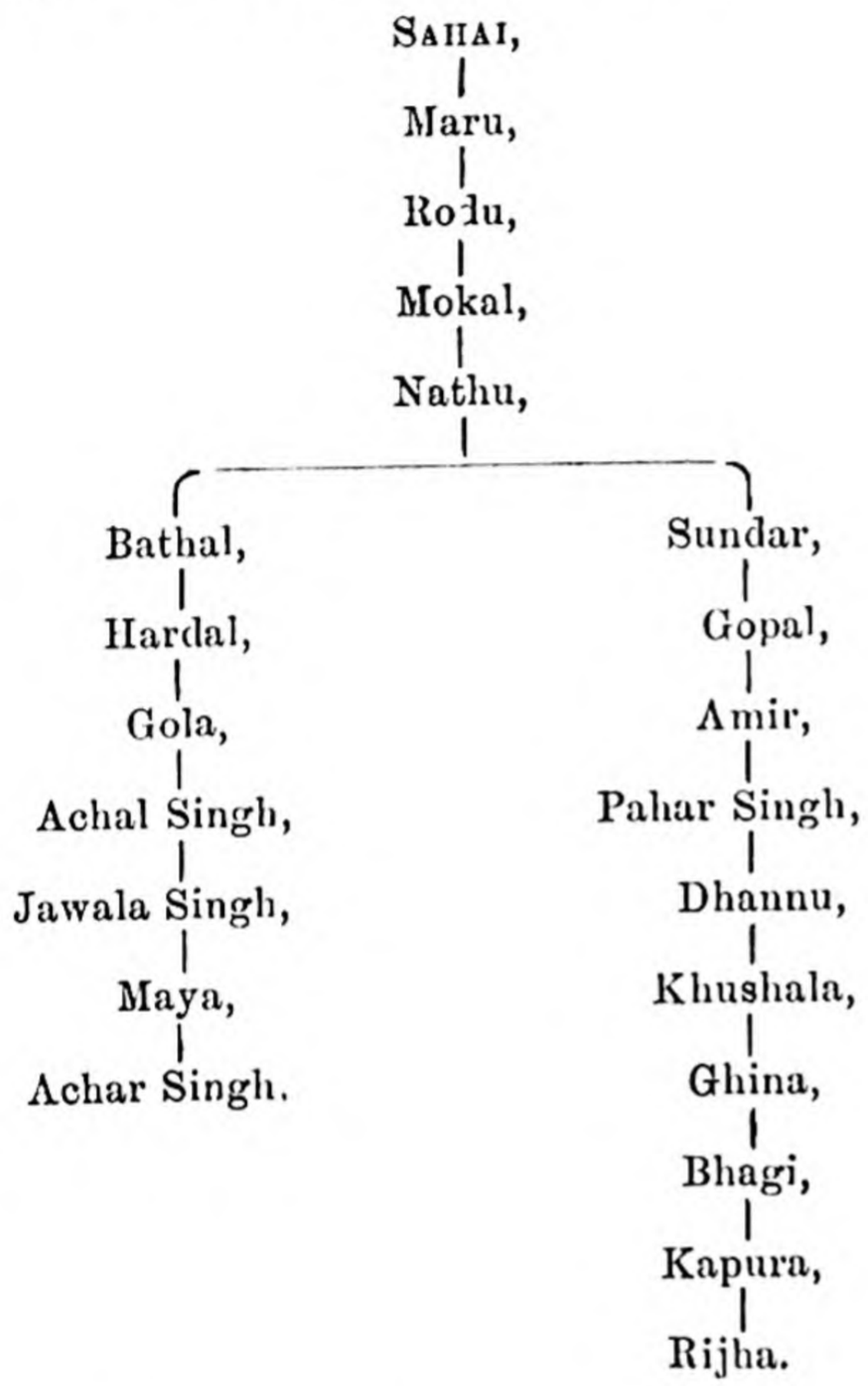
Both sides appeal. The defendent again urges those pleas which have been decided against her, and asks that the suit may be dismissed; the plaintiff urges that she should be given a decree for possession.

(1) 188 P. L. R. 1905.

RAM DEVI *v.* SHIB DEVI.

I propose first to consider the question whether the plaintiff is entitled to succeed after her mother. It is urged for the defendant that Achar Singh was a collateral of Rijha.

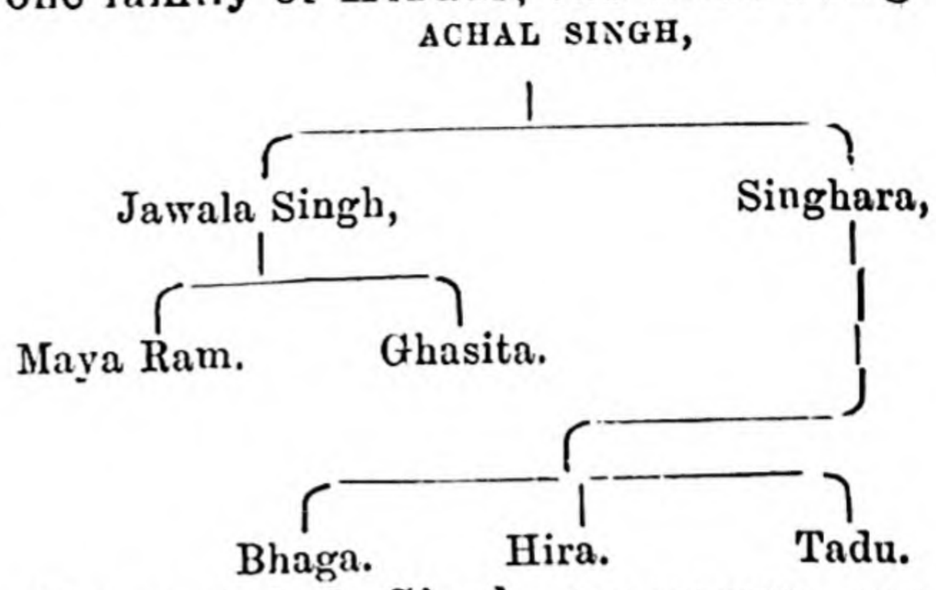
One Harnam Das, Brahmin, appears as witness for defendant and professes to give the genealogical tree as follows:—



Now let us see how far this genealogical tree, professedly given from memory—for the witness says that though his father had a written tree he does not know whether it is lost or whether his brother has it—is supported by any records.

There are genealogical trees of four villages on the record. That of Beata village seems to afford no help at all. The Nansota village tree (*i. e.*, the tree of Rijha's village) gives the tree, as stated by Harnam Das from Rijha up to Amir and the note as to foundation of the village says Amir came from Virowal and broke up the *jungle*. The tree of Serak village gives the tree down from Sahai to Jawla Singh and shows Sunder as another son of Nathu. Beneath Sundar no descendants are shown; there is, however, a note that he went off to Sundarpur.

The tree of Sundarpur village shows two families of Muhammadan Rajputs and one family of Hindus, the third being



Above Achal Singh no names are given. Achar Singh was son of Maya Ram. Even supposing that the Sundar who is said to have founded Sundarpur is the same as the son of Nathu who left Serak village (though it seems strange that in Serak village the tree is given for five generations above Sundar, whereas in Sundarpur village the people professed themselves unable to give Sundar's pedigree) there is a link wanting. According to the village pedigree tables we get from Achar Singh up to Sahai through Nathu, and from Rijha up to Amir but there is nothing outside the evidence of Harnam Das to connect Amir with Nathu except the bare statement that Amir came from Virowal and founded Nansota, and Virowal, according to one witness Lalu (see page 69), is another name for Sundarpur. To produce a Brahmin as witness to reel off a string of names and so supply a gap in the pedigree tree set up is easy enough.

When mutation of names was effected on death of Rijha, I note that Maya, father of Achar Singh, came from Serak and claimed to be next heir after *Musammat* Kirpo but his claim was not investigated. When gifting the land to Achar Singh, *Musammat* Kirpo described him as a reversioner, but *Musammat* Kirpo's conduct throughout has been such as to render it impossible to attach weight to her statements or actions. And it is, of course, possible that she credited Maya's claim to be a collateral, but this does not render it unnecessary for Achar Singh's widow to prove the alleged relationship now that on the strength of it she wishes to defeat the claim of the plaintiff. It was possibly on account of her crediting Maya's claim to relationship that *Musammat* Kirpo employed first Maya and then Achar Singh

as her agent, as she professes to have done (see page 67.) In my opinion it is not proved that Achar Singh was a collateral of Rijha. No doubt they were both of the same *gôt*, but a claim to succeed to property on the score of relationship should, in my opinion, be supported by evidence showing the relationship, otherwise any man might claim to exclude a daughter on the ground that he was her father's collateral both he and her father being descended from Adam.

Excluding Achar Singh, it is not shown that any other collaterals of Rijha are in existence to contest the claim of Rijha's daughter to be the next heir. But it is contended that among Rajputs of the Dasuya Tahsil, a daughter never inherits, and here reliance is placed on the *Riwaj-i-am* (see page 24) where it is stated for the Dasuya Tahsil:—"No share has ever been given to a daughter nor is she entitled to it." But on page 25 an answer is given, which is apparently one for the whole district, that "in our tribe a daughter cannot inherit any property," which seems clearly opposed to the answers for the Garhshankar and Hoshiarpur Tahsils given on page 24. Showing that in the absence of collaterals a daughter can inherit. The answer to question 40 (given on page 4 of the paper-book) also shows that in certain cases a daughter does inherit. To deprive a daughter even in the absence of collaterals of all rights of succession would be quite opposed to general custom, and I would hold that in the absence of collaterals a daughter is entitled to succeed. Cases of absence of all collaterals must be uncommon; and this is very possibly the explanation of the statement "no share has ever been given to a daughter."

I omitted in the earlier part of this judgment to note an argument put forward by defendant's Counsel that in the plaint it is not denied that Achar Singh was a collateral, and that all that is denied there is that he was a near collateral; without going into the question of the exact meaning of the words "*rishta karabat*," I would hold that plaintiff's Counsel probably put down in the plaint as much as he thought necessary for the purposes of her case, and that the wording of paragraph 5 of the plaint cannot be taken to be an admission, binding on the plaintiff that Achar Singh was a distant collateral. Possibly, it was recognised that as both Achar Singh and Rijha were of the same *gôt*, there must be a common ancestor somewhere in the remote past, but, as I have already said, I do not think it sufficient for a man to say: "We are all descendants of Adam;" nor is it sufficient to say: "we all came out of the Ark."

The next question with which I will deal is whether *Musammat* Kirpo's unchastity entails forfeiture of her life-estate. That she has been unchaste is admitted. Of the allegation that she also left her husband's house, the best proof is to be found in her statement of 7th November 1902, (*vide* page 38) in which she states clearly that she is living with Achar Singh and does not want to live in Nansota where her tenants want to kill her and Achar Singh; this statement was made at the time when *Musammat* Kirpo was trying to get Achar Singh appointed as her *sarbarah lambardar*. No doubt, it was made nearly three months after the gift had been made in Achar Singh's favour, but I should say there was not the least doubt that Achar Singh had got the woman quite under his thumb at the time, and had induced her to forsake all for him, and so had got first a lease and then a deed of gift from her.

The *Riwaj-i-am* (see page 3) lays down that a widow loses her rights in case of unchastity or of re-marriage and four instances are given in support of this. As defendant's Counsel points out the four instances given are all cases of Muhammadan Rajputs and of the Hoshiarpur Tahsil, and Counsel argues that it cannot be assumed that the custom of Muhammadan Rajputs is the same. He points out that a Hindu widow governed by her personal law does not forfeit her rights, whereas he urges that an unchaste Muhammadan widow is even subject to death according to her personal law. But, as far as I know, an unchaste Muhammadan widow does *not*, according to her personal law, lose her property merely by reason of unchastity; of course, if she dies or is killed she loses her rights; but this applies to all the world, for a dead person can have no rights in property. As far as I can discover, there is not a scrap of evidence anywhere tending to show that the custom of Hindu Rajputs of any Tahsil of the Hoshiarpur District differs in any respect from that of Muhammadan Rajputs of the same Tahsil. The latter were also originally Hindus, and it does not follow that

change of religion necessarily means a change of customs. I am unable, therefore, to see any force in the argument that cases relating to Muhammadan Rajputs should be disregarded.

Turning to the previous judgments, I will first notice those put in by the defendant:—

(1) *Ala Devi* v. *Fateh Din*, decided by Hakim-ud-din Ahmad, Subordinate Judge, on 30th November 1891. The Subordinate Judge held that no special custom had been proved, and that according to general custom unchastity did not entail forfeiture. He noted the entry in the *Riwaj-i-am*, but considered this insufficient. He apparently overlooked the fact that there are four instances cited in the *Riwaj i-am*.

This case apparently was not appealed.

(2) *Maghar* v. *Daropti*, decided by Rai Dalip Singh, Munsif 2nd Class, on 24th December 1895, (printed on pages 30-34 of the paper-book).

This judgment cites the case above noted and refuses to rely on the four instances cited in the *Riwaj-i-am* as not having been "tested and examined in Court." It also apparently interprets the clause in the *Wajib-ul-arz* as to forfeiture being the penalty of a widow's unchastity as meaning that an unchaste widow cannot get possession, and not as meaning that a widow having once got possession and thereafter becoming unchaste is liable to dispossession—a curious and unsatisfactory judgment in my opinion.

(3) *Sundar Singh* v. *Musammat Rupan*, (*vide* pp. 28-30). The lower Court held that unchastity did not entail forfeiture, but the Divisional Judge on appeal pointed out that this question did not arise, as plaintiff had sued to dispossess the widow solely on the ground of her re-marriage. So this case proves nothing.

For the plaintiff, the following cases are cited:—

(1) *Musammat Karim Bibi* v. *Malang Khan*, decided by Lala Mul Raj, Divisional Judge, on 24th July 1905 (*vide* pages 14-16).

For defendant it is objected that the *onus* was wrongly placed on the widow in this case (*vide* para. 3 on page 16), but this was apparently done because the *Riwaj-i-am*, supported by instances, was against her.

(2) *Musammat Rahmati* v. *Rahiman*, decided by Major Beadon, Divisional Judge, on 2nd November 1905. This decision, too, relied on the *Riwaj-i-am* and the instances cited therein, and also on the case above cited of *Musammal Karim Bibi* v. *Malang*, and on a Chief Court ruling C. A. No. 873 of 1899 (*Amir Bakhsh* v. *Kande Khan*.)

(3) *Dhaju* v. *Hira*, decided by Major Beadon on 5th March 1908. Here the Divisional Judge does not give all the facts as they appear to have been given in a previous order remanding the case for further inquiry. The Divisional Judge remarks that unchastity by itself may not be sufficient to deprive a widow of her life-estate but that a widow who has become unchaste and has left her husband's house to live with another man can hardly be in a better position than a widow who has re-married. The Divisional Judge then found that the widow having become a bad character and gone to a different village had lost her rights. This judgment only goes so far as to find (it was not necessary to go further) that unchastity coupled with desertion of her husband's house, entails forfeiture of a widow's rights.

(4) Then, though earliest of all, not least in importance, is the Chief Court ruling in Civil Appeal No. 873 of 1899 (*Amir Bakhsh* v. *Kande Khan*) where the *Riwaj-i-am* and the four instances there cited are noted, and it is held that unchastity forfeits a widow's rights. In this case a Local Commissioner was appointed, and the whole consensus of opinion as shown by his report was, that unchastity forfeited the widow's life-estate.

I do not think it necessary to examine the oral evidence in detail. Some of the above noted cases are cited by the witnesses. Cases of which no records are forthcoming may or may not be true; it is easy for witnesses to give names and allege facts. As to the opinion of witnesses as to what the custom is, I consider nothing much need be said. Some of the witnesses apparently think that a widow may have illegitimate children, but must not be called unchaste unless she re-marries. The *Riwaj-i-am*, supported by instances, is against the defendant and so is the great bulk of the previous decisions. I would hold that *Musammat* Kirpo has by her misconduct forfeited her life-estate.

Two questions remain, (1) whether the plaintiff, being herself a female with only a limited estate, has the right to control her mother's actions and attack her mother's alien-

RAM DEVI *v.* SHIB DEVI.

ations, and (2) whether the alienee is entitled to hold possession, in spite of *Musammat* Kirpo having forfeited her rights, until *Musammat* Kirpo's death; in other words, whether plaintiff must content herself with a declaratory decree and cannot recover possession at once. I will first deal with the latter question.

The District Judge has followed the ruling published as *Bainta* v. *Achhar* (1), which lays down that even where a reversioner is entitled to claim the estate from a widow by reason of her unchastity having forfeited her life-estate, the alienee from the widow cannot be prejudicially affected by the action taken by the reversioner subsequent to the date of the alienation; so that all that the reversioner can get is a declaration protecting his reversionary rights. It is held that unchastity of the widow does not "*per se* make her succession to the estate null and void *ab initio*," and I quite agree that unchastity does not annul the widow's *succession*. A widow succeeds by the death of her husband; her succession is a fact which subsequent misconduct may terminate but cannot cancel. But it seems to me that the real question is whether, the widow having once succeeded and then having become unchaste, such unchastity does not forfeit her rights as instantly as re-marriage would do. It is urged by defendant's Counsel that re-marriage mechanically terminates the widow's tenure, whereas unchastity only gives the reversioner a right to terminate the tenure. For my own part, with all due respect to the learned Judges who decided *Bainta* v. *Achhar* (1), I am quite unable to agree. I fail to see any difference between unchastity and re-marriage in this respect. I cannot see why an act of adultery should not be regarded as in itself extinguishing a widow's tenure just as much as going through the ceremony of *karewa*. The idea seems to me the same in either case, *viz.*, that when a widow unites herself to another man she *loses* all rights in the estate of her late husband. In the case of *karewa* the re-union is legalized; in the case of unchastity the re-union is irregular. In either case it seems to me that the claim on the former husband's estate is at once forfeited. In the case of re-marriage unless the widow gives up the property out of Court, the reversioner has to come into Court, and if the re-marriage is denied he has to prove it before he can get possession. So, too, in the case of unchastity, unless the widow gives up the estate voluntarily the reversioner has to come into Court and prove his claim. I do not think that it can be said in either case that the widow ceases to be owner and that the reversioner becomes the owner by reason of the decree; it seems to me that in both cases the widow's tenure has ceased and the reversioner's ownership has commenced *by reason of the widow's act* (adultery or re-marriage) and that the decree merely recognises this and gives the reversioner possession of that which has already become his property. In my opinion, the widow in all such cases becomes a trespasser directly the ceremony of re-marriage or the act of adultery is committed, and the suit of the reversioner is to be regarded as a claim to dispossess a person who has, *prior to the institution of the suit*, ceased to hold any rights and become a trespasser.

I would remark that it appears to me that if the ruling in *Bainta* v. *Achhar* (1) is correct, all that an unchaste widow who finds herself threatened with a suit for ejectment has to do is to execute a deed of gift of her husband's estate in favour of a lover, brother, daughter or any one whom she may favour or whom she thinks she can trust; the result will be that the reversioner is at once shut out until the widow's death, and the penalty of forfeiture of life-estate then seems to be to become a mere farce easily evaded. I have already heard complaints that widows, who lose their rights by re-marriage but not by unchastity, prefer to live with their lovers without going through any marriage ceremony; this cannot be helped. But if among tribes whose custom recognizes unchastity equally with re-marriage as entailing forfeiture of a widow's life-estate, the principle laid down in *Bainta* v. *Achhar* (1) is to be followed, we shall, I fear, find that alienations by unchaste widows of their husbands' estates will soon become the fashion in order to shut out the reversioners from wresting the property from the widows.

I regret, therefore, that I cannot agree with the above ruling. My opinion is that unchastity at once forfeits the widow's rights.

If the above opinion of mine be correct, it is, I think, unnecessary to consider the question whether a daughter can control her mother's alienations, for, *Musammat* Kirpa having by reason of unchastity ceased to

hold the estate even before the gift in question, there was nothing left to her which she could gift and the daughter is entitled to ignore the gift as a void transaction effected by a stranger subsequent to the property having passed to the daughter.

But if *Bainta* v. *Achhar* (1) is to be followed, then we must decide whether the daughter is competent to control her mother's actions. Seeing the unfavourable position in which daughters seem to stand amongst Rajputs of the Hoshiarpur District in regard to matters of succession, I should feel inclined to follow *Sher Muhammad Khan* v. *Muhammad Khan* (2), and to hold that the daughter cannot control her mother's actions. In *Natha Singh* v. *Mohan Singh* (3) it is observed that a right to succeed does not necessarily infer the right to control (see page 337). In *Chiragh Bibi* v. *Hassan* (4), it is held that among Arains of the Lahore District a daughter can control her step-mother's alienations, but the daughters seem to take a high place among Arains, and "clearly are recognized as having a strong position as heirs." In *Nur-ul-nissa* v. *Gauhar-ul-nissa* (5), it is laid down that the power of control, by a female, cannot be presumed. But *Maqsud-ul-nissa* v. *Kaniz Zohra* (6) lays down that any female entitled to succeed on the death of another female can control the latter's alienations if the latter has only a limited estate. I think it is high time that some definite rule should be laid down, if possible, so that we may know on whom the burden of proof in such cases is to lie.

My own inclination would be, to hold that the estate passed to the daughter even prior to the gift, and to raise the decree to one for possession, but as this would mean to overrule *Bainta* v. *Achhar* (1), I would, if my learned brother agrees with my views, refer this case to a Full Bench for a decision as to the correctness of the above ruling.

If the Full Bench should decide that the above ruling is correct, I would ask the Full Bench also to decide, in view of the apparent conflict of opinions [*Sher Muhammad Khan* v. *Muhammad Khan* (2), *Chiragh Bibi* v. *Hassan* (4) *Nur-ul-nissa* v. *Gauhar-ul-nissa* (5) and *Natha Singh* v. *Mohan Singh* (3) on one side and *Maqsud-ul-nissa* v. *Kaniz Zohra* (6) on the other] whether the presumption should be that a female holding a life-estate is subject to control in her dealings by a female next entitled to succeed as a similar life-tenant.

(2) 5 P. R. 1895.
(3) 93 P. R. 1906; 163 P. L. R. 1906.
(4) 19 P. R. 1906; 70 P. L. R. 1906.
(5) 61 P. R. 1906.
(6) 135 P. R. 1908.

JUDGMENT OF THE FULL BENCH.

ROBERTSON, J.—I think this reference can be disposed of very shortly. It appears to me that it was the result of a little misunderstanding due to the desire, which I appreciate, of my brothers, Johnstone and Chevis, JJ., not to appear to disregard what was understood to be laid down in the (unpublished) judgment by Mr. Justice Rattigan and myself in *Bainta* v. *Achhar* (1).

We are all agreed that that judgment does not govern the case now before us, and that it is, therefore, unnecessary to discuss any of the other points raised. This reference draws our attention to the danger of unauthorized reporting. It may be as well to notice what the judgment in *Bainta* v. *Achhar* (1) really did say.

There is no doubt that a distinction must be drawn between the nature of the forfeiture of a widow's estate by a widow who re-marries and by a widow who is proved to be unchaste. In the case of a forfeiture by re-marriage throughout the Province the woman ceases altogether to be the widow of her deceased husband, loses all rights and every kind of interest in his estats, and becomes a member of another family. The case of forfeiture by unchastity where it is established is different. The woman does not cease to be the widow of her deceased husband nor does she become a member of another family. By custom she forfeits a special form of maintenance recognized in this Province, *i. e.*, the possession for life of her husband's estate, and it is a question, more often answered perhaps in the affirmative than in the negative, whether she is not even then entitled to maintenance from her husband's relatives.

In cases where she is held to be still entitled to maintenance though not to possession of her deceased husband's estate, it may be said that what occurs as a result of unchastity is the substitution of one form of maintenance for another of lesser extent at the option of the reversioners.

In the judgment in *Bainta* v. *Achhar* (1), which was given on the facts of a particular

case, it was found that a widow had made an alienation in good faith for value received to an alienee who had nothing to put him on his guard, no action having been taken by the reversioners at that time, to deprive the widow of the estate. It was held, not that the widow could resist the claim on her own account, but that the equities in favour of the vendee, a purchaser for value in good faith before any action had been taken by the reversioners, were so strong that the Judges considered that his rights could not be affected by a subsequent suit on the part of the reversioners to obtain possession of the estate on the ground of alienor's unchastity. Indeed, in that case the Judges were by no means convinced even that the unchastity had occurred before the transfer (Notice their remarks that the succession could not be considered null and void *ab initio*).

Certainly, the reversioners had taken no action and there was nothing to warn the purchaser. In the case before us, it is clearly found that unchastity forfeits the rights of the widow to retain possession of the estate for her maintenance for life. The alienee was a donee and not a vendee for value. Moreover, the estate was clearly made over to him in consequence of his illicit relations with the widow and with the express object of defeating the rights of the reversioners. It is, therefore, unnecessary to discuss the principles which led to the judgment in *Bainta Achhar* (1), in which the wording, as it was a decision on the facts of the particular case and not intended for publication, may or may not have been wide. We hold it quite inapplicable to the case before us where unchastity forfeits the estate of a widow and where there is no alienee for value in good faith with any equities at all in his favour or whose claims, apart from those of the widow, require to be considered. This being so, in view of the findings of fact in the present case, and the facts of the previous case, it becomes unnecessary to discuss the second part of the reference.

The only question decided by this Full Bench is that the judgment in *Bainta* v. *Achhar* (1) does not govern the case before us. The case is, therefore, referred back to the Division Bench for decision.

Judgment announced on 17th November.

CHEVIS, J.—I understand that my learned brothers and myself are all agreed that the forfeiture which unchastity involves comes into force, as against the widow and also as against any person in whose favour she has alienated the land other than a person who in a *bona fide* alienee for consideration, with effect from the date of the unchastity and not merely from the date of institution of a suit by the reversioners. This appears to me all that it is necessary to decide for the purposes of the present appeal and I think it unnecessary to consider the peculiar case of a *bona fide* alienee for consideration.

I agree with my learned brother Robertson that the judgment in *Bainta* v. *Achhar* (1), as now explained, does not govern the case before us. It is now unnecessary to consider the second question referred to the Full Bench.

JOHNSTONE, J.—I concur in the observations of my brother Chevis.

RATTIGAN, J.—I agree that the judgment in *Bainta* v. *Achhar* (1) is not relevant to the present case, decided, as the former appeal was, upon its peculiar facts. As at present advised, I see no reason to question the general soundness of the proposition stated by my brother Chevis, but it is not necessary for us to give a definite opinion thereon, especially as the point has not been argued before us and incidental questions of some importance may have to be considered before a final decision can be given.

ROBERTSON, J.—I agree.

AJMER-MERWARA JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPLICATION No. 172 OF 1910.

April 21, 1911.

Present:—Mr. Colvin, J. C.

RAM GOPAL—PLAINTIFF—APPLICANT

versus

THE AGENT, BOMBAY BARODA AND CENTRAL INDIA RAILWAY Co.—DEFENDANT—OPPOSITE PARTY.

Railways Act (IX of 1890*), s.* 77—*Notice to the Traffic Manager equivalent to notice to the Agent—Contract Act (IX of* 1872*), s.* 23—*Risk-note Form H—Liability of the Railway Administration.*

It is the business of the Traffic Manager to settle all claims against a Railway. A notice to that official is a claim preferred "to the Railway Administration" under section 77 of the Railways Act. The agent

must be presumed to know what is going on in his subordinate offices and the notice of claim to the Traffic Manager must be regarded as equivalent to notice to the Agent.

Woods v. *Meher Ali*, 13 C. W. N. 24; 4 M. L. T. 427; 2 Ind. Cas. 107, followed.

Where a consignor signs a risk-note in the old Form H. and agrees to hold the Railway Administration free from all responsibility for any loss etc., for such consignment, the Railway Administration is fully protected from liability to compensation for loss.

Petition for revision against the order of the Judge, Court of Small Causes, Nasirabad.

ORDER.—The opposite party not advancing any serious objections to the re-admission of the petition for revision, this application is granted, provided it is supported by an affidavit as to the applicant having made a mistake and attended the wrong Court.

The affidavit has since been filed.

This Court, in anticipation of the filing of the affidavit, proceeds to dispose of the case on the merits. There are two somewhat important points of law involved in the case. The case was remanded to the lower Court to determine whether the notice served by the plaintiff actually reached the Agent of the Railway Company, and the lower Court has answered this question in the negative. But the real points for determination appear to be (*i*) Is it necessary that notice in such a case should be actually served upon the Agent of the Railway? (*ii*) Is defendant protected from liability to compensation owing to plaintiff having signed the risk-note (Form H)? As regards these two points I must say that the decision given by the Calcutta High Court in *Woods* v. *Meher Ali* (1), appears eminently reasonable. It is really the business of the Traffic Manager to settle such claims and, in the circumstances, the notice to that official is a claim preferred "to the Railway Administration" under section 77 of the Railways Act. The Agent must be presumed to know what is going on in his subordinate offices, and the notice of claim to the Traffic Manager must be regarded as equivalent to notice to the Agent. It is not disputed that notice of claim was sent to the Traffic Manager within six months, and, so far as this matter goes, the case is not, in my opinion, liable to be thrown out. In regard to the second point I am unable to follow the argument of the lower Court in which reference is made to section 23 of the Contract Act. The plaintiff signed risk-note in Form H, and in that document it clearly says that in consideration of special reduced or owner's risk rate, the signatories of the document agree that the sender shall hold the Railway Administration "harmless and free from all responsibility" for any *loss*, destruction, damage, etc., of such consignment. This seems to me to fully protect the Railway Administration from liability to compensation. I am informed that the wording of this Form H has since been altered so as to throw on the Railway Administration the liability for complete *loss* of any consignment. But the form signed by plaintiff was the old form and it seems to afford complete protection to the Railway in this case. This being so, I must dismiss this application, the lower Court's arguments for its conclusions are different from those of this Court, but the result is the same, the plaintiff not having made out a case for interference in revision costs on the applicant.

Application dismissed.

(1) 13 C. W. N. 24; 4 M. L. T. 427; 2 Ind. Cas. 107.

PUNJAB CHIEF COURT.

CIVIL REFERENCE No. 36 OF 1912.

January 6, 1912.

Present:—Mr. Justice Chevis.

BELA SINGH—PETITIONER

versus

LABH SINGH—DEFENDANT.

Jurisdiction of Civil or Revenue Court—Suit for eviction—Plaintiff alleging forcible dispossession—Test—Examination of plaintiff—Defendant proving to be a tenant—Practice—Dismissal of suit.

A suit to evict defendant from land of which he is alleged to have taken forcible possession from plaintiff is cognizable by a Civil Court.

In ascertaining whether a suit is cognizable by a Civil or by a Revenue Court, it is not enough merely to look at the plaint.

The real test in such cases is to examine the plaintiff and see whether, according to the plaintiff, the defendant took the land from plaintiff in the first instance for cultivation, or whether the defendant got possession in the first place by force.

If, on inquiry, the Civil Court finds that the defendant is, as a matter of fact, a tenant and not a trespasser, the Civil Court should dismiss the suit.

Case referred by the Commissioner of the Lahore Division with his No. 450, dated the 11th April 1911, for the orders of the Chief Court.

ORDER.—This is a reference under section 99, Tenancy Act. The plaint was presented

SALIMUDDI *v.* UZIR MAHOMED.

to a Munsif who returned it for presentation to a Revenue Court, holding the suit to be cognizable by a Revenue Court. The Revenue Court thinks the suit cognizable by a Civil Court and so has referred the matter to this Court for decision.

The defendant is in possession and the plaintiff sues to evict the defendant, alleging that the latter has taken forcible possession. The defendant is, in one part of the plaint, spoken of *muzaria*, and this has probably misled the Munsif; but had the Munsif examined the plaintiff as he should have done, he could easily have found out the real nature of the claim.

In such cases it is not enough merely to look at the plaint, for it is only too common a practice for petition-writers to describe the defendant as having taken forcible possession even when the plaintiff really means to say that the defendant is a tenant who has refused to pay rent and who is holding on in opposition to the landlord's wishes. The real test in such cases is to examine the plaintiff and see whether, according to the plaintiff, the defendant took the land from plaintiff in the first place for cultivation, or whether the defendant got possession in the first place by force. The Revenue Officer examined the plaintiff, who then stated that he had not given the land to defendant for cultivation, but that defendant had taken possession forcibly two years ago and that prior to such trespass plaintiff had cultivated the land himself. This makes it clear that this is a suit to eject a trespasser, not a tenant.

The suit is cognizable by a Civil Court, and I direct that the plaint be returned for representation to a Civil Court.

I may remark that if on inquiry it should appear that defendant is, as a matter of fact, a tenant and not a trespasser, the Civil Court should dismiss the suit, as the Civil Courts cannot decree the ejectment of a tenant.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 9, 47, 48 AND 49 OF 1909.

December 18, 1911.

Present:—Mr. Justice Carnduff.

SALIMUDDI HOWLADAR AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

UZIR MAHOMED HOWLADAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage-decree—Execution—Purchaser—Failure to get possession—Suit to recover possession—Obstruction by person interested not made party in mortgage-decree Who is to retain possession.

The purchaser at a sale in execution of a mortgage decree, if he fails to get possession or is dispossessed, is entitled to recover possession by suit from a person interested but excluded from the mortgage-action, subject to that person's right to redeem.

Appeal from the decree of the Sub-Judge of Backergunge, dated August 1st, 1908, modifying that of the Munsif of Bhola, dated December 11th, 1907.

Babu *Prokash Chandra Majumdar*, for Babu *Romesh Chandra Sen*, for the Appellants.

Babu *Abinash Chandra Guha*, for the Respondents.

JUDGMENT.—These appeals arise out of four suits for the recovery of the rent for the years 1310 to 1313 of certain holdings in a *nimhowla*. Nazir Mahomed, defendant No. 2, is one of the tenants, and he claims to be the mortgagee of the *nimhowla* in possession thereof, having had the *nimhowla* mortgaged to him by the plaintiff's vendor and having been put in possession of it in execution of his mortgage-decree. As the mortgagee obtained possession in the year 1312, the Courts below have allowed the plaintiffs rents for the years 1310, 1311 and a part of 1312. The plaintiffs now appeal, claiming the rest of the rent of 1312 and the rent of 1313.

The plaintiffs' purchase was in *Bysakh* 1309, that is May 1902. Nazir Mahomed's mortgage was executed in 1304, that is in 1897. It has been found that Nazir Mahomed had no notice of the plaintiff's purchase when he brought his mortgage suit in 1904 and obtained a decree. In execution of that decree, he purchased the *nimhowla* and his purchase was confirmed in *Sawan* 1312, that is August 1905. Having no notice of the plaintiffs' purchase, he did not make the plaintiffs parties to his mortgage suit; and it in now contended that, as the plaintffs are not bound by the mortgage-decree or the sale

in execution thereof, their rights are in no way affected and they are entitled to the rents of 1312 and 1313 which have been refused them. The mortgagee purchaser's proper remedy, it is further contended, is either to bring a fresh action on his mortgage against the plaintiffs or to sue the plaintiffs for confirmation of possession, thus allowiug the plaintiffs an opportunity of exercising their right of redemption. The respondent, on the other hand, argues that as he is in possession, his possession ought not to be disturbed and the proper remedy of the plaintiffs is to bring a suit for redemption.

On behalf of the appellants I have been referred to the cases of *Jugdeo Singh* v. *Habibulla* (1) and *Sriheri Banerjee* v. *Khitishchandra Rai Bahadur* (2) and it is further contended by their learned Vakil that the two cases of *Gangadas Bhattar* v. *Jogendranath Mita* (3) and *Bunwari Jha* v. *Rumjee Thakur* (4), on which the lower Courts and the respondent rely, really support the appellants' case. I have considered these cases carefully, and the question raised is, no doubt, one of some nicety and by no means free from difficulty: but the result of the decisions seems to me to be this, that the purchaser at a sale in execution of a mortgage-decree, if he fails to get possession or is dispossessed, is entitled to recover possession by suit from a person interested but excluded from the mortgage action, subject to that person's right to redeem. That being so, I think, that where the purchaser at the sale in execution of a mortgage-decree is, as here, actually in possession, his possession ought to be maintained, subject, of course, to the other party's right to bring a suit for redemption. On the whole, then, I think that these appeals must be dismissed with costs.

Appeals dismissed.

(1) 12 C. W. N. 107; 6 C. L. J. 612.
(2) 24 C. 569 at p. 574; 1 C. W. N. 509.
(3) 5 C. L. J. 315; 11 C. W. N. 403.
(4) 7 C. W. N. 11 at pp. 18, 19.

[(1912) 1 M. W. N. 11.]

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1211 OF 1909.

November 9, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

VELLUVAKANDI KUNHI PATHUMMA —PLAINTIFF—APPELLANT

versus

PONNANKI MOOSSAN MAMMAD—DEFENDANT—RESPONDENT.

Muhammadan Law—Moplahs *following* Marumakatayam *system*—Moplah *wife claiming maintenance under Muhammadan Law bound to live with her husband, if so required, notwithstanding* Marumakatayam *custom to the contrary.*

Though the usual practice amongst the Moplahs of North Malabar following the Marumakathayam law is for a married woman to live in her tarward house, yet, as the wife's right to maintenance is derived by her from the Muhammadan Law, she must take it subject to the obligation under that law to live with the husband in his own house if he requires her to do so.

Second appeal against the decree of the District Court of North Malabar, in Appeal Suit No. 318 of 1903, presented against the decree of the Court of the District Munsif of Cannanore in Original Suit No. 349 of 1907.

Mr. *J. L. Rosario*, for the Appellant.

Mr. *T. R. Ramachandra Aiyar*, for the Respondent.

JUDGMENT.—The Judge finds that under the Muhammadan law, a wife is bound to go and live with her husband. It is not quite clear whether he means "under the Muhammadan law" as observed by the community to which the parties belong though his reference to the evidence of the plaintiff's witnesses Nos. 2 and 6 may show that that is his meaning. It is strongly contended for the appellant that, according to the usage of Marumakkathayam Moplahs, there is no obligation on the part of a wife to leave her tarwad house in order to live with her husband. As the question is one affecting a pretty large community, we consider it desirable to have a distinct finding on the question whether a Moplah wife governed by the Marumakkathayam law is bound to leave her tarwad house and to take up her residence with her husband, and whether such obligation on her part, if any, is subject to any and what restrictions.

The parties are at liberty to adduce fresh evidence.

The finding should be submitted within two months after the re-opening of the District Court after the recess, and seven days will be allowed for filing objections.

[In compliance with the above judgment the District Judge submitted the following

FINDING:—

I am directed to submit a finding on the following question:—

"Whether a Moplah wife governed by the Marumakathayam law is bound to leave her tarwad house and take up her residence with her husband, and whether such obligation on her part, if any, is subject to any and what restrictions."

2. On a perusal of the remand order certain conclusions suggested themselves—in the light of one's knowledge of North Malabar—and the evidence adduced on remand has not materially modified those conclusions. They are:—(1) that it is the custom under Marumakathayam law for a Moplah wife to live in her own tarwad house; (2) that notwithstanding this, she is bound to go and live with her husband if he so requests. This will be elucidated further on.

3. Plaintiff has examined three additional witnesses at remanded hearing and defendant four.

4. P. W. No. 8 is the Athigari of Muzhapilangad which is about five miles from where the parties live. He is a follower of Marumakathayam, as are also, I may state at once, all the other witnesses examined on remand. He states that among Marumakathayam Moplahs there is no obligation on a woman to leave her tarwad and go and live with her husband on marriage, that the custom is for husbands to visit their wives in their tarwad houses, and that the husband generally lives in the wife's tarwad house after marriage. Both this witness and all the others examined on remand have been cross-examined about particular instances where more or less well-known Moplahs have followed the practice opposed to the one in favour of which they are giving evidence. And no doubt there is considerable diversity of usage; in the case of some of the Moplahs alluded to their wives live with them, in the cases of others the wives live in their tarwad houses. To return to P. W. No. 8, he admits in cross-examination that as regards the rights and obligations arising out of marriage, Moplahs follow Muhammadan law. The witness states that he does not know any Moplah wife who is living with her husband. But he has to admit immediately after that his own wife is living with him. The question whether if a wife refuses to go and live with her husband she is entitled to maintenance does not seem to arise on the issue referred for a finding. Nevertheless, as it could scarcely be said to be altogether unconnected with the subject I allowed the witnesses to be questioned on the point, noting the objection of Counsel and Pleader for plaintiff.

5. P. W. No. 9, a resident of the Amsam of the parties, with Rs. 70 assessment in his name, corroborates the last witness *re* the custom and the absence of obligation on the part of the wife to go and live elsewhere than in her tarwad house with her husband. All the witnesses admit that the *vidukudal* or consummation ceremony takes place in the wife's tarwad house and that the husband lives there for some time afterwards. This particular custom appears to have practically no exceptions. This witness is a son of plaintiff's karnavan's daughter and various other marriage connections between relatives of his and of plaintiff are elicited. P. W. No. 10 an inhabitant of Cannanore about four miles from where the parties live with Rs. 44 assessment in his name corroborates the two previous witnesses *re* custom and the wife not being bound to go and live elsewhere with her husband. The witness was convicted with Kalleri Pokkar in a famous forgery case but was acquitted on appeal. He denies that among respectable people the wife goes and lives with the husband. But the evidence shows that the practice is largely followed among such people.

6. D. W. No. 7—1st D. W. on remand—is acting Kazi of Tellicherry for his father the permanent Kazi, who, he states, is ill. He says his tarwad has some property for which there is Rs. 20 in his karnavan's name. He says that among Marumakathayam Moplahs a wife is bound to go and live with her husband if he so requests. He would apparently rather answer a question where a Moplah wife spends most of her time—in her husband's or her tarwad houss than the question where Moplah wives generally live.

He, however, states that "in this country," meaning no doubt in the locality of Tellicherry, most wives live in their tarwad houses. In cross-examination he draws a distinction, in the country parts the wife lives permanently in her husband's house but that in towns the husband lives in the wife's house. I don't know whether this evidence of his is simply an attempt to wriggle or represent a solid distinction. He states the obligation of a wife to go and live with her husband is founded on Muhammadan Law and not on local custom, but again he states that according to local custom she must go. Again, he states there is no special local custom in the matter.

7. D. W. No. 8 is karnavan of his tarwad which he says is one of the principal ones in Tellichary paying Rs. 1,000 assessment —the amount standing in his name as karnavan is only about Rs. 20—also states that a Marumakathayam Moplah wife is bound to go and live with her husband. Of course, all the witnesses on remand who say the wife is bound also say that if she refuses to go she is not entitled to maintenance. The witnesses on the other side on remand say, of course, that her not going does not disentitle her to maintenance. These latter witnesses also seem to announce a general proposition that under Muhammadan law a husband is bound to maintain his wife unless and until he divorces her, *i. e.*, apparently even if she refused to go though bound. If such were the case, his remedy would presumably be to divorce her. But Muhammadan law does not compel a husband to maintain his wife under all circumstances till he divorces her. There is nothing in this point and besides the maintenance matter is not immediately in question in the issue before me. To continue with D. W. No. 8, though he states that a wife is bound to go and live with her husband he supports the other side otherwise because he states that as far as his knowledge extends the husband generally lives in the wife's house, though he modifies this by saying that the custom is for the husband to live in the wife's house, portion of the time and for the husband to take the wife to his house for the other portion. Again, he says that Moplahs will live for some time in their wives' houses and if there is no accommodation they will leave.

8. D. W. No. 9 is one of the karnavans or manager of the Baliapatam *jamath* mosque and says his tarwad is an ancient one in Baliapatam. He says that if a Marumakkathayam Moplah wants his wife to go and live with him she must, that the wife's place of residence is determined by the husband and in the absence of such determination she resides in her own tarwad house. But he states that most women go and live in their husbands' houses; again, that it is about half and half each way; and that he can't say which arrangement is most prevalent. His own wife he admits lived in her tarwad house for a considerable time though she has been living with him permanently for a long time. The witness and the Kazi of the Baliapatam mosque (P. W. No. 6) appear to be on opposite sides in some disputes *re* mosque matters. D. W. No. 10 lives in the locality of the parties and corroborates the previous witnesses *re* the wife's obligation. In his locality the majority of wives, he says, live with their husbands. He conducts some cases he says and it would seem that he assisted in this case also for defendant.

9. I have summarized the foregoing evidence mainly for convenience of reference. As stated already, it does not materially affect my previous ideas in the matter.

10. There can be no question about its being the custom for the wives of Marumakkathayam Moplahs to live in their wives' tarwad houses and be visited by their husbands there. Those witnesses who try to prove the contrary are essaying an impossible task. It is one of the recognized incidents of Marumakaythayam law which the North Malabar Moplahs follow. The evidence of P. W. Nos. 8, 9 and 10 and of D. W. No. 8—who supports them on this point—may be accepted about the custom. The evidence of D. W. Nos. 7 and 9 is halting and inconclusive on it, for the simple reason that they are trying to show that the custom is other than it really is. Even apart from evidence there is no doubt about the existence of the custom in question. No doubt, it has numerous and probably ever increasing exceptions.

11. Had the issue referred for a finding been whether such a custom existed or not I should have had no hesitation in reporting in the affirmative. I should also have added

that it is an ancient custom, a widespread one and one not repugnant to public morality—essentials of a valid custom.

But the issue is not that but whether a Moplah wife governed by Marumakathayam law is bound to leave her tarwad house and go and live with her husband. The existence of the custom in question cannot alone settle this point. Other considerations arise. There is the question of Muhammadan law. The parties are married according to the rites of Muhammadan law. In all matters appertaining to religion they follow Muhammadan law. Marriage is, of course, a religious institution under Muhammadan law. And, of course, under Muhammadan law a wife is bound to live with her husband if he requests her to do so. Though there is nothing opposed to public morality in the custom of a wife not going to her husband's house but remaining in her own tarwad house, yet there cannot be any doubt that such a custom must be repugnant to Muhammadan marriage law as well as to the marriage laws of every patriarchal people. That a wife could refuse to live with her husband in his house if it so pleases her is utterly opposed to the principles of those laws. It seems to me doubtful whether it would even be possible to establish such a custom as a binding modification of Muhammadan marriage law. But assuming it could I am clearly of opinion that there is no such evidence in this case as would justify holding that this Marumakathayam custom has become such a binding modification of Muhammadan law as to justify a wife in refusing to go and live with her husband. The custom exists and has existed because Moplahs accepting the conditions of the Marumakathayam law under which they lived, accepted also that one of them by which wives continued to live in their own tarwad houses and did not in consequence desire to exercise their right under Muhammadan law. But it does not follow that this obvious and highly important right under Muhammadan law has been abrogated and that if a husband requests his wife to live with him as Muhammadan law lays down, she is entitled to refuse. No doubt the Kazi of Baliapatam was examined as a P. W. on commission at the original trial and he says "if a husband calls his wife to live in his house she should go if it is advantageous to her, and she should not go if it is disadvantageous." This is not the view of D. W. No. 7 the acting Kazi of Tellicherry and it seems to me more an attempt to reconcile the two conflicting facts than an authoritative exposition of which of the two laws is to prevail in the matter. The mere evidence of P. W. Nos. 8—10 that the wife is bound to go cannot establish the important point now in question *re* the conflict between Muhammadan law and Marumakathayam custom. It would have been desirable to have had more definite and more extensive ecclesiastical evidence on the question. It was not sought to examine the Baliapatam Kazi again in the light of the High Court's remand order.

12. With reference to the portion in the remand order "...and whether such obligation on her part, if any, is subject to any and what restrictions," neither side has taken its stand on any question of this sort, not even in connection with the Baliapatam Kazi's statement just quoted; he does not elucidate further what amounts to "advantageous" and "disadvantageous" except to indicate that even the giving of property by the husband to the wife need not necessarily make things "advantageous" to her.

13. I may allude to the fact that the very right to the maintenance which plaintiff claims accrues to her only under the Muhammadan law; it is unknown to Marumakathayam law. So the law plaintiff seeks to overrule on one point is the very law which enables her to sue. If the rights, why not also the obligations of Muhammadan law?

14. On the facts before me I, therefore, decide on the issue referred to me by the High Court that a Moplah wife governed by Marumakathayam law is bound to leave her house and go and live with her husband if he requests her to do so]

The second appeal coming on for final hearing after the return of the finding the Court delivered the following

JUDGMENT.—The Judge has found that the usual practice amongst the Moplahs of North Malabar following the Marumakathayam law is for a married woman to live in her tarwad house, though there are many instances where the wife goes to live with her husband in his own house, but he holds

that as the wife's right to maintenance is derived by her from the Muhammadan law she must take it subject to the obligation under that law to live with the husband in his own house if he requires her to do so. We agree in this view. Besides, the custom of living in the tarwad house cannot be said to be anything more than a social usage and does not carry any legal consequences. The result is that the second appeal must be dismissed with costs.

Appeal dismissed.

[s. c. 16 C. W. N. 97; 11 M. L. T. 6; 9 A. L. J. 68; (1912) 1 M. W. N. 32.]

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

November 2, 1911.

Present:—Lord Macnaghten, Lord Robson, Sir John Edge and Mr. Ameer Ali.

JAMNA DAS—PLAINTIFF—APPELLANT

versus

Pandit RAM AUTAR PANDE AND OTHERS —DEFENDANTS—RESPONDENTS.

Mortgage—Sale of equity of redemption—Undertaking by purchaser to pay off mortgage—Personal liability to pay—Balance legally recoverable—Transfer of Property Act (IV of 1882*), s.* 90.

The purchaser of an equity of redemption is not personally bound to pay the mortgage-debt.

A mortgagor sold his equity of redemption and left a part of the purchase-money with the purchaser to pay off the mortgage. The purchaser did not do so, and the mortgagee sued on the mortgage and sold the mortgaged property which was not sufficient to pay off the decretal amount. He then sued, under section 90 of the Transfer of Property Act, for the recovery of the balance for the purchaser:

Held, that, the mortgagee had no right to avail himself of the undertaking given by the purchaser to his vendor, as the mortgagee was no party to the sale; and that the purchaser not having entered into any contract with the mortgagee, was not a person from whom "the balance was legally recoverable" within the meaning of section 90.

Appeal from the judgment of the Allahabad High Court, dated April 20th, 1909, reported as 31 A. 352; 6 A. L. J. 427; 2 Ind. Cas. 460, affirming that of the Sub-Judge of Mirzapore, dated the April 16th, 1907.

FACTS.—Lakhpati Koer borrowed Rs. 40,000 from the plaintiff Jamna Das on a mortgage-bond. She subsequently sold all her properties including the equity of redemption in the mortgage to the principal defendant, and out of the consideration-money she left Rs. 40,000 with the purchaser to pay off the mortgage, but the purchaser did not do so.

The mortgagee instituted a suit on his mortgage against the representatives of the mortgagor and against the purchaser, the principal defendant, and obtained a decree. He then caused the mortgaged property to be sold, but the sale-proceeds were not sufficient to pay off the decretal amount. Thereupon he instituted the present proceedings for recovery of the balance of the amount under section 90 of the Transfer of Property Act. The Court of first instance gave him a decree against the representatives of the mortgagor but dismissed his application against the principal defendant. He appealed to the High Court but his appeal was dismissed. He then appealed to the Privy Council.

Sir *E. Richards, K. C.*, and Mr. *Ross*, for the Appellants.

Mr. *L. DeGruyther, K. C.*, and Mr. *Bhagwandin Dube*, for the Respondents.

JUDGMENT.

LORD MACNAGHTEN.—This is a perfectly plain case. The action is brought by a mortgagee to enforce against a purchaser of the mortgaged property an undertaking that he entered into with his vendor. The mortgagee has no right to avail himself of that. He was no party to the sale. The purchaser entered into no contract with him, and the purchaser is not personally bound to pay this mortgage-debt. Therefore, he is not a person from whom, in the words of the 90th section of the Transfer of Property Act, "the balance is legally recoverable."

Their Lordships will, therefore, humbly advise His Majesty that this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *Ranken, Ford, Ford & Chester.*

Solicitors for the Respondents: Messrs. *Barrow, Rogers* and *Nevill.*

KIRPAL SINGH *v.* SANT SINGH.

(S. C. 71 P. R. 1911.)

PUNJAB CHIEF COURT.

CIVIL APPEAL No. 662 OF 1909.

May 22, 1911.

Present:—Mr. Justice Rattigan and Mr. Justice Shah Din.

KIRPAL SINGH—DEFENDANT—APPELLANT

versus

SANT SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Bond in favour of managing member—Right to sue—Manager's right to sue in his own name without impleading other members—Right of other members to receive payments—Appeal—Court-fee—Payments disallowed by first Court—Prayer for declaration as to who is entitled to money—Prayer for reduction of amount of decree—Court Fees Act (VII of 1870*), Sch. II, Art.* 17 *VI—Parties.*

A bond was executed in favour of some members of a joint Hindu family as obligees. These members brought a suit for recovery of the money due on the bond. The other members of the family were not impleaded as parties. The defendant had made certain payments to the other members on account of the debt. He pleaded that the debt was due to all the members of the family and that the payments should be allowed towards the debt. The Court of first instance held that the payments could not be regarded as payments made to the plaintiffs and decreed the whole claim. The defendant appealed, affixing a Court-fee stamp of Rs. 10 on his memorandum of appeal:

Held, that the memorandum of appeal was sufficiently stamped so far as the prayer for a final declaration as to who was entitled to the money was concerned, but that the defendant must pay *ad valorem* Court-fee on the amount of payments by which he sought the decree of the lower Court to be reduced.

If a contract is made on behalf of a joint Hindu family by the managing member, the latter is entitled to sue on the contract in his own name without making the other members of the family parties to the suit.

In the case of such a contract, no other member of the family is competent to interfere or to give receipts in connection therewith.

Kishen Parshad v. *Har Narain Singh*, 15 C. W. N. 321; 8 A. L. J. 256; 9 M. L. T. 343; 13 C. L. J. 345; 21 M. L. J. 378; 13 Bom. L. R. 359; 33 A. 272 (P. C.); (1911) 2 M. W. N. 395; 9 Ind. Cas. 739, followed.

Where a debtor executes a bond in favour of some members of a joint Hindu family under the impression that the contract is with all the members of that family and has no notice or reason to believe otherwise, he is justified in making payments to members of the family other than the obligees and should be given credit therefor.

First appeal from the order of the District Judge, Gujranwala District, dated 29th April 1909.

Mr. *Shadi Lal*, for the Appellant.

Rai Sahib Lala *Sukh Dial*, for the Respondents

JUDGMENT.—A preliminary question arises in this appeal with regard to the sufficiency of the Court-fee stamp. Briefly stated, the facts are as follows:—

One Bishen Singh, with his four sons Hakim Singh, Sanat Singh, Ganesha Singh and Narain Singh formed a joint Hindu family and owned two shops, one at Laddhewala, the other at Mannanwala, both in the Gujranwala District. Bishen Singh died in November 1903, and on the 21st July 1904 Sardar Kirpal Singh (defendant-appellant) executed a bond for Rs. 17,000 nominally in favour of Hakim Singh and Sant Singh. The latter are the only persons who are named in the bond as the obligees, and on the 1st February 1908, Sant Singh and the two sons of Hakim Singh (who had died prior to suit instituted the present claim which is for recovery of Rs. 21,585-14-3, that is to say, for Rs. 17,000 as principal and Rs. 5,585-14-3 as interest and compound interest. Plaintiffs admit that a sum of Rs. 1,000 was re-paid by defendant on 12th *Maghar, Sambat* 1962 (26th November 1905) and they give defendant credit for the said amount.

Defendant admitted execution of the bond and liability thereupon, but pleaded (1) that the money had been advanced to him from the joint fund of the family and that plaintiffs were, therefore, not competent to sue alone for its recovery and that the other members of the joint family (Ganesha Singh and Narain Singh) should be impleaded as co-plaintiffs; and (2) that he had paid Ganesha Singh and Narain Singh Rs. 10,400 in all, including the Rs. 1,000 admitted by plaintiffs to have been re-paid, and (3) that as this payment was made to persons who were members of the joint family, he should be given credit therefor. When examined upon the pleadings, defendant distinctly stated that he still owed over Rs. 9,000 on the bond, and that he was ready to pay that amount "to whomsoever the Court will order" (page 21 of the paper-book).

Before issues were drawn, Ganesha Singh and Narain Singh filed an application in Court (on the 20th February 1908) in which they asserted that money paid to defendant had come from the funds of the joint family, and that as they were equally entitled to it they should be impleaded as co-plaintiffs. The

District Judge practically ignored this application, his order being that it should be "placed on the record."

The case then went to trial upon the following issues:—

"(1) Should all the members of the plaintiffs' joint Hindu family be brought on the record as co-plaintiffs?

(2) Have any re-payments been made by the defendant?

(3) Should the re-payment made to Ganesha Singh and Narain Singh be looked upon as re-payments made to the plaintiffs in satisfaction of the bond in suit?

(4) What is now due from the defendants?"

Upon these issues the District Judge found (*i*) that as the bond was executed exclusively in the names of Hakim Singh and Sant Singh, these persons were entitled to sue in their own names for its enforcement, and that it was unnecessary for them to implead the other members of their family as co-plaintiffs or as defendants; (*ii*) that a total sum of Rs. 10,400 had been paid by defendant to Ganesha Singh and Narain Singh, but (*iii*) that the defendant was not justified in making these payments to the latter, who had no authority to act as agents of the plaintiffs for this purpose; and (*iv*) that the said payments by defendants could not be regarded as payments made to plaintiffs.

The District Judge accordingly granted plaintiffs a decree for the full amount claimed (*viz.*, Rs. 21,585-14-3) with interest at the rate of 12 annas *per cent. per mensem* from the date of suit until realization. He further ordered defendant to pay costs of the suit.

From this decree the defendant has preferred an appeal to this Court and has affixed a Court-fee stamp of Rs. 10 only upon his memorandum of appeal. To his grounds of appeal the defendant has added the following note:

"As the defendant-appellant never denied liability for the debt and even now accepts the decree in the main, only contending that the Court should finally decide as to who is entitled to it, the value for purposes of Court-fee cannot be determined as it is a case when he only wants a final declaration as to who is entitled to the money and a stamp of Rs. 10 is sufficient for this portion of the relief."

We have heard arguments upon this question, but neither Counsel has been able to refer us to any authority directly in point and we must accordingly decide it upon principle.

No doubt the grounds of appeal are in the main of the nature of an interpleader, and appellant's chief objection is that the Court has decided the suit without impleading Ganesha Singh and Narain Singh, who also claim to be entitled to the money due on the bond. He points out that the result will be that he has to run the risk of a second suit at the instance of those persons.

This contention is, we think, well founded in part. The defendant has still to pay (in any event) a large sum to the persons who are legally entitled to the bond, and as to this sum he expresses his willingness to pay the said amount to whomsoever the Court may adjudge it to be due. *Pro tanto*, he accepts the decree of the District Judge, and the only question that he wants definitely settled is whether the plaintiff, or Ganesha Singh and Narain Singh, or both jointly, are entitled to the balance. As to this part of his appeal we think this memo. of appeal has been sufficiently stamped with a Court-fee of Rs. 10 (article 17 (6) of the 2nd Schedule to the Court Fees Act). But as regards the sum of Rs. 10,400 which the defendant says he has paid to Ganesha Singh and Narain Singh, the matter is very different. Here defendant asks for the reversal of the decree of the District Judge and credit given to him for this amount. The District Judge has held that the payment of this amount to Ganesha Singh and Narain Singh cannot be regarded as payment to plaintiffs, and it is the object of defendant upon this appeal to show that this finding is wrong and that to that extent the decree of the District Judge must be set aside. This is a relief of which the value can certainly be determined, and we accordingly hold that the plaintiff must pay *ad valorem* duty on the said amount of Rs. 10,400.*

In support of his client's appeal, Mr. Shadi Lal devoted much time and trouble to establish the facts that the four brothers,

* NOTE. The appellant made up the deficiency in the Court-fee stamp in accordance with this order.

KIRPAL SINGH *v.* SANT SINGH.

Hakim Singh, Sant Singh, Narain Singh and Ganesha Singh, constituted a joint Hindu family in every sense of the terms; that the whole of their property was still joint, and that the Rs. 17,000 advanced to defendant, within a few months of the death of Bishen Singh, the father of the said four brothers, had come from the joint family funds. A very lengthy and convincing argument was addressed to us in support of these contentions, without interruption on the part of Mr. Sukh Dial, and as Sant Singh (the principal plaintiff) had in the lower Court distinctly asserted that the money in question had been "allotted" to him and Hakim Singh by his father, we were led to infer that the respondents still maintained that the loan to defendant had nothing to do with the joint family. We were, therefore, somewhat surprised when Mr. Sukh Dial, on rising to reply, admitted that the money came from the joint funds and that the plaintiffs would (if successful in this case) have eventually to account to Narain Singh and Ganesha Singh for it. Plaintiffs' position, as now explained, is this:—The family is joint in every respect, and the money advanced to defendant came from the joint family chest; but, though joint, the four brothers have mutually agreed that the two shops, the one at Mannanwala, the other at Laddhewala, shall be carried on independently of each other; that the contract with defendant was made by the Laddhewala shop, of which plaintiffs are alone the managing members, and that, therefore, plaintiffs are alone entitled to sue in respect of that contract and to receive payments in respect thereof from defendant. Mr. Sukh Dial conceded, further, that the suit must be regarded as one by plaintiffs in a representative capacity, that is, by them as the Managers of the Laddhewala branch suing on behalf of the family. The only points, therefore, in dispute upon this appeal are (1) whether the alleged repayments made by defendant to Narain Singh and Ganesha Singh were actually made; (2) whether the sum of Rs. 1,000 which was admittedly re-paid by defendant on the 12th *Maghar*, *Sambat* 1962 was paid directly to Hakim Singh or indirectly to the latter through Ganesha Singh; and (3) if such re-payments, if established in fact, can be held to be valid payments, binding upon plaintiffs.

It is, we think, to be regretted that the respondent's position was not made clear at the commencement of the hearing, as considerable time would thereby have been saved and Mr. Shadi Lal spared much trouble.

But the position of plaintiffs has now been made clear and we have consequently to deal only with the above questions, as Mr. Shadi Lal concedes that if plaintiffs are suing merely on behalf of the family, as the alleged Managing members of the Laddhewala shop, they were entitled to bring the suit in their name, without making the other members of the family parties to the suit. Upon this point the ruling of their Lordships of the Privy Council reported in *Kishen Parshad* v. *Har Narain Singh* (1) is conclusive. Mr. Shadi Lal, however, does not admit that plaintiffs are the Managing members of that shop, or that the contract was made with that shop or distinct from the family as a whole, and in any event, he contends, that defendant had no knowledge of any arrangement *inter se* which may have been made by the members of the family. The learned Counsel argues that defendant had always regarded the family as joint in every respect, and that he had no knowledge whatever of the arrangement alleged by plaintiffs, but denied by the two other brothers, Narain Singh and Ganesha Singh.

After full consideration of the evidence upon the record of the pleadings of the parties and of the arguments of learned Counsel, we have come to the conclusion that defendant has succeeded in his contentions.

In the first place, we agree with the District Judge that defendant has proved that he made re-payments to Narain Singh and Ganesha Singh aggregating in all Rs. 10,400.

Plaintiffs admit that the sum of Rs. 1,000 was actually re-paid, and it is clear from the entry in their own books, made by the late Hakim Singh, that this sum was received through the Mannanwala people, *i. e.*, through Narain Singh and Ganesha Singh. As to the other items of Rs. 900, Rs. 2,500, Rs. 2,000 and Rs. 4,000, we have the evidence of defendant who swears that he paid these sums to Narain Singh and Ganesha Singh and his evidence is corroborated by that

(1) 15 C. W. N. 321; 8 A. L. J. 256; 9 M. L. T. 343; 13 C. L. J. 345; 21 M. L. J. 378; 13 Bom. L. R. 359; 33 A. 272 (P. C.); (1911) 2 M. W. N. 395; 9 Ind. Cas. 73

of these two persons, and of his agent Ram Singh, and by the entries in defendant's account books. It was, no doubt, difficult for plaintiffs to prove the negative, but the fact that Narain Singh and Ganesha Singh (who will eventually have to account for monies so received and who admit that the plaintiffs are entitled to a half share therein) support defendant's assertion that these sums have been paid to them, is, we think, a very strong piece of evidence in favour of defendant's plea. The District Judge finds that the sums were actually paid to Narain Singh and Ganesha Singh, but somewhat inconsequentially, he proceeds to hold the defendant was acting in collusion with those two brothers against the plaintiffs. It is true that the witness, Dharam Singh, stated that after the brothers had quarrelled, the plaintiffs alleged before him that Narain Singh and Ganesha Singh were in collusion with defendant, but that Narain Singh and Ganesha Singh denied the allegation. Except for this, there is nothing on the record to support the theory of fraud or collusion, and whether Sant Singh or Budh Singh so much as hinted at it, though we are bound to say that the execution of the pro-note on the 16th *Magh*, *Sambat* 1963 (28th January 1907) for Rs. 13,054-6-0 is a circumstance which does not impress us favourably. The very fact that defendant does not rely upon this note (which relieved him of all liability as regards the payment of compound interest) is a point against him. But upon the balance of evidence, we think his contentions must prevail. He has from the outset pleaded re-payment to Narain Singh and Ganesha Singh, giving full details as to amounts re-paid and dates of re-payment, and Sant Singh, though examined on no less than five occasions during the course of the trial, has never ventured to suggest that defendant was colluding with his brothers. The District Judge has found the books of the defendant to be in order and above suspicion, and Mr. Sukh Dial has not been able to satisfy us that this finding is erroneous. In view of all these facts we must hold that defendant actually paid Narain Singh and Ganesha Singh Rs. 10,400 towards the liquidation of his debt upon the bond of the 17th July 1904.

As regards the *second point*, we have already pointed out that the entry made by Hakim Singh himself fully corroborates defendant and Narain Singh and Ganesha Singh in their assertion that the Rs. 1,000 re-paid on the 12th *Maghar*, *Sambat* 1962, were received through Ganesha Singh.

The real dispute between the parties is with regard to the *third* question. Assuming that the re-payments were made to Narain Singh and Ganesha Singh, can we hold that plaintiffs are bound thereby? This is a question of some difficulty, but after giving every weight to Mr. Sukh Dial's arguments, we are of opinion that plaintiffs are bound to acknowledge and give credit for those payments.

From a purely equitable point of view, it would appear unjust to compel defendant to pay plaintiffs sums of money which he has already paid to persons who are jointly entitled with plaintiffs to those monies, and who admit that they have received the same and are ready to account to plaintiffs therefor. But if plaintiffs are legally entitled to recover such sums from defendant, questions of equity cannot be considered as a bar to their claim. The question, then, is whether plaintiffs are in law entitled to ignore those re-payments? Mr. Sukh Dial contends that they are so entitled because (*a*) the contract was, upon the face of the bond, made solely with Hakim Singh and Sant Singh, as the Managing members of Laddhewala shop, and (*b*) the latter alone were entitled to receive payments in respect of that debt. Now it may, we think, be taken as established by the decision of their Lordships of the Privy Council to which we have already referred, that if a contract is made on behalf of a joint Hindu family by the Managing member, no other member of the family is competent to interfere in that contract or to give receipts in connection therewith. Mr. Shadi Lal demurred to this interpretation of their Lordships' judgment, but we think it is sound. But while the principle is clear, its application to the facts of particular cases may not be easy, and every case must necessarily be decided upon its own facts.

In the present case, the crucial question is whether the contract was made by Hakim Singh and Sant Singh as Managing members of the Laddhewala branch, and whether defendant knew that the contract was with the latter only, and not with the joint family. If he did, he had no right to make payments to other members of the family. On the

other hand, if he had no reason to believe that the contract was other than a contract with all four of the joint brothers, he was, in our opinion, fully justified (until notified otherwise) in making payments to any one of those four brothers on behalf of the family.

Now what are the facts? Admittedly, the family was joint and during the life-time of the father, Bishen Singh, both shops were managed jointly. Defendant had dealings with the family during Bishen Singh's life-time. Bishen Singh died in November 1903 and the bond was executed in July 1904, and it is admitted that at that time all four brothers were on the best of terms. It is not suggested that any notice was given to defendant that the two shops were to be managed independently and when the bond was executed, all four brothers were present and the money (according to defendant's evidence which is uncontradicted upon the point) was actually handed to him by Narain Singh. Plaintiff, Sant Singh, himself admits that the bond was executed neither at Laddhewala nor at Mannawala but at Gujranwala, and there can be little, if any, doubt that the money was paid there. Then we have a letter from defendant to Sant Singh and Hakim Singh (printed at page 5 of the paper-book) in the last sentence of which defendant distinctly informs plaintiff that he told "Narain Singh and Ganesha Singh that he would pay interest when the grain was sold." This letter and this remark admittedly refer to this bond-debt and it is a legitimate inference from the words used by defendants that he regarded Narain Singh and Ganesha Singh as equally entitled in the debt.

Furthermore, we have it established that from the very outest defendant made re-payments through Narain Singh and Ganesha Singh. The first re-payment the item of Rs. 1,000 was made on the 12th *Maghar*, *Sambat* 1962 (26th November 1905) and it is clear from the evidence of defendant Narain Singh and Ganesha Singh and from the terms of the entry made by Hakim Singh himself in his own books, that this sum was paid by defendant to Ganesha Singh and remitted by the latter to the Laddhewala shop. Plaintiffs are unable to show that they protested against this payment to the Mannanwala branch, or that they informed defendants that all payments must in future be made direct to them.

As regards the other sums Narain Singh has deposed in clear terms that "Sant Singh and Hakim Singh had knowledge of these recoveries" (paper-book page 22, L. 20). Sant Singh was examined on two occasions after that statement was made, but on neither occasion did he venture to contradict Narain Singh's very emphatic assertion. On the other-hand, in his evidence given on the 8th April 1908—(paper-book page 24) he makes two false statements, (1) that the Rs. 17,000 lent to defendant had been allotted to his share by Bishen Singh, and (2) that after the death of Bishen Singh plaintiffs got no money from the Mannanwala firm. It is clear from the entry made by Hakim Singh (and Sant Singh could not have been ignorant of the fact) that the Rs. 1,000 had been received after the death of Bishen Singh, from the Mannanwala branch.

As a matter of fact, a quarrel arose in the family after the death of Hakim Singh, and it was in consequence of this dispute that the two branches, at Mannanwala and Ladhewala practically, though not nominally, separated from each other and refused to recognize each other's acts. The defendant has sworn that he personally knew nothing of this dispute, until the institution of the present suit and there is nothing on the record to rebut this evidence as to this.

There is evidence on the record to the effect that in their dealings with various third parties, all four brothers acted upon the assumption that each of them was entitled to enforce contracts made in the names of some only of them, but we lay no great stress upon this, though we cannot lose sight of the fact that in a previous suit Hakim Singh (the eldest brother) distinctly admitted that it was immaterial in whose name a bond was executed and that any one of the brothers could sue to enforce it (see his statement made on the 14th August 1901). The important point is whether defendant was led to believe that the four brothers were joint and that his contract, though nominally in the names of Sant Singh and Hakim Singh alone, was really a contract with the joint family. It is now, somewhat tardily and reluctantly, admitted that in point of fact the contract was with the joint family, and that all members of it are entitled to share therein, and the sole ground upon which defendant's right to pay monies thereunder to Narain Singh and

KIRPAL SINGH *v.* SANT SINGH.

Ganesha Singh is denied, is that plaintiffs were, to the knowledge of defendant, the sole managing members of the Laddhewala branch and that it was this branch alone which made the contract. But here the facts are all against plaintiffs. The contract was made at Laddhewala; the money came from the joint fund and was actually handed over to defendant by Narain Singh; all four brothers were present when the contract was made; and the first repayment was made to Ganesha Singh and received through him, without demur, by Hakim Singh. Further, the case for plaintiffs as now set up, is radically different from the allegations made in the plaint and pleadings, and from the statements made by Sant Singh when examined as a witness. Plaintiffs' original claim, though not very lucidly expressed, was obviously intended to suggest that the debt was due to them alone, and that no one else had any interest therein, and it was in support of this that Sant Singh asserted that the Rs. 17,000 was advanced out of monies allotted to him and Hakim Singh by his father, Bishen Singh.

In view of all these facts, we are of opinion that defendant who apparently had no object in making payment to the Mannanwala branch rather than to the Laddhewala branch was justified in assuming that all four brothers were jointly and equally interested in the contract and that he had no knowledge that it was the Laddhewala branch alone which had made the contract with him. We further find that defendant had no notice that the Laddhewala branch was being managed independently of the Mannanwala branch, and that re-payments were to be made to plaintiffs and not to any other member of the joint family with whom he was led to suppose that he had contracted. On the contrary, we find that he had every reason to believe that repayments made to the Mannanwala branch would be recognized as valid by the other members of the family, just as the re-payment of Rs. 1,000 had been so recognized. Mr. Sukh Dial laid some stress on the fact that in defendant's account-books there was a separate *khata* in respect of debts due to (1) Narain Singh and Ganesha Singh, and (2) this bond debt which is entered as due to Hakim Singh and Sant Singh. In point of fact, we find that the first *khata* No. 57 (page 9 of the paper-book) was closed with an entry to the effect that Rs. 2,167-8-0 was due on account of interest on this very sum of Rs. 17,000, and that this entry was thereupon transferred to *khata* No. 42 which is in the name of Hakim Singh and Sant Singh (page 11 of paper-book). In these two *khatas* sums due on the bond and on other accounts are mixed up, but so far from this affording an argument in support of plaintiffs' case, it seems to us to show clearly that defendant regarded this bond-debt as due to all four brothers. Otherwise, why should the *khata* of Narain Singh Ganesha Singh finish with the entry regarding the amount due on the bond debt of Rs. 17,000, and why should the *khata* of Hakim Singh-Sant Singh contain entries relating to payments made, otherwise than in respect of the bond-debt, to Narain Singh and Ganesha Singh.

We accordingly so far accept the appeal that we hold that the defendant is entitled to credit for the sum of Rs. 9,400, (*i.e.*, the Rs. 10,400 *minus* the Rs. 1,000 for which plaintiffs have given defendant credit). Plaintiffs in claiming the sum of Rs. 21,585-14-3 have not only ignored the sum of Rs. 9,400 which we find to have been duly re-paid, but have claimed interest and compound interest on the principal sum of Rs. 17,000 upon the assumption that the said sum of Rs. 9,400 was not re-paid. In view of our findings, not only will the latter sum have to be deducted from the total amount claimed, but a proportionate deduction will have to be made in respect of the interest and compound interest claimed by plaintiffs. This is a matter of account which must be settled by the office in consultation with the parties' Counsel. Plaintiffs are clearly entitled to a decree for the balance due from defendant and must be given such relief, together with interest on such sums from the date of institution of suit until realization, at the rate specified in the decree of the District Judge. As regards costs we direct the parties to bear their own throughout the litigation.

Appeal accepted.

ENSAR ALI *v.* YAKUB ALI.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL NO. 1509 OF 1910.
December 18, 1911.
Present:—Mr. Justice Carnduff.
ENSAR ALI AND OTHERS—DEFENDANTS—APPELLANTS
versus
YAKUB ALI—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 106—Suit between rival proprietors—Question of possession—Suit between two rival tenants—Question of title, if may arise—Court not to go behind statement in judgment.

The question of possession alone should be considered in a proceeding under section 106 of the Bengal Tenancy Act between two rival proprietors: but the question of title may legitimately arise and be decided in such a proceeding between two rival tenants or between a landlord and a tenant.

Mohunt Padmalav Ramanuja Das v. *Lukshmi Rani*, 12 C. W. N. 8 at p. 15, relied upon.

A Court will not go behind any statement in the judgment of another Court.

Mirza Shamsher Bahadur v. *Kunj Behari Lall*, 7 C. L. J. 414; 12 C. W. N. 273; 3 M. L. T. 212, relied upon.

Appeal from the decree of the Special Judge of Backergunge, dated February 4th, 1910, affirming that of the Assistant Settlement Officer of Backergunge, dated September 21st, 1909.

Babu *Hem Chandra Sen*, for the Appellants.

Dr. *Sarat Chandra Basak*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-respondent under section 106 of the Bengal Tenancy Act, 1885, for the correction of an entry in a record of right relating to a *miras karsa* holding. The holding was entered in the record as belonging to one Moharuddi and the defendants, half and half. Moharuddi has died and Yakub claims to be, as his second cousin, entitled to 4-annas of the holding. He accordingly brought this suit in order to have his name entered in respect of 4 annas. Both the Courts below have concurred in altering the record accordingly.

The defendants now appeal, and on their behalf, three contentions have been pressed before me, *first*, it is said that the onus has been wrongly placed on the defendants, whereas it ought to have been placed on the plaintiffs, *secondly*, it is contended that the lower Courts have not found what the precise share of Yakub under the Muhammadan law is, and, therefore, they had no right to alter the record by entering his name in respect of any particular share, *lastly*, it is urged that, in cases under the Bengal Tenancy Act, the sole question to be decided is the question of possession and no question of title ought to be considered at all.

The first point I am unable to understand. I can find nothing in either of the judgments of the lower Courts regarding the onus of proof excepting the remark made by the lower Appellate Court that the onus of proving that Moharuddi was not entitled to a share in the property lies on the appellants and that the appellants have utterly failed to discharge that onus. There can be no question as to the soundness of this remark, for Moharuddi is entered in the record as the owner of half the *miras karsa* and the burden of proof is, of course, on the person alleging that that record is incorrect.

As regards the second point, the learned Vakil for the appellants relies on the case of *Mohunt Padmalav Ramanuja Das* v. *Lukshmi Rani* (1). In that case, no doubt, it was held that the question of possession alone ought to be considered in a proceeding under section 106 of the Bengal Tenancy Act between two rival proprietors; but I am here concerned with a proceeding between rival tenants and, as one of the learned Judges (Mr. Justice Coxe) observed at page 15 of the report, in suits between tenant and tenant or between landlord and tenant, question other than that of possession may legitimately arise. The ruling relied upon is, therefore, within point; and I see no reason for extending it to cases such as this.

As regards the third argument, I find it stated in both the judgments of the Courts below that the plaintiff was admittedly the heir of Moharuddi and so entitled to a share of 4 annas. I, for my part, am not prepared to go behind any such statement in the judgment of a Court, and, in this connection, I venture to express my entire concurrence with the remarks made by Mukerjee and Caspersz, JJ., in the case of *Mirza Shamsher Bahadur* v. *Kunj Behari Lall* (2)

There is really no substance in this appeal and it must be dismissed with costs.

Appeal dismissed.

(1) 12 C. W. N. 8 at p. 15.
(2) 7 C. L. J. 414; 12 C. W. N. 273; 3 M. L. T. 212.

DHIAN SINGH *v.* DHIAN SINGH.

PUNJAB CHIEF COURT.

MISCELLANEOUS CIVIL APPEAL No. 372 OF 1909.

January 3, 1912.

Present:—Mr. Justice Robertson and Mr. Justice Shah Din.

DHIAN SINGH—PLAINTIFF—APPELLENT

versus

DHIAN SINGH—DEFENDANT—RESPONDENT.

Jurisdiction—Suit by vendee for possession—Decree on payment of sum exceeding Court's pecuniary jurisdiction.

In a suit for possession of land brought by a vendee against his vendor, a Court has no jurisdiction to pass a decree for possession on payment of a sum which exceeds the pecuniary limit of its jurisdiction.

Mohamad Afzal Khan v. *Nand Lal*, 16 P. R. 1908, 146 P. L. R. 1908; 73 P. W. R. 1907, followed.

Miscellaneous appeal from the order of the Additional Divisional Judge, Sialkot Division, dated 23rd January 1909, reversing that of the Munsif, 1st Class, Gujranwala, dated the 17th August 1906, decreeing the claim and remanding case for re-decision.

Rai Bahadur Lala *Sukh Dial*, for the Appellant.

Bhagat *Gobind Das*, for the Respondent.

JUDGMENT.—The facts are briefly these. The plaintiff-appellant sued for possession of 78 *kanals*, 10 *marlas* of proprietary and occupancy land, together with accessory right therein, on the allegations that it had been sold to him by defendant-respondent for Rs. 4,070, that of this amount Rs. 2,531 was due to the latter, and that in spite of repeated demands, he had refused to receive this amount and deliver possession of the property sold.

The defendant-respondent raised certain pleas which it is not necessary to notice in this place. Issues were framed on the pleadings of the parties and after evidence had been recorded on both sides on those issues, the Court of first instance held that Rs. 2,631 out of the consideration-money was payable by the plaintiff to the defendant, and accordingly it decreed possession of the property in dispute in favour of the plaintiff on payment of the said amount to the defendant.

The defendant appealed to the Divisional Court and contended, *inter alia*, that out of the land in dispute 11 *kanals*, 4 *marlas*, *Khata* No. 86, were not assessed to land revenue, and that as the market-value of that area was about Rs. 11,000 the first Court which was that of a Munsif of the 1st class, had no jurisdiction to entertain the suit. The learned Divisional Judge remanded the case to the Munsif for an inquiry and report on points raised by the defendant. The return was to the effect that 5 *kanals*, 12 *marlas* out of the land in dispute were not assessed to land revenue and that the market-value of the said area was not less than Rs. 500. On receipt of the return, the Divisional Judge held that the portion of the land in suit which was not assessed to land revenue must be valued at its market price for purposes of jurisdiction, and he agreed with the Munsif that its market-value was not less than Rs. 500. As the value of the rest of the land for purposes of jurisdiction, calculated at thirty times the revenue was Rs. 991, the learned Judge held that the value of the whole subject-matter of the suit was over Rs. 1,000 and that, therefore, the Munsif had no jurisdiction to entertain the suit. The Divisional Judge accordingly accepted the appeal and remanded the case under Order XLI, rule 23, Civil Procedure Code, to the Court of the District Judge for a fresh trial.

The plaintiff has appealed to this Court from the Divisional Judge's order of remand. The Pleader for the defendant-respondent has taken the preliminary objection that as the Munsif did not dispose of the suit upon a preliminary point, the Divisional Judge had no power to remand the case under Order XLI, rule 23, Civil Procedure Code, for a fresh decision. In our opinion the Divisional Judge's order can be reasonably construed as one returning the plaint to the plaintiff to be presented to the proper Court, and, construed as such, it is appealable under Order XLIII, rule 1 (*a*), Civil Procedure Code. The preliminary objection is, therefore, overruled.

The respondent's Pleader further points out that according to the Full Bench ruling of this Court [*Mahomad Afzal Khan* v. *Nand Lal* (1)] the Munsif had no jurisdiction to pass a decree for possession of the land in dispute in favour of the plaintiff on payment of Rs. 2,631 and as the Advocate for the appellant is not prepared to question the correctness of the said ruling,

(1) 16 P. R. 1908; 146 P. L. R. 1908; 73 P. W. R. 1907.

we must hold that the decree passed by the Munsif was *ultra vires*. On this view of the case, it is not necessary to decide whether the view taken by the Divisional Judge in his order of remand as to the value of the suit for purposes of jurisdiction is correct or not, and the question as to the valuation of the subject matter of the suit can be again raised and decided in the Court of first instance. We set aside the order of the Divisional Judge and the decree of the Munsif, and direct that the plaint be returned to the plaintiff for presentation in the proper Court. Parties will pay their own costs throughout.

Order set aside.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 23 OF 1909.

November 28, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Abdur Rahim.

ADUSUPALLI VENKATA ROW—APPELLANT

versus

MARIKRUTHU AMMAL AND ANOTHER—RESPONDENTS.

Parties—Limitation—Death of party—One of legal representatives brought on record—No bar by time against bringing other representatives.

Where one of the representatives of a deceased party to a suit is brought on the record in time, there is no bar by time to bring in other representatives on the record subsequently.

Ramanuj Sewak Singh v. *Hingu Lal*, 3 A. 517 and *Krishnaji Janardan* v. *Murarry Rao*, 12 B. 48, followed.

Appeal against the order of the District Court of Chingleput, in Appeal Suit No. 224 of 1909, presented against the order of the Court of the District Munsif of Poonamalli, in C. M. P. No. 884 of 1906, in E. P. No. 774 of 1906 (O. S. No. 161 of 1894, on the file of the City Civil Court of Madras.

Mr. *Joseph Satya Nadar*, for the Petitioner.

Mr. *T. R. Ramachandra Iyer*, for the Respondents.

JUDGMENT.—The judgment-creditor had applied in time for bringing one of the representatives of David Pillai, namely, the second respondent, Swami Pillai, on record and that application was granted. That being so, the cases of *Ramanuj Sewak Singh* v. *Hingu Lal* (1) and *Krishnaji Janardan* v. *Murarry Rao* (2), with which we agree, show

(1) 3 A. 517
(2) 12 B. 48.

that there is no bar to the other representatives of the David Pillai, *viz.*, respondents Nos. 3 and 4 being also brought on the record on the present application. We may say that we do not understand the ground on which the learned District Judge distinguishes these cases. We order that Marikruthu Ammal and Kalanithi Ammal be brought on the record as legal representatives of David Pillai and set aside the order of the District Judge with costs to be paid by the respondents.

Order set aside.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 824 OF 1910.

November 1, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

NATESA PILLAY—APPELLANT

versus

MUNUSAWMY NAICKEN AND OTHERS—RESPONDENTS.

Mortgage—Assignment—Suit by assignee—Mistake as to date of mortgage in assignment-deed—Right of plaintiff to prove that suit mortgage was assigned.

Where a deed assigning a mortgage contains a mistake as to the date of the mortgage-deed, it is open to the assignee, suing on the mortgage to show that what he purchased is the mortgage sued on, and the date mentioned in the assignment-deed is a misdescription.

Palaniappa Tevan v. *Sadagopa Mudaliar*, (1911) 2 M. W. N. 133; 9 M. L. T. 319; 9 Ind. Cas. 729, followed.

Mr. *T. V. Gopalswami Madaliar*, for the Plaintiff.

Mr. *G. S. Ramachandra Iyer*, for the Respondents.

JUDGMENT.—We are of opinion that the plaintiff was entitled to show that the right purchased by Veera Pillay under Exhibit C was the mortgage now sued on, and that the year of the mortgage-deed mentioned in Exhibit C was a misdescription. See *Palaniappa Mudaliar* v. *Sadagopa Tevan* (1). The decrees of the lower Courts must be reversed and the suit remanded to the Court of first instance for fresh disposal according to law. The costs of the second appeal and the costs in the lower Appellate Court will abide the result.

Appeal allowed.

(1) (1911) 2 M. W. N. 133; 9 M. L. T. 319; 9 Ind. Cas. 729.

ALIM ALI *v.* NABBU.

PUNJAB CHIEF COURT.
CIVIL REVISION No. 691 OF 1911.
January 5, 1912.
Present:—Mr. Justice Chevis.
ALIM ALI—DEFENDANT—PETITIONER
versus
NABBU AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Custom—Adoption—Alienation—Gift—Daughter's son—Muhammadan Rajputs of Hissar District.

Among Muhammadan Rajputs of the Hissar District, the burden of proving the validity of the adoption of a daughter's son or of a gift in favour of a daughter's son lies on the adoptee or the donee. The adoption of a daughter's son who belongs to another caste is not valid by custom.

A gift of ancestral property to a daughter's son is not valid by custom.

Petition under section 70 (*a*) (*b*) of Act XVIII of 1884, as amended by Act XXV of 1899, for revision of the order of the Divisional Judge, Hissar Division, dated the 26th October 1910, reversing that of the Munsif, 3rd Class, Hissar, dated the 30th June 1910, dismissing plaintiffs' suit.

Lala *Lajpat Rai*, for the Petitioner.

Mr. *Gullu Ram*, for the Respondents.

JUDGMENT.—The plaintiffs, who are collaterals of Ahmad, sue for a declaration that the deed of gift executed by Ahmad, in favour of Alam Ali shall not affect their reversionary rights. Ahmad is dead, but plaintiffs cannot sue for possession in the presence of *Musammat* Najban. The deed of gift in question is a registered document, dated 15th April 1905. In it Ahmad describes Alam Ali as his adopted son. Alam Ali is daughter's son of Ahmad, and it is also pleaded in defence that Muratib, father of the donee, was a *khana-damad*. The argument for the defendant is that Alam Ali was adopted, that the suit is time barred, that the adoption was valid, and that apart from adoption, the gift is valid by custom, especially in view of the facts that the donee's father was *khana-damad* and that the gift was for services rendered by the donee's father.

The first Court held the adoption proved and valid, and also pronounced in favour of the validity of the gift, and so dismissed the suit. It also held the suit to be time-barred by Article 91, Limitation Act.

The learned Divisional Judge on appeal held that there was no adoption prior to the gift, that the suit was not time-barred, that there was an adoption at the time of the gift, but that such adoption was not valid, and also that the gift was not valid.

I admitted the case to a hearing under section 70 (1) (*a*) as regards the time of adoption, the judgment of the learned Divisional Judge seeming to me defective on this point and under section 70 (1) (*b*) as regards the validity of the gift. The office should have classed this case as an appeal, it being admitted partly under section 70 (1) (*b*).

First, as to the alleged adoption. The Divisional Judge says that an adoption certainly took place as mentioned both in the plaint and pleas, but that it was only "just before and along with the gift." The original plaint certainly says "*Mutbana karke hibba likh dya*," but the amended plaint says "*Mutbana likha kar*," and I do not think that the plaintiffs meant to admit more than that Ahmad professed to have adopted Alam Ali.

I have now gone through the evidence as to the alleged adoption of Alam Ali ten years prior to suit. Of the witnesses who speak of this adoption some certainly say that it took place in their presence, but what is their evidence worth? Dad Ali is uncle of Muratib Ali, the donee's father, and Ali Mir is also a relation of Muratib Ali's. And seeing that there is no recital in the defendant's written pleas of an adoption having taken place long before the execution of the deed of gift, I think the Divisional Judge's finding that the alleged adoption 10 years prior to suit is a myth should be upheld.

Even supposing that there was an adoption at the time of the gift, it seems to have been a mere paper adoption, and in any case I do not think the validity of the adoption of a daughter's son, a person of another *gôt* is proved. The adoptor was a Muhammadan *Rajput*, the adoptee a *Sayad*. The old *Wajib-ul-arz* says that a person of a *ghair gôt*, if adopted, gets no share (*hissa*). I do not wish to place too much reliance on an assertion in a *Wajib-ul-arz* unsupported by instances, but setting the *Wajib-ul-arz* aside, I think the *onus* of proving the validity of the adoption rests on the defendant. The instances cited by the witnesses are vague, as the relationship is not cited. It is said that one Maula Bakhsh adopted one Abdul Ghani and that the collaterals sued in vain, that one Rahim

adopted one Rustam, that one Wazir adopted his sister's son, that one Nawab Ali adopted one Fattah. In only one case is the relationship of the adoptee to the adoptor stated, and this is the case of adoption of a sister's son and we are not told what collaterals were in existence, whether they assented or contested the adoption, and whether the adoptee was of the same *gôt* as the adoptor. The defendant's witness Bakhshi, *Zaildar*, says that a boy of another *gôt* cannot be adopted. I think the Divisional Judge has rightly held that the adoption was not valid by custom.

Then, as to the validity of the gift. The *Wajib-ul-arz* says that a gift to a daughter's or sister's son is invalid if any descendant of the grandfather of the donor objects. (Plaintiffs are such descendants). I do not wish to lay much stress on an old *Wajib-ul-arz* of this sort, which begins the subject of gifts with the remarkable assertion that alienations by gift are subject to pre-emption. But, apart from the *Wajib-ul-arz*, I think that it lies on the defendant to prove that a gift of ancestral land to a daughter's son is valid, even in Hissar, one of the eastern districts of the Punjab. To prove the validity of the gift three mutations are put forward —

(1) On 20th February 1880, a gift by *Musammat* Jaiman, widow of Wazir, to her *khana-damad* was attested.

(2) On 16th July 1889, a gift by *Musammat* Amirunnissa to her *khana-damad* was attested and apparently some collaterals objected at time of mutation.

(3) On 23rd December 1889, a gift by *Musummat* Manbibi to Mahbub, her husband's daughter's son (*sic*), was attested though collaterals objected.

But the evidence of Shamas, defendant's witness, shows that in the first two of these three cases the collaterals did assent, and in the third case a later mutation shows that Mahbub surrendered a part of the gift because the collaterals objected. These three cases, if they were good instances, would go to show that even widows could make gifts, but in two cases it seems that the collaterals assented to the gift, while in the third the collaterals were appeased by a part surrender of the gift. These cases, therefore, prove nothing, and, in my opinion, defendant has failed to prove the validity of the gift. As to services being rendered, I fail to see how Ahmad's providing his son-in-law with a home can be regarded as service rendered by the son-in-law.

I omitted in an earlier part of this judgment when, dealing with the value of the oral evidence produced to prove the alleged adoption ten years prior to suit, to point out that one witness, Dad Ali, goes so far as to make the absurd statement that Muratib Ali, too, was adopted (*go l men liya*) by Ahmad, this shows how reckless or stupid witnesses can be in supporting the party which has called them.

I uphold the Divisional Judge's decree and dismiss this case with costs.

Case dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1330 OF 1910.

November 30, 1911.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

KOIPALLI RAMIAH—APPELLANT

versus

SAJJA SUBBIAH AND OTHERS—RESPONDENTS.

Contract Act (IX of 1872), s. 45—Contract—Specific performance—Contract with a number of persons—Right of one to enforce specific performance—Vendor and Purchaser.

Where an agreement is made to sell certain property to several persons, one of the latter only cannot claim specific performance of the agreement.

Safiur Rahman v. *Maharamunnessa Bibi*, 24 C. 832, referred to.

Second appeal against the decree of the Subordinate Judge of Ellore, in A. S. No. 228 of 1909, presented against the decree of the District Munsif, Narsapur, in O. S. No. 249 of 1908.

Mr. *Prakasam*, for the Appellant.

Mr. *Narayanmurthi*, for the Respondents.

JUDGMENT.—The first defendant entered into an agreement with the plaintiff and defendants Nos. 2 and 3 to convey certain land. The plaintiff alone instituted this suit for specific performance. Defendants Nos. 2 and 3 repudiate the contract and say that they are not willing to get any sale-deed from the 1st defendant. The lower Courts have dismissed the suit on the ground that the plaintiff alone had no right to demand performance of the agreement. In our opinion they are ob-

TARI BAZ KHAN *v.* FATEH KHAN.

viously right. Section 45 of the Contract Act lays down the rule on the point. The second and third defendants do not want the land, the first defendant is not bound to compel them to take it along with the plaintiff.

We agree with the decision in *Safiur Rahman* v. *Maharamunnessa Bibi* (1) and dismiss the second appeal with costs.

Appeal dismissed.

(1) 24 C. 832.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1070 OF 1910.

December 19, 1911.

Present:—Mr. Justice Chevis.

TARI BAZ KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

FATEH KHAN—DEFENDANT—RESPONDENT.

Custom—Succession—Daughters—Collaterals of sixth degree—Pathans *of Mianwali Tahsil—Burden of proof—Method of computing degree of relationship.*

Among *Pathans* of the Mianwali *Tahsil*, daughters exclude collaterals of the 6th degree in matters of succession to the ancestral property of their father.

The mode of computing degrees of agnatic relationship among these *Pathans* is to count from the collaterals to the common ancestor both being included.

Girdhari Ram v. *Faizullah Khan*, 48 P. R. 1908; 98 P. W. R. 1908; 166 P. L. R. 1908, followed.

The words '*warisan chhe pusht ke andar*' mean collaterals up to and including the fifth degree and exclude the collaterals in the sixth degree

The burden of proving a custom whereby remote collaterals such as those of the sixth degree exclude daughters rests on the party who asserts such a custom

Bholi v. *Man Singh*, 86 P. R. 1908; 146 P. W. R. 1908, followed.

Abdul Karim v. *Sahib Jan*, 5 P. R. 1908; 29 P. W. R. 1908; 99 P. L. R. 1908, referred to.

Second appeal from the order of the Divisional Judge, Campbellpur, dated 4th October 1910, reversing that of the Munsif, 1st Class, Mianwali, dated 6th July 1910, decreeing plaintiffs' claim.

Mr. *Fazl Elahi*, for the Appellants.

Rai Bahadar Bakhshi *Sohan Lal*, for the Respondent.

JUDGMENT.—The land in suit, 115 *kanals*, 2 *marlas*, belonged to Thaj Khan, and after his death was sold by his widow *Musammat* Lalo to the defendant for the small sum of Rs. 9. The plaintiffs' collaterals sue for possession, challenging the alienation as without necessity. The defendant pleaded (1) that the plaintiffs had no right to sue in the presence of Thaj Khan's daughters, (2) that the alienation was for consideration and necessity, and (3) that the plaintiffs were estopped by acquiescence.

The first Court found in plaintiffs' favour on all three of the above points and decreed the claim, but the Divisional Judge came to a different finding on all three points and dismissed the suit. The plaintiffs have lodged a further appeal to this Court.

The appeal can be decided solely on the question of plaintiffs' right to claim possession in the presence of daughters.

The three daughters of Thaj Khan are still alive. Two of them married collaterals, and so their sons are included among the plaintiffs. But if the daughters succeed in preference to the collaterals, the sons of those daughters cannot sue in the presence of their mothers: if the daughters of Thaj Khan are the real persons entitled to possession they and they alone can have a right to oust the defendant. Had the daughters assigned their rights the case would have been different, but no such assignment has been pleaded.

So the question is whether, on the death of Thaj Khan's widow, the right to hold his land passed to the daughters or to the collaterals. The plaintiffs would be regarded as collaterals in the fifth degree if the usual method of computation were followed, *i. e.*, to count upwards from the last male owner to the common ancestor, both being included; but the parties are *Pathans* who belong to the Mianwali *Tahsil*, formerly part of the Bannu District, and here the mode of computation is to count from the collaterals to the common ancestor both being included: see *Girdhari Ram* v. *Faizullah Khan* (1). Adopting this method of computation, the plaintiffs are collaterals some in the sixth and rest in the seventh degree. The *Riwaj-i-am* lays down that daughters succeed in the absence of collaterals within the sixth degree (*chhe pusht ke andar.*) This, in my opinion, means that daughters are excluded by collaterals in the fifth degree, but not by collaterals in the sixth degree. I form this opinion after referring to the four instances quoted in the *Riwaj-i-am*, which are as follows: (1)

(1) 48 P. R. 1908; 98 P. W. R. 1908 166 P. L. R. 1908.

TARI BAZ KHAN *v.* FATEH KHAN.

Bakhtawar died. There were collaterals in the fifth degree but the daughter succeeded.

(2) Ahmad Khan died, no callaterals for five degrees and the married daughter succeeded.

(3) Muhammad Khan died; no collaterals up to the fifth degree, and the daughters succeeded.

(4) Prem died; no collaterals up to the fifth degree, and the daughter succeeded, the *warisan* suing in vain.

Had the meaning of the phrase *chhe pushat ke andar* been that collaterals up to and including those in the sixth degree excluded daughters, I should have expected to find it recorded in the above four instances that there were no collaterals up to the sixth degree, whereas in each case the degree spoken of is the fifth.

In *Abdul Karim* v. *Sahib Jan* (2), it is laid down that there is no general rule, that regardless of tribe and creed agnates, however remote, exclude daughters from succession to ancestral property. In *Bholi* v. *Man Singh* (3), it is also laid down that the burden of proving a custom whereby remote collaterals, such as those of the sixth degree, exclude daughters rests on the party who asserts such a custom. So the *onus* of proof was rightly laid on the plaintiffs in this case. No instances of a collateral in the sixth degree excluding a daughter has been noted, and the mere assertions of witnesses as to what the custom is cannot be regarded as of any value in the absence of instances. All that can be said is, that the collaterals have obtained mutation of names in their favour as regards the rest of Thaj Khan's land, but this fact alone is not worth very much when we remember that two of the daughters of Thaj Khan, who might have claimed mutation in their own favour, are represented by sons who figure among the collaterals. No doubt the amount of land falling to those sons is lessened by the inclusion of other collaterals, but still I do not think this fact alone sufficient to discharge the burden of proof, especially in face of the entry in the *Riwaj-i-am*. That entry is against the collaterals, and cannot be altogether disregarded even though the first instance might be criticized as one open to doubt as an instance where the daughter, contrary to the rule laid down, excluded even collaterals in the fifth degree. The use of the word *warisan*, too, in the fourth instance might be commented on as showing a want of precision, for the *waris* is surely the person entitled to succeed whoever he or she may be, but probably the word is merely a careless slip for *Jaddian*. In fact, in all the instances the wording seems to me inacurate, the words *aulad narina* being used *e.g.*, *panch pusht tak us ki aulad narina koi na thi*—when the proper word should be *Jaddian*. Still, however these instances may be criticized, there is the fact that the rule is laid down in the *Riwaj-i-am* and three instances are given of a daughter succeeding in the absence of collaterals in the fifth degree, while one instance is cited of a daughter succeeding even in the presence of collaterals in the fifth degree. It may be said that there is nothing in the second and third instances to show that there were any collaterals even beyond the fifth degree. It may also be urged that daughters sometimes succeed by consent even though not strictly entitled to do so, especially where they have married collaterals or where the amount of land is small. But though such arguments may lessen the value of the entry in the *Riwaj-i-am* and of the instances there quoted, I do not think that this entry and the instances can be entirely disregarded.

The case stands thus. The burden of proof is on the plaintiffs, there is in their favour nothing but the fact that they have succeeded to the rest of Thaj Khan's land, while there is against them the entry in the *Riwaj-i-am* supported by four instances. I consider that plaintiffs have failed to discharge the *onus* and I must, therefore, uphold the decision of the learned Divisional Judge on the ground that plaintiffs have failed to prove a right to sue for possession in the presence of Thaj Khan's daughters.

I say nothing as to the alienation being for necessity. Anything I might write on this point would be merely *obiter dictum* after I have come to the above finding, and certainly would not be binding on the daughters of Thaj Khan, who may very possibly sue on their own account now that the collaterals have failed to wrest the land from the defendant.

(2) 5 P. R. 1908; 29 P. W. R. 1908, 99 P. L. R. 1908.

(3) 86 P. R. 1908; 146 P. W. R. 1908.

SANTU *v.* ARJAN DAS.

The appeal fails and is dismissed with costs.

Appeal dismissed.

P. S.

I note that in *Girdhari Ram* v. *Faizullah Khan* (1), the question of the daughters succeeding as heirs was raised, but the right of the daughters to succeed to the exclusion of the plaintiffs (collaterals in the sixth degree) was not decided, it being held that the plaintiffs' suit which was merely for a declaration, was maintainable even in the presence of the daughters and of nearer collaterals.

PUNJAB CHIEF COURT.

MISCELLANEOUS CIVIL CASE NO. 312 OF 1911.

CIVIL APPEAL NO. 914 OF 1909.

December 20, 1911.

Present:—Mr. Justice Johnstone.

SANTU AND OTHERS—DEFENDANTS—PETITIONERS

versus

Mahant ARJAN DAS—PLAINTIFF—RESPONDENT.

Ex parte *decree—Application for setting aside—Period of limitation expired—Review—"Other sufficient cause"—Service notice—Sepoy—Notice received without objection without the intervention of Commanding Officer—Civil Procedure Code (Act V of* 1908*), O. V, r.* 28, *O. XLVII, r.* 1 (1)*—Limitation Act (IX of* 1908*), Sch. I, Art.* 169.

Where the period prescribed for making an application for setting aside an *ex parte* decree has expired the party aggrieved by the decree is not entitled to ask for review of the judgment.

The Legislature having expressly provided a party aggrieved by an *ex parte* decree a method for obtaining justice, it is highly improbable that such person had another remedy also by way of review.

A party can only ask for a review of judgment on the ground of "other sufficient cause" if he is able to show that the judgment is incorrect.

Where a notice of appeal was sent to a *sepoy* respondent without the intervention of his Commanding Officer and the *sepoy* received it without demur he cannot subsequently urge in an application to set aside the *ex parte* decree, that he was not duly served, the notice not having been sent through his Commanding Officer.

Petition, under Order XLI, rule 21, of Act V of 1908, for re-hearing of the appeal case noted above and for reversal of the *ex parte* decree passed therein on 8th June 1911.

Lala *Rama Nand*, for the Petitioners.

Mr. *Duni Chand*, for the Respondent.

ORDER.—On 8th June 1911, I heard and decided *ex parte* in the absence of the respondents Further Appeal No. 914 of 1909. On 9th August 1911 the present application for a re-hearing of that case and for setting aside the *ex parte* decree was laid before me, and I issued notice. For the opposite party Mr. Duni Chand raises the objection that the application is barred by time under Article 169 of Act IX of 1908. That Article allows 30 days from the date of the decree in appeal, or, where notice of the appeal was not duly served, from the date on which the applicant has knowledge of the decree. In this case notices were duly served, and, therefore, clearly this petition was put in more than 30 days after the date of the decree in appeal. I say that notices were duly served, although the petitioner's Pleader tries to make out that this was not so. He admits that in the case of all his clients but one service was duly effected, but as to that one he contends that under Order V, rule 28, Civil Procedure Code, the summons should have been sent through the Commanding Officer, petitioner being a *sepoy* and that this was not done. I overrule this objection. There is no doubt that the *sepoy* petitioner did receive his notice and he took it without objection, and it is too late now for him to raise an objection of this kind.

The point of limitation being thus clear, the petitioner's Pleader is forced to adopt another line. He asks that the petition be taken as one for review. But this seems to me to be out of the question. In the first place, it was filed definitely as a petition for a re-hearing of a case and not for a review, and, *secondly*, according to law, I can see no ground for review at all. Turning to Order XLVII, rule 1, sub-rule (1), it is clear that if there is any ground for review at all, it must come under the words "any other sufficient reason," for none of the previous phrases can possibly be applied to the present application. It seems to me that a party can ask for a review of judgment on the ground of "other sufficient reason" only if he is able to show that the judgment is incorrect. Here the judgment was obviously correct, for the appellants appeared before me and the respondents who were all duly served

did not, and, therefore, the only course open to me was to hear the case *ex parte*. Nothing urged by the petitioner now could make it right to say that that proceeding of mine was wrong, and, therefore, in my opinion, there is no case for review at all. I would also note that the Legislature has expressly provided a means whereby a party aggrieved by an *ex parte* decree can get justice, and it seems to me highly improbable that the Legislature intended to give such a person also another remedy by way of review. If this had been the intention of the Legislature where would have been the use of Article 169 aforesaid at all, for a party would be able to turn the flank of Article 169 on every occasion and it would become a dead letter?

For these reasons I dismiss the application with costs.

Application dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1049 OF 1909.

January 2, 1912.

Present:—Mr. Justice Robertson and Mr. Justice Rattigan.

GHASI RAM—DEFENDANT—APPELLANT

versus

JAI LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Principal and agent—Gambling debt of principal paid by agent—Right of agent to recover sums actually paid—*Hundi *drawn by principal—Consideration—Contract Act (IX of* 1872), *s.* 23—*Public policy.*

An agent is entitled to recover from his principal sums actually paid by the agent in settling a gambling debt incurred by the principal, whether the payment is by way of adjustment of accounts or in cash.

Behari Lal v. *Parbu Lal*, 79 P. R. 1908; 130 P. W. R. 1908 (F. B.), followed.

A *hundi* executed by a principal in favour of his agent for such payments is for consideration.

First appeal from the order of the District Judge, Rohtak, dated the 10th August 1909, decreeing plaintiffs' claim.

Mr. *Arthur Grey*, for the Appellant.

The Hon'ble Mr. *Muhammad Shafi*, for the Respondents.

JUDGMENT.—This is a case in which the claim is ostensibly based simply upon three *hundis* amounting in all to Rs. 4,700 drawn by the defendant Ghasi Ram in favour of the plaintiff Jai Lal and another on.....

The original *hundis*, when they fell due, were renewed and it is clear that Rs. 207 interest has been paid upon them. The consideration for these *hundis* is frankly stated to be the payment by Jai Lal of a gambling debt due from Ghasi Ram to Jai Lal's brother Mutsadi Lal. It appears that Mutsadi Lal had brought a suit against Ghasi Ram on account of some actual trade transaction and was threatening further action in respect of a sum of upwards of Rs. 25,000 which he alleged to be due from Ghasi Ram on account of gambling debts (*Badni* transaction). Mutsadi Lal and Ghasi Ram agreed to submit the whole of the question between them to Jai Lal, Mutsadi Lal's brother, and another person named Behari Lal for investigation and settlement. These two persons examined the accounts with care and apparently discovered that the largest item which Mutsadi Lal was claiming from Ghasi Ram amounting to about Rs. 21,000 was not really claimable from Ghasi Ram, the defendant, but from another Ghasi Ram, a member of a different firm. This item was accordingly struck off and Rs. 4,700 was found to be due from Ghasi Ram to Mutsadi Lal. Mutsadi Lal represented himself as agent for Ghasi Ram in these gambling transactions and claimed the right to recover on the ground that he had settled these transactions with other gamblers. If this could be proved to be so, it would appear to bring the case within the purview of the Full Bench judgment in *Behari Lal* v. *Parbhu Lal* (1) which abandoned the view previously taken by the Judges of this Court in *Ragnath Sahai* v. *Man Raj* (2) and *Kashmiri Mal* v. *Girdhari Lal* (3). On settlement being made for Rs. 47 apparently in order to bring the claim more clearly within the purview of the Civil Courts, Jai Lal undertook to pay off Ghasi Ram's debt to Mutsaddi Lal and Ghasi Ram agreed to give *hundis* for the amount Rs. 4,700, to Jai Lal thus bringing in a third party in whose favour a right to sue was intended to be created. This Rs. 4,700 appears to have been due on account of balance of losses on a number of transactions and corresponds approximately with the sum shown in his favour by Mutsaddi Lal in his evidence which amounts to Rs. 4,624.

(1) 79 P. R. 1908; 130 P. W. R. 1908 (F. B.).
(2) 80 P. R. 1895.
(3) 74 P. R. 1908; 57 P. W. R. 1907.

CHITTAR KUAR v. GOURA KUAR.

We may say at once that, in our opinion, the letter on page 101 of the record from Rai Ghasi Ram to Dhanraj-Basheshar Lal (Exhibit P. 44), dated *Sawan Badi* 9th, *Sambat* 1962, and the reply of the same date from Dhanraj-Basheshar Lal to Harjas Rai Ghasi Ram (Exhibit D. 1) show conclusively that Jai Lal was in fact, if not in name, a partner with his brother Mutsadi Lal. The letter, Exhibit D. 1, was written by Kidar Nath, whom Jai Lal states to be his own *munim*, and signed by Jai Lal for "Dhan Raj-Basheshar Lal," which is a firm admittedly in which Mutsadi Lal is a partner. Consequently, we hold that it is very difficult indeed for Jai Lal to prove that the execution of *hundis* in his favour placed him in any better position than Mutsadi Lal himself would have been in had the *hundis* been drawn in his name.

This transaction is admittedly a gambling one and apparently under the law in England would not there be recoverable through the instrumentality of Courts of law. Two Judges of the Chief Court have spent a day and a half in hearing this case and many days were spent in the lower Court over it thus involving the tax-payers in a large amount of expense for the purpose of settling a gambling debt. As the law stands, however, as laid down in *Behari Lal* v. *Parbhu Lal* (1), and other judgments of this Court, if Mutsadi Lal had actually paid this debt as agent for his principal, Ghasi Ram, either by way of adjustment of accounts or in cash, he would be entitled to recover the amounts from Ghasi Ram. In our opinion the position stands thus. At the time when the *hundis* were executed, Mutsadi Lal was threatening to sue Ghasi Ram for a very much larger sum. Under rulings, more particularly in *Behari Lal* v. *Parbhu Lal* (1), a large portion, if not all, could probably have been recovered. Both parties apparently at that time desired to act honestly. Ghasi Ram was not prepared to repudiate a gambling transaction into which he had entered Rs. 4,700 was found to be due from him on a consideration which might have formed the subject of a successful action. He was of full age and intelligence and a man of business. With his eyes open he chose to discharge this debt by the execution of *hundis* in favour of Jai Lal. On a subsequent occasion he renewed these *hundis* and though there is no satisfactory proof of this, is even said to have paid interest. We consider that, under these circumstances, it cannot be said that there was no consideration for the *hundis*. There is no proof that Ghasi Ram was in any way deceived as to the actual facts. The money may have been recovered at law although the origin of it was a gambling transaction and consequently we cannot say that Ghasi Ram can claim to repudiate his liability now. As an instance of the extent to which gambling transactions go, we note that one item originally claimed was upwards of Rs. 20,000 alleged to have been lost in one single transaction. We find that as the law stands Ghasi Ram is liable to pay Rs. 4,700 for which he executed the *hundis*.

As regards interest, we note that an issue was drawn. Ghasi Ram denied liability for any. The *onus* of proving that interest was due was thrown upon the plaintiffs and they produced practically no evidence upon the point. Consequently, we do not see how it is possible for us to hold that interest was payable. It is possible that the *onus* was wrongly placed and it is probable that, under the custom of trade; interest would be payable. But in face of the issue and the way in which *onus* was laid and no objection taken to this order and no evidence offered, we can only find that no interest was payable. To that extent only we accept the appeal, and decree Rs. 4,700 in favour of the plaintiffs as against Ghasi Ram.

Seeing the nature of the transaction which lay at the basis of these *hundis*, we do not see any obligation to allow the plaintiffs their costs. We accordingly decree that each party should bear its own costs throughout.

Appeal accepted.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 236 OF 1910.

December 18, 1911.

Present:—Mr. Richards, K. C., Chief Justice, and Mr. Justice Banerji.

CHITTAR KUAR—PLAINTIFF—APPELLANT

versus

GOURA KUAR—DEFENDANT—RESPONDENT.

Hindu Law—Co-widows—Partition.

A Hindu co-widow is entitled to have her husband's property partitioned.

CHITTER KUAR *v.* GOURA KUAR.

Gajapathi Nilamani v. *Gajapathi Radhamani*, 1 M. 290; 1 C. L. R. 97; 4 I. A. 212, *Kuthaperummal* v. *Venkabai* 2 M. 194, *Bhugwandeen Doobey* v. *Myna Baee*, 11 M. I. A. 487, 9 W. R. (P. C.) 23, referred to.

First appeal from the decision of the Subordinate Judge of Bareilly, dated the 1st July 1910.

Mr. *Choudhri* (with him Dr. *S. C. Banerji*), for the Appellant.

The Hon'ble Dr. *Sunder Lal* (with him Mr. *Lalit Mohan Banerji*), for the Respondent.

JUDGMENT.- The appellant who is one of the two widows of one Madan Mohan Lal, brought the suit, out of which this appeal has arisen, against the other widow of the aforesaid deceased for a declaration that the defendant being childless was only entitled to maintenance and had no right to have the *zemindari* villages belonging to her deceased husband partitioned between the two widows. It appears that Madan Mohan Lal died some time in the year 1909, leaving two widows who are the parties to this suit. The plaintiff has a daughter but the defendant has no issue. The names of both the widows were entered in the Revenue Records. The defendant applied to the Revenue Court for partition of a half share. The plaintiff objected and was referred to the Civil Court. Thereupon she instituted the present suit. She put forward her claim on two grounds; *first*, that under a custom prevailing among *Kurmis*, to which caste the parties belong, a childless widow only receives maintenance and has no right to the estate of her husband; and, *secondly*, that under the general Hindu Law a widow cannot claim partition.

The Court below has dismissed the plaintiff's claim, being of opinion that the custom alleged had not been proved and that as both the widows inherited the property of their husband they were entitled to joint enjoyment of the property and to divide it between themselves for the purpose of such enjoyment.

The plaintiff has preferred this appeal, and her first contention is that the custom alleged by her is proved. We are of opinion that this contention has no force. A number of witnesses were examined who spoke generally as to the existence of the alleged custom, but, with the exception of one witness, none of the others was able to refer to any instance in which a childless widow was excluded by another having a female child. The only instance which was referred to was that of Hari, but one instance does not establish a custom. The *wajib-ul-araiz* of some of the villages were referred to, some of these *wajib-ul-araiz* are declarations made by a single owner, and even according to these *wajib-ul araiz* it is manifest that where a widow has a male child that male child excludes the widows and the childless widow has only a right to receive maintenance from the son. In the original *wajib-ul-araiz* the vernacular word used is "*aulad*" (issue) but judging by the context it is manifest that this word was meant to apply to male issue only.

The next contention on behalf of the appellant is that under the Hindu law a widow is not entitled to claim partition. We were referred to the following cases, namely, *Gajapathi Nilamani* v. *Gajapathi Radhamani* (1); *Kathaperumal* v. *Venkabai* (2) and *Bhugwundeen Doobey* v. *Myna Baee* (3). In the case first mentioned, their Lordships, no doubt, observe that "widows taking a joint interest in the inheritance of their husbands have no right to enforce an absolute partition of the joint estate between them". But their Lordships further held that where the widows could not go on peaceably in the joint enjoyment of the property, they could by mutual agreement or otherwise separately hold the property although they had no right to partition in the proper sense of the term and that the share of one would go by right of survivorship to the other notwithstanding the separation. In the case before us, the two widows, although entitled to enjoy the property, appear to be unable to do so peacefully unless they divided it; in fact, the plaintiff in this suit has tried to exclude the defendant altogether from the whole of the property left by her husband admitting her only to a bare right to maintenance. That being so, we are unable to hold that the defendant has no right to apply for a partition such as would enable her to enjoy her share of the property of her husband for her life. Such a partition would in no way affect the plaintiff's right of survivorship in the event of her surviving the defendant.

The appeal, therefore, fails and is dismissed with costs including fees on the higher scale.

Appeal dismissed.

(1) 1 M. 290; 1 C. L. R. 97; 4 I. A. 212.
(2) 2 M. 194.
(3) 11 M. A. 487; 9 W. R. (P. C.) 23.

MUTYALA PAPAYYA *v.* KOSURI MURAMALLU.

[s. c. 11 M. L. T. 11; (1912) 1 M. W. N. 7.]

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1044 OF 1910.

November 29, 1911.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

MUTYALA PAPAYYA—PLAINTIFF—APPELLANT

versus

KOSURI MURAMALLU—DEFENDANT—RESPONDENT.

Madras Hereditary Village Offices Act (III of 1895), *ss.* 3, 21—*Claim to the emoluments of the office of village carpenter—Proprietary estate—Jurisdiction of Civil Courts.*

Civil Courts have no jurisdiction to entertain claims to emoluments of the office of village carpenter in a proprietary estate. Such offices are governed by section 3 clause (4) of Act III of 1895.

Chinnaya Asari v. *Mooniappa Mudali*, 7 M. L. T. 264; 5 Ind. Cas. 41, dissented from.

Second appeal against the decree of the Subordinate Judge's Court of Cocanada in A. S. No. 143 of 1909, presented against the decree of the Court of District Munsif of Cocanada, in O. S. No. 215 of 1909.

FACTS.—Suit to recover lands which formed the emoluments of the office of a village carpenter in a proprietary estate. The defendants contended that the suit is not maintainable in a Civil Court by reason of section 21 of Act III of 1895. The Courts below, upholding the defendant's contention, dismissed the suit. The plaintiff appealed.

Mr. *V. Ramadoss* for Mr. *P. Narayana Murti* for Appellant:—Section 3, clause (4), must be construed with reference to section 3 clause (3). The offices mentioned in clause (4) are totally excluded from the operation of the Act, if in proprietary estates. I rely on *Chinnayya Asari* v. *Mooniappa Mudali* (1).

Mr. *V. Ramesam*, for Respondent:—If clause (4) applies to non-proprietary villages, the Legislature could have easily said so. The report of the Select Committee shows that these offices are not excluded from the Act. The object of excluding them from clause (3) but including in clause (4) is to apply different rules of succession—See sections 10, 11 and 12 of the Act. The Board of Revenue understands the Act as I contend (*Vide* S. O.)

In 1904 a Bench of this Court decided this point against my contention. The Government then referred the matter for the opinion of the Advocate-General who pointed out that the decision (Civil Miscellaneous Appeal No. 226 of 1904) was wrong. The Government thereupon thought it is unnecessary to amend the Act and sent a Circular to the Collectors in the Presidency instructing the Revenue Courts to continue to take cognisance of such suit.

Chinnayya Asari v. *Mooniappa Mudali* (1) was wrongly decided. The point was not overlooked in *Raja of Vizianagram* v. *Dantivada Chelliah* (2).

JUDGMENT.— The question argued in this second appeal is whether Revenue Courts have jurisdiction to try a claim to the office and emoluments of a village carpenter in a proprietary estate. Both the lower Courts hold that they have and we are of opinion that they are right.

Mr. Ramadoss for the appellant contends that section 3 of the Madras Hereditary Village Offices Act, III of 1895, excludes from the operation of the Act the offices of a village carpenter and the other offices mentioned in sub-clauses (4). The section divides into four classes the village offices to which the Act is applicable. The third class is mentioned in sub-clause (3) in these terms 'Other hereditary village offices in proprietary estates except (1) the offices forming class (4) below.' Then the fourth class runs thus—'The hereditary offices of village artizans and village servants such as the following.' The first office enumerated is the village carpenter. The argument for the appellant is that inasmuch as clause 3 mentions as offices to which the Act applies 'other hereditary village offices in proprietary estate except the hereditary offices of certain village artizans and village servants it cannot be applied to those that are thus excepted.' But what is excepted is included in the next sub-clause. The object of excepting the offices mentioned in sub-clause (4) from sub-clause (3) was to form them into a separate class as, according to the scheme of the Act, it was intended to deal with questions relating to succession and other matters relating to the offices included in sub-clause (3) and sub-clause (4) separately. The object of the exception was to carve out a smaller class for the purpose of making special provision for offices in that class with respect to succession and other matters. It is true that clause (3) speaks of other hereditary

(1) 7 M. L. T. 264; 5 Ind. Cas. 41.

(2) 28 M. 84.

village offices in proprietary estates except those included in clause (4) and that clause (4) does not expressly speak of the hereditary offices of village artizans and village servants in proprietary estates. At the same time, it is not confined in express terms to hereditary offices of village artizans and village servants in non-proprietary estates. It will be observed that succession to offices mentioned in clauses (1), (3) and (4) is dealt with separately in that Act. Section 10 deals with the offices forming class 1, section 11 with offices forming class 3 and section 12 with those forming class 4. The subject of the control and punishment of village officers is also dealt with separately in sections 7 to 9. None of such provisions, it may be noted, has reference to clause (4) in section 3. It is quite clear to our minds that the object of the draftsman was merely to group the offices under convenient heads for the purpose of dealing with them in different sections with reference to the questions of succession, punishment, etc., of village officers, artizans and servants. The result of upholding the appellant's contention would be that the emoluments attached to the offices mentioned in clause (4) of sub-section 3 would not be declared inalienable under section 5 of the Act. There can be no doubt that the emoluments of all public offices of the kind were declared inalienable by Regulation VI of 1831. That provision was repealed by Act III of 1895, and section 5, we have no doubt, was intended to re-enact the rule of inalienability embodied in that Act. We can conceive of no reason for supposing that the Legislature could have intended not to declare the inalienability of emoluments attached to the offices mentioned in clause (4) in section 3. Our attention has been drawn to a judgment of Munro and Abdur Rahim, JJ., in *Chinnayya Asari* v. *Mooniappa Mudali* (1). That judgment is, no doubt, in the appellant's favour. But it is an extremely short one. The learned Judges say: 'We have no doubt that the District Judge has properly considered section 3 of Act III of 1895.' No reasons are given by the learned Judges themselves for the conclusion they arrived at. In *Rajah of Vizianagaram* v. *Dantivada Chelliah* (2), the learned Judges who decided that case proceeded on the assumption that a carpenter's *inam* was covered by section 5 of Act III of 1895. Reference is made to it in the latter case of *Chinnaya Asari* v. *Mooniappa Mudali* (1) and it is said that the fact that the office was that of a village carpenter in a proprietary estate seems to have escaped notice. It is hardly likely that such was the case though no doubt it was not argued that the emoluments of such an office were inalienable. For the reasons given above, we are unable, with all deference, to agree with the judgment in *Chinnayya Asari* v. *Mooniappa Mudali* (1).

We dismiss the second appeal with costs.

Appeal dismissed.

(S. C. 76 P. R. 1911.)

PUNJAB CHIEF COURT.

CIVIL APPEAL NO. 218 OF 1911.

April 19, 1911.

Present:—Sir Arthur Reid, KT., Chief Judge.

ZIA-UD-DIN—PLAINTIFF—APPELLANT

versus

GOBIND RAM—DEFENDANT—RESPONDENT.

Landlord and tenant—Ejectment—Notice—Denial of landlord's title before suit.

No notice for the determination of a tenancy, even if a notice is required by the terms of the lease, is necessary for maintaining a suit for the ejectment of a tenant, where the tenant has, before institution of the suit, denied the landlord's title and the validity of the lease.

Haidri Begum v. *Nathu*, 17 A. 45, followed.

Second appeal from the order of the Divisional Judge, Ambala Division, dated the 28th October 1910.

Dr. *Muhammad Iqbal*, for the Appellant.

Mr. *Ganpat Rai*, for the Respondent.

JUDGMENT.—The lower Appellate Court found in favour of the plaintiff-appellant's title but dismissed the suit and appeal on the ground that the notice specified in the leases found to have been executed, had not been given by the appellant. The latter alleged in his plaint dated December 2nd, 1909, that his title had been denied by the defendant-respondent on the 1st August 1908. This allegation was not traversed in the written statement, which denied the appellant's title and alleged that the leases had been executed on false pretences.

Under these circumstances, further evidence of the denial of title was, in my opinion, unnecessary and the ruling in

Haidri Begum v. *Nathu* (1), that under the circumstances notice was unnecessary, is directly in point.

I decree the appeal, set aside the decree of the lower Appellate Court and remand the appeal under Order XLI, rule 23, of the Code of Civil Procedure, for decision of any other points involved in the second issue framed by the Court of first instance.

Court-fee on the memorandum of appeal here will be refunded and other costs will be costs in the cause.

Appeal accepted.

(1) 17 A. 45.

[s. c. 11 M. L. T. 15; (1912) 1 M. W. N. 1.]

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NOS. 120, 121 AND 122 OF 1910.

November 15, 1911.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

KUPPUSAMI IYENGAR AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SUBBARAYA ROWTHA MINDA NAINAR AND ANOTHER—RESPONDENTS.

Execution—Mortgage-decree—Purchase of judgment-debtor's mortgage-decree—Application to execute latter decree—Civil Procedure Code (Act V of 1908), *O. XXI, r.* 16—*Sale certificate, construction of.*

C. obtained a mortgage-decree against *N.* and in execution thereof became purchaser of certain other mortgage-decrees obtained by *N.*: *Held*, that the whole interest of *N.* in the decrees obtained by him had passed to *C.* by operation of law and that, therefore, *C.* was entitled to apply as transferee under Order XXI, rule 16, Civil Procedure Code, for the execution of those decrees.

Ramasamy Pillay v. *Muthoo Chetty*, (1910) M. W. N. 4; 7 M. L. T. 125; 5 Ind. Cas. 834; *Rowthu Minda Nainar* v. *Kuppusami Aiyangar*, 5 M. L. T. 278; 1 Ind. Cas. 535, referred to.

Per Spencer, J.—Where in a sale certificate relating to several plots of land, instead of the boundaries of each plot being stated, a general description of the whole area sold is entered, the *paimash* and survey numbers of the plots must be taken as a far more definite specification of what was sold than the boundaries.

Appeals against the order of the Subordinate Judge's Court of Mayavaram at Kumbaconam, dated the 12th April 1910, E. P. Nos. 189 of 1909, 23 of 1910 and 24 of 1910 respectively connected with O. S. Nos. 43 of 1893, 33 of 1893 and 35 of 1895 respectively on the file of the Subordinate Judge of Kumbaconam.

IN A. A. O. No 120 of 1910.

Mr. *C. V. Anantakrishna Aiyar*, for the Appellant.

Mr. *K. Ramachandra Aiyar*, for the Respondents.

In A. A. O. Nos. 121 & 122 of 1910.

Mr. *C. V. Anantakrishna Aiyar*, for the Appellant.

JUDGMENT.

APPEAL AGAINST ORDER NO. 120 OF 1910.

ABDUR RAHIM, J,—I think the order of the Subordinate Judge is wrong in so far as it disallows the petition of the appellants who are decree-holders in Original Suit No. 62 of 1901 to proceed against the properties not mentioned in the sale-certificate dated the 16th December 1904 but included in the decree obtained by the Nadars, the judgment-debtors of the appellant, against the respondents. I have assumed that the properties now sought to be proceeded against are not covered by the sale-certificate in question because there is no evidence on record to show that they are, but the decrees obtained by the appellants against the Nadars entitle them to recover the judgment-debt from their persons and other properties. The properties in dispute are undisputedly included in the mortgage-decrees of the Nadars and so all their rights in those properties are liable to be sold if the decree obtained by the appellants is not satisfied by the sale of the Nadar's interest in the properties hypothecated to them and ordered to be sold under the appellant's decree. Order XXI, rule 53 of the Code of Civil Procedure which governs this case lays down that the holder of a decree sought to be executed by the attachment of another decree for sale in enforcement of a mortgage or charge shall be deemed to be the representative of the holder of the attached decree and, therefore, to be entitled to execute such attached decree in any manner lawful for the holder thereof. It was the same Subordinate Court of Kumbaconam that passed the decree obtained by the Nadars against the respondents and the decree obtained by the appellants against the Nadars. Then, all that would be necessary for the attachment of the Nadars' decrees, so far as the properties in question are concerned, is to pass an order to that effect and then the appellant can proceed to execute the mortgage decrees of the Nadars. The appeal is, therefore, allowed with costs here and in the

KUPPUSAMI IYENGAR v. SUBBARAYA ROWTHA MINDA NAINAR.

Court below and the Subordinate Court will be asked to dispose of the appellant's application for execution according to law.

APPEAL AGAINST ORDER NOS. 121 AND 122 OF 1910.

These appeals follow Appeal No. 120 of 1910.

APPEAL AGAINST ORDER NOS. 120, 121 AND 122 OF 1910.

SPENCER, J.—The decree-holders in Original Suits Nos. 33 and 43 of 1893 and 35 of 1895 who may for shortness be termed the 'Nadars' mortgaged their interest to the appellants, who may be called the 'Chetties.'

The Chetties brought a suit, Original Suit No. 62 of 1901, for sale upon their mortgage and obtained a decree. In execution of this decree there was a Court auction at which the Chetties became the purchasers of the hypothecation rights of the Nadars in certain immoveable properties described in the sale-certificate in these proceedings.

The Chetties now seek to have sold by the Court certain other lands not specified in the sale-certificate but covered by the Nadars' decrees. The judgment-debtors in the Nadars' decrees who are respondents in these appeals object that the Chetties are not entitled to exercise against lands not included in their sale-certificate powers which they have by virtue only of their purchase.

Out of the contentions of the parties two questions arise, *viz.*, (1) whether the Chetties by their right as mortgagees are entitled, so long as their decree remains unsatisfied, to step into the shoes of the Nadars and execute their decrees against the respondents up to the limit of the Nadars' interest in the mortgaged properties, and (2) whether the sale-certificate covers the lands now sought to be proceeded against although by some mistake they may have not been specifically mentioned.

On the second point the appellants rely on the well-known rule that if in a document, boundaries and extent are at variance, boundaries should prevail. In the second column of the sale-certificate boundaries have been given, and these are said to include the whole extent mortgaged under the original decrees. But I find no proof that the lands now sought to be sold lie within these boundaries. Boundaries have been given as the form requires it, but instead of the boundaries of each plot being stated a general description of the whole area sold is entered. In this case the *paimash* and survey numbers of the plots must be taken as a far more definite specification of what was sold than the boundaries.

As regards the first point, it was held by the Chief Justice in proceedings between these same parties in *Subbaraya Rowthu Minda Nainar* v. *Kuppusamy Iyengar* (1) that the mortgage interest under the decree obtained by the Nadars includes the right to sell the property in default of payment and that no order for sale of the decrees obtained by the Nadras was necessary in order to enable the Chetties to execute the decrees which they (the Nadars) had obtained. This view is supported by the ruling in *Tarvadi Bholanath* v. *Baikashi* (2) wherein it was held that the sale of a mortgage-debt in execution by public auction carries with it the right to proceed against the mortgaged property. No attachment and sale under section 274 of the old Civil Procedure Code was considered necessary in such a case. In this case it appears that the hypothecated mortgage decrees obtained by the Nadars were sold by the Kumbaconam Sub-Court at the instance of the Chetties and bought in with that Court's permission, and afterwards there was an amicable settlement in this Court at which the sale to the Chetties was confirmed.

Order XXI, rule 55, clauses (1), (3) and (6) of the new Code of Civil Procedure which govern the present proceedings make the matter much clearer than section 273 of the old Code. Clause 1 expressly makes the rule applicable to decrees for sale in enforcement of a mortgage; clause (3) declares that the holder of the second decree shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute the attached decree in any manner lawful for the holder thereof, and clause (6) deals with the procedure to be followed as to giving of notice.

In *Ramasamy Pillai* v. *Muthoo Chetty* (3) a mortgagee was held to be a transferee for the purposes of section 134 of the Transfer of Property Act and to have a right as such to sue in his own name. The appellants in the present case are in a stronger position as they are mortgage decree-holders and have by the

(1) 5 M. L. T. 278; 1 Ind. Cas. 535.
(2) 26 B. 305.
(3) (1910) M. W. N. 4; 7 M. L. T. 125; 5 Ind. Cas. 834.

compromise effected in this Court become purchasers of the decrees obtained against the respondents. The whole interest of the Nadars in the decree obtained by them has passed to the Chetties by operation of law and, therefore, the appellants were entitled to apply as transferees under Order XXI, rule 16 for execution of those decrees to the Court which passed them. These appeals must, for these reasons, be allowed with costs in this Court and the Court below and the execution petition must be sent back to the Subordinate Judge for disposal according to law.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 508 OF 1912.

January 3, 1912.

Present:—Mr. Justice Chevis.

NATHU RAM—APPELLANT

versus

Musammat KARMON—RESPONDENT.

Appeal—Minor's property in possession of third person—Remedy of guardian—Suit—Practice—Guardians and Wards Act (VIII of 1890), ss. 47, 48.

There is no provision in the Guardians and Wards Act authorizing a Court to compel a person in possession of a minor's property to hand over the property to the person appointed guardian of the minor's property.

No appeal lies against an order of the District Judge declining to compel a person in possession of a minor's property to hand it over to the guardian and referring the guardian to a separate suit.

Miscellaneous appeal from the order of the District Judge, Amritsar, dated the 26th January 1911, directing appellant to bring a suit formally.

Mr. *Vishnu Singh*, for the Appellant.

Rai Bahadur Bakhshi *Sohan Lal* for Mr. *Roshan Lal*, for the Respondent.

JUDGMENT.—The appellant has been appointed guardian of the property while the respondent has been appointed guardian of the person of the minor. The minor was born on 24th September 1893, and so is now over 18 years of age.

The respondent is in possession of the property and refuses to hand it over to the appellant. The appellant having asked the District Judge to compel respondent to hand over the property, the District Judge has referred appellant to a civil suit to get possession. Appellant appeals.

For respondent it is pointed out that the District Judge's order is not one of the orders mentioned in section 47 of the Guardians and Wards Act, and so no appeal lies. This seems correct. Mr. Vishnu Singh suggests that I should treat the matter as an application for revision under section 70 (1) (*a*) of the Punjab Courts Act. Looking to section 48 of the Guardians and Wards Act, I am not at all sure that I have any powers on the revision side in such matters. But in any case what could I do? Mr. Vishnu Singh is unable to point to any section of the Act authorising the Court to compel a person in possession of the property to hand over the property to the person appointed guardian of the property, so I am unable to see that the District Judge has committed any irregularity.

When I admitted this case, I thought it might be possible to bring respondent to her senses by warning her that she might be regarded as no longer fit to be guardian of the person, but I was not then aware that the minor was a lad of 18 years of age, a lad who looks quite fit to be guardian of his own person.

The appeal fails and is dismissed, but in view of the defiant conduct of the respondent in not handing over the property, I pass no order as to costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 264 OF 1911.

December 13, 1911.

Present:—Mr. Justice Coxe and Mr. Justice N. Chatterjea.

SHAM LAL CHATTERJEE—JUDGMENT-DEBTOR—APPELLANT

versus

HAZARI MAL BABU—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2 sub-rr. (1), (3)—Fraudulent arrangement between decree-holder and judgment-debtor—Adjustment of decree in part—Arrangement not certified, effect of—Decree-holder's fraud—Estoppel against precise term of enactment.

An arrangement between the decree-holder and the judgment-debtor of a compromise instalment decree to the effect that the latter should make defaults in the payment of instalments, in collusion with the decree-holder in order to give the latter an op-

SHAM LAL *v.* HAZARI MAL.

portunity of executing his decree so that certain property instead of being sold out of Court according to the stipulation in the compromise, should be sold in execution, is an adjustment of the decree in part to the satisfaction of the decree-holder, within the meaning of Order XXI, rule 2 of the Code of Civil Procedure. Such an arrangement ought to have been certified to the Court, and if not certified it would not be recognized by the execution Court.

Order XXI, rule 2, sub-section (3) applies even where the decree-holder is guilty of fraud.

There can be no estoppel against the precise terms of a provision of the Code.

Appeal from the order of the Sub-Judge of Burdwan, dated May 27th, 1911.

Babus *Ram Chandra Majumdar* and *Karunamoy Bose*, for the Appellant.

Babu *Shashi Shekhar Bose*, for the Respondent.

JUDGMENT.

COXE, J.—The opposite party in this case is a decree-holder, who obtained an instalment-decree against the petitioners. Instalments were to be paid twice a year, from 1314 to 1325; and there was also a stipulation that if a certain estate, called Lot Chandrabati, was sold out of Court at an adequate price, the sale-proceeds should be paid to the decree-holder and credited against the decretal amount.

It is not disputed that the two instalments due in 1316 were not paid in full. It has been faintly argued that this did not constitute default, because the terms of the agreement were that the decree-holder should not be entitled to execution, unless these two instalments remained wholly unpaid. But, on referring to the terms of the contract, it seems to us perfectly clear that the meaning of the parties was that if these two instalments were not paid in full, that is to say, if any portion of these two instalments remained unpaid, the decree-holder should be entitled to execute his decree. When this default had been made the decree-holder took out execution against all the property covered by the decree and for the whole balance due to him. The judgment-debtor, petitioner, made no objection; but he asked that Lot Chandrabati only might be sold. This request was agreed to by the decree-holder. Lot Chandrabati was sold; and the sale-proceeds, amounting to Rs. 10,000, were credited against the decretal amount. The decree-holder then took out execution against the remaining property.

The judgment-debtor has now objected to this execution; and he says that he made these two defaults in 1316 in collusion with the decree-holder; that it was arranged between the parties that he should make these two defaults, in order to give the decree-holder an opportunity of executing his decree, so that Lot Chandrabati, instead of being sold out of Court, according to the stipulation in the compromise, should be sold in execution.

The learned Subordinate Judge held that the judgment-debtor was not entitled to put forward this argument at all, and he rejected the objection and allowed execution to proceed.

The judgment-debtor appeals to this Court and for the purposes of this appeal we must take it that his story is untrue, although, of course, at present there is no evidence whatever in support of it. We must assume that he and the decree-holder made this arrangement that he should make these two defaults; but that the decree-holder should not thereby be entitled as he otherwise would have been entitled by the decree, to realise the whole balance of the money, but should only be entitled to sell Lot Chandrabati and should then be debarred from proceeding with the execution of his decree until further default had been made. The sum of Rs. 10,000, realised by the sale of Lot Chandrabati, would have covered the instalments for about 5 years from 1316; so that by this alleged agreement the decree-holder was debarred from proceeding with his decree until 1321.

It appears to me that an arrangement of this kind is certainly an adjustment of the decree in part to the satisfaction of the decree-holder within the meaning of Order XXI, rule 2, of the Code of Civil Procedure. It may be open to doubt whether a mere agreement to grant time would be an adjustment within the meaning of that section; although, speaking for myself, I should be inclined to think that it would be such an adjustment.

But, be that as it may, it is quite clear that the agreement pleaded by the judgment-debtor amounts to a good deal more than an agreement to grant time; and, therefore, it was incumbent on the parties to certify it to the Court, and they had no right actively to conceal it from the Court's knowledge. As it was not certified it would not be recognised by the execution Court.

BRINDARANI CHOUDHRANI v. ANNODA MOHAN RAY.

It has been argued, *firstly*, that this adjustment is saved from the operation of sub-section 3 of the section I have quoted, by reason of the fact that the conduct of the decree-holder was fraudulent, and, *secondly*, that the decree holder is estopped from denying the adjustment. It seems to me, however, that to hold that sub-section 3 has no application where the decree-holder has been guilty of fraud, would take all real meaning out of the sub-section, as there must be few cases in which, when the payment is not certified to the Court, the concealment is not fraudulent. As to estoppel, there can be no question of estoppel against the precise terms of a provision of the Code.

It appears to me, therefore, that the decision of the learned Subordinate Judge is right and should be upheld. The appeal is accordingly dismissed with costs, which we assess at two gold *mohurs*.

N. CHATTERJEA, J.—I agree.

Appeal dismissed.

(s. c. 16 C. W. N. 94.)

CALCUTTA HIGH COURT.

CIVIL RULE No. 5035 OF 1911.

November 28, 1911.

Present:—Mr. Justice Caspersz and Mr. Justice D. Chatterjee.

Rani BRINDARANI CHOUDHRANI—CLAIMANT—PETITIONER

versus

ANNODA MOHAN RAY CHOUDRY—DECREE-HOLDER—OPPOSITE PARTY.

Bengal Tenancy Act (VIII of 1885), s. 170, cl. (3)—Purchaser of holding before rent-decree—Right to deposit to prevent sale.

Where a tenure is transferred before a rent decree is made against the transferror tenant, the transferee is not entitled to make a deposit under section 170 clause (3) of the Bengal Tenancy Act.

But where on previous occasions, similar deposits made by the transferee were withdrawn by the landlord decree-holder, the transferee should be permitted to make the deposit.

Jotindra Mohan Tagore v. *Durga Dabe*, 10 C. W. N. 438; *Radhika Nath Sarkar* v. *Rakhal Raj Gayen*, 13 C. W. N. 1175; 10 C. L. J. 473; 3 Ind. Cas. 835 and *Jugal Mohini Dasi* v. *Srinath Chatterjee*, 7 Ind. Cas. 477; 12 C. L. J. 609, referred to.

Rule against the order of the Munsif of Nilphamari dated July 7th, 1911.

FACTS.—The petitioner Rani Brindarani purchased a permanent tenure of the judgment-debtors in 306 B. S. long before the period in respect of which the arrears of rent have now been decreed. On two previous occasions, in 1909 and 1910, the Rani was allowed to make deposits of moneys then due on account of rent decree and now, when she made a similar deposit, the learned Munsif upon the objection of the decree-holder held that she was not entitled to make the deposit, that the deposit actually made by her was not good and valid, and that the tenure should be sold.

The petitioner moved the High Court against that order and obtained this Rule.

Babu *Baidya Nath Dutt* and *Hem Chandra Mittera*, for the Petitioner.

Babu *Dwarka Nath Chuckerbutty*, for the Opposite Party.

JUDGMENT.—The question for determination in this Rule is whether the petitioner is entitled to make a deposit under the provisions of section 170 (3) of the Bengal Tenancy Act. The petitioner, Rani Brindarani Choudhrani, purchased a permanent tenure of the judgment-debtors in the year 1306, that is, long before the period in respect of which the arrears of rent have now been decreed. In that view, and having regard to the authority of the case of *Jotindra Mohan Tagore* v. *Durga Dabe* (1), the Munsif has directed the tenure to be sold and refused to consider the deposit actually made by the Rani as good and valid deposit.

The petitioner, manifestly, is not a judgment-debtor within the intent of section 170 (3). The arrears of rent have been decreed as due from other persons against whom the landlord brought his suit. The petitioner, also, does not represent the judgment-debtors because the tenure was transferred before the decree made in the rent suit. For the same reason, the petitioner cannot be said to have any interest voidable on the sale to be held in execution of the rent-decree. That decree does not affect the interest, if any, of persons who were not parties thereto. The tenure is not an encumbrance on itself, it has been transferred in its entirety to the petitioner. We, therefore, think that the case relied on by the Munsif justifies his order so far as it holds that the petitioner cannot bring her case within the strict language of section 170 (3).

(1) 10 C. W. N. 438.

GOPAL CHANDRA CHAKRABARTI *v.* RADHARAMAN DAS BABAJI.

Our attention has been called to two other cases on this point. But in *Radhika Nath Sarkar* v. *Rakhal Raj Gayen* (2) the decision in *Jotindra Mohan Tagore* v. *Durga Dabe* (1) was not cited or considered, while in *Jugal Mohini Dasi* v. *Srinath Chatterjee* (3) the learned Judges thought the observations in the earlier case were *obiter*. They, however, adopted the same procedure and permitted the deposit to be made on the ground that, on a previous occasion, the landlord had withdrawn a sum similarly paid in by the claimant under section 170 (3) of the Act. We see no reason why the Rani, the petitioner before us, should not be granted a similar indulgence.

It appears that, on the 9th October 1909, the petitioner was allowed to make a deposit of the money then due and decreed "at her own risk." That was done and the decree-holder took out the sum deposited. Again, on the 12th March 1910, the same procedure was observed though nothing was then said as to the deposit being made subject to all just exceptions. The landlord withdrew the money, as before.

In these circumstances, it seems to us that the decree-holder having accepted previous deposits and there being a contest between the parties as to the composition of the tenure concerned, we are justified in interfering.

The order of the Munsif, dated the 7th July 1911, is set aside. The petitioner deposited the money but there is an order for refund. If the money has been taken back the petitioner may make the deposit as prayed. On such deposit being made within a time to be fixed by the Munsif, the sale will not be held, otherwise the proceedings will continue. If no refund has been made, the Munsif will pass the necessary orders for due appropriation of the sum paid in, and stay the sale.

The Rule is made absolute with costs. We assess the hearing fee at two gold *mohurs*.

Rule made absolute.

(2) 13 C. W. N. 1175; 10 C. L. J. 473; 3 Ind. Cas. 835.

(3) 12 C. L. J. 609; 7 Ind. Cas. 477.

(s. c. 16 C. W. N. 108.)

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2900 OF 1908.

August 22, 1911.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice D. Chatterjee.

GOPAL CHANDRA CHAKRABARTY—DEFENDANT—APPELLANT

versus

RADHARAMAN DAS BABAJI—PLAINTIFF—RESPONDENT.

Hindu Law—Succession—Shebait—*Deed of endowment*—Shebait *to succeed*—"Shishya shishyanukrame," *meaning of.*

Where a deed establishing an idol directed that the *Shebaitship* should on the death of the first *shebait* descend from disciple to disciple of the first *shebait*:

Held, that one disciple of a *shebait* may succeed another disciple in the line of the original *shebait*, and that the maker of the endowment did not intend that one disciple should be succeeded by his own disciple and not by a brother disciple of the previous *shebait*.

Appeal from the decree of the Additional District Judge of Dacca, dated September 12th, 1908, modifying that of the first Munsif of Naraingunge, dated July 30th, 1906.

FACTS.—One Gopal Sarma established an idol by a deed appointing Nobin Brojaboshi as the first *shebait* and directing that the *shebaitship* should on his death descend from disciple to disciple of the first *shebait shishya shishyanukrame*. Nobin had two disciples Adyaita and Srinibash. On his death, Adyaita succeeded Nobin. And on Adyaita's death, Srinibash the other disciple of Nobin succeeded. After the death of Srinibash his disciple Ramananda succeeded and after Ramananda's death, the plaintiff as his disciple became the *shebait* but was dispossessed by the defendant. The plaintiff has brought this suit for a declaration of his title and recovery of possession of the idol and its properties.

The defence was that the plaintiff had no title, as he was not in the line of succession, because Srinibash not being a disciple of Adyaita had no title to succeed.

The lower Appellate Court held that the fact that Srinibash was a co-disciple of Adyaita was not at all material, and that he had a good title, and a decree was given to the plaintiff.

The defendent appealed.

Mr. *S. P. Sinha* and Babu *Govind Chandra Dey Roy*, for the Appellant.

In re STAMP ACT.

Babu *Jogesh Chandra Roy* and Dr. *Sarat Chandra Basak*, for the Respondent.

JUDGMENT.—The decision of this appeal depends upon the proper construction of the document, Exhibit I, and of the words *shishya shishanukrame*, that is to say, disciple following after disciple, in that document. It is contended on behalf of the appellant that the maker of the endowment intended that one disciple should be succeeded by his own disciple, and not by a brother disciple of the previous *shebait*. That, however, does not seem to be the proper construction of the document. The words should be construed like the words *puttra puttradikrame* in other deeds; and, if we do so, it does not matter, so long as one disciple of a *shebait* succeeds another disciple in the line of the original *shebait*. In this case Srinibash was a disciple of Nobin, and he succeeded Adyaita, another disciple of Nobin. Succession, therefore, was in accordance with the intention of the endowment. This being decided, the findings of the lower Appellate Court upon the questions of fact arising in the case dispose of the appeal, and it is, therefore, dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

CIVIL REFERENCE CASE No. 25 OF 1911.

June 16, 1911.

Present:—Sir Arthur Reid, KT., Chief Judge, Mr. Justice Kensington and Mr. Justice Shah Din.

In re STAMP ACT.

Stamp Act (II of 1899), *s.* 2 (7)—*Negotible Instruments Act (XXVI of* 1881), *s.* 5—*Cheque—Receipt—Instrument purporting to receive money from bank and specifying name of messenger.*

An instrument which purports to receive a sum of money from the saving account of a depositor with a Bank and specifies the name of the messenger who is to receive payment is only a receipt and is not liable to stamp duty as a cheque.

Ratnlal Rangildas v. *Vrijbhukan Prabhuram*, 17 B. 684, distinguished.

Case referred by the Junior Secretary to the Financial Commissioner, Punjab, with his Letter No. 1482, dated the 13th February 1911, for the order of the Chief Court.

ORDER.—This is a reference under section 57 of the Stamp Act for a decision whether a certain document is chargeable with stamp duty as a cheque. The document is in these terms,—

"The Punjab Co-operative Bank, Limited.
Dated 28th September 1910.

"Rs. 5.

"Received from the Punjab Co-operative Bank, Limited, Lahore, the sum of Rs. 5 only from my Saving Account on Ledger Folio 160-6.

The Registrar, Joint Stock Companies, Punjab.	(Sd.) Khosla. Depositor's signature and address.

Messenger or Agent.

Section 2 (7) of the Stamp Act defines a cheque as a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand. A bill of exchange is defined in section 5 of the Negotiable Instruments Act XXVI of 1881, as an instrument in writing, containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument. We are unable to hold that the instrument in question, which purports to be a receipt, is an unconditional order to pay the sum specified in it. It is true that a Messenger or Agent is specified in the instrument, but, whatever may be the private understanding between the executant and the banker, the instrument is in the form of a receipt and we are unable to import into it, merely on the assumption that the banker will pay the person described in it as Messenger or Agent, the sum specified, any words which could justify our treating it as a cheque. *Ratnlal Rangildas* v. *Vrijbhukan Parabhuram* (1) cited in the text books is not in point, the instrument therein dealt with containing a distinct order to a specified individual to pay a specified sum to a specified person, and the decision that the instrument was not liable to stamp-duty being based on the fact that the drawee was not a banker. Although the instrument before us was addressed to a bank, our answer to the reference is that it is not a cheque.

(1) 17 B. 684.

MIR SARWARJAN *v.* FAKHRUDDIN MAHOMED.

[s. c. 16 C.W.N. 75;(1912)1 M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69.]

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

November 9, 1911.

Present:—Lord Macnaghten, Lord Shaw, Lord Marsey and Mr. Ameer Ali.

MIR SARWARJAN—DEFENDANT—APPELLANT

versus

FAKHRUDDIN MAHOMED CHOWDHURI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Minor—Guardian or Manager of minor—Contract for purchase of immoveable property—Specific performance—Mutuality, want of—Powers of minor's Manager and of his guardian.

It is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property. And, as the minor is not bound by the contract there is no mutuality and the minor cannot obtain specific performance of the contract on attaining majority.

Quære.—Whether there is any difference between the position and powers of a manager and those of a guardian of a minor.

Appeal from the decree of the Calcutta High Court, dated December 6th, 1906, affirming that of the Sub-Judge of Backergunge, dated February 23rd, 1904.

The case was referred to a Full Bench by Rampini and Woodroffe, JJ. The judgment of the Full Bench is reported as 11 C. W. N. 34. The Full Bench sent the case back to the Division Bench which affirmed the decree of the First Court which decreed the suit.

The defendant then appealed to the Privy Council.

Mr. *L. DeGruyther, K. C.*, and Mr. *K. Brown*, for the Appellant.

Mr. *A. M. Dunne*, for the Respondents.

JUDGMENT.

LORD MACNAGHTEN.—This is an appeal from a decree of the High Court at Calcutta affirming a decree of the Subordinate Judge of Backergunj.

All the questions raised in the litigation but one were disposed of before the appeal was taken to the High Court, and when the case was before a Division Bench of that Court that question was made the subject of a reference to the Full Bench.

The reference was in the following terms:—"Can specific performance of a contract validly entered into on behalf of a minor be enforced?"

The reference came before the Chief Justice and four other Judges of the High Court. They agreed in returning an answer which seems to be carefully guarded and is perhaps rather enigmatical. The Chief Justice observed that the question submitted to the Court was "a wide and far-reaching question." His opinion was that they could only "answer the question by saying that if a contract is validly entered into on behalf of a minor, and there is mutuality in such contract, it might be specifically enforced." The other learned Judges concurred.

The case was then sent back to the Division Bench to be tried out on the merits. The decree under appeal to the High Court was a decree for the specific performance of an agreement for the purchase and the sale of immoveable estate. The agreement was expressed to be made between a Mr. Garth and the appellant, Mir Sarwarjan. Mr. Garth was at the time manager of the estate of the respondent No 1 who was then a minor.

After observing that they had already considered the evidence and had "come to the conclusions: (1) that it was a contract validly entered into, and (2) that there is mutuality with regard to it; for 'the agreement made by Mr. Garth with Mir Sarwarjan would seem to be as enforceable against the minor as it is against Mir Sarwarjan,'" the learned Judges of the Division Bench stated that they saw no reason to dissent from their views already expressed and recorded "(1) that the contract was validly entered into particularly when, as pointed out, it was for the benefit of the minor, and was accepted and ratified by him, and (2) for the reason given 'there is no want of mutuality' in respect of this agreement."

The agreement in question was entered into by an agent of Mr. Garth, without any express authority from him, but there was some evidence that Mr. Garth adopted or assumed to adopt the agreement on behalf of the minor. At any rate, it was assumed in both Courts and it was the opinion of the Subordinate Judge that the contract was not intended to bind the manager personally, and, therefore, it was assumed that it was intended to bind the minor or the minor's estate. It was also assumed that the purchase was an advantageous purchase for the minor. In this judgment and for the pur-

pose of this judgment their Lordships accept all the foregoing assumptions.

The learned Judges of the Division Bench disposed of the question of mutuality at the first hearing in the following terms: "There is no want of mutuality in this case for the agreement made by Mr. Garth with Mir Sarwarjan would seem to be as enforceable against the minors as it is against Mir Sarwarjan. The acts of a guardian in this country bind the minor. There is no difference between his position and powers and those of a manager." No other or further reason in regard to this point was given by the learned Judges when the case was referred back to them.

Without some authority, their Lordships are unable to accept the view of the learned Judges of the Division Bench that there is no difference between the position and powers of a manager and those of a guardian. They are, however, of opinion that it is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property, and they are further of opinion that as the minor in the present case was not bound by the contract there was no mutuality, and that the minor who has now reached his majority cannot obtain specific performance of the contract.

Their Lordships, therefore, will humbly advise His Majesty that the appeal should be allowed, the order of the High Court discharged, and the suit dismissed.

The respondent No. 1 must pay the costs of the appeal. Any costs paid under the order of the High Court must be re-paid, but there will be no other order as to costs in the Courts below.

Appeal decreed with costs.

Solicitors for the Appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents: Messrs. *Morgan, Price & Co.*

(s. c. 16 C. W. N. 116.)

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 76 OF 1910.

August 24, 1911.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice D. Chatterjee.

UPENDRA NATH GHOSH AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

THE CHAIRMAN OF THE CALCUTTA CORPORATION—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872*)*, ss. 13 83 —*Map prepared by Government of* Khas Mehal *lands—Boundary dispute—Admissibility—Witness, non-attendance of—Prayer for arrest—Refusal upon insufficient ground.*

A map, more than 30 years old and prepared under the direction of Government as landlord is admissible in evidence, under section 13, though not as a public record under section 83, of the Evidence Act.

In a suit against the Calcutta Municipality, the plaintiff desired to call as a witness a servant of the Municipality and to require him to produce certain material documents. The witness failed to attend and the plaintiff asked the Court to compel his attendance by arrest if necessary. That prayer was rejected without satisfactory reasons:

Held, that the attendance of the witness should be compelled with the production of the documents, and that the case should be sent down to the first Court for re-hearing.

Appeal under section 15 of the Letters Patent from the decree of Mr. Justice Vincent dated July 28th, 1910, passed in S. A. No. 2242 of 1908.

The judgment of Mr. Justice Vincent was as follows:—

VINCENT, J.—This appeal arises out of a dispute regarding a small plot of land 1 *cotta*, 10 *chattaks* in area in Bhowanipur.

The plaintiffs allege that this land is part of a holding of theirs in the Government estate of Panchannagram and that in any case they have been in possession of the same for many years and have acquired a title to it by adverse possession whether the land was originally included in their holding or not. They allege further that the defendant Municipality, relying on certain entries made in a map prepared under the Bengal Survey Act, has lately been attempting to take possession of the said land. The plaintiffs, therefore, in this suit seek for a declaration of their title and confirmation of their possession, and further pray that an injunction may be issued prohibiting the defendant from, in any way, interfering with their possession.

The defendant Municipality states that the land in dispute has been measured as part of a public road in certain proceedings under the Survey Act, and that as part of a public road the land is Municipal property under the provisions of Act III (B. C.) of 1899. The plaintiffs' suit has been dismissed in both the lower Courts and hence this appeal is filed.

Now although the memorandum of appeal contains many grounds on which the decree is objected to, yet learned Counsel who appeared for the appellants stated specifically in Court that he would only press two points, namely, (1) that a certain map called Billon's map had been wrongly admitted in evidence and, if admissible, undue weight had been given to it in deciding the suit and the appeal in the Courts below, and (2) that the Court of first instance had improperly refused to take steps to enforce the attendance of an important witness for the plaintiffs. An affidavit was filed showing that this latter point was pressed in the lower Appellate Court, although it is not dealt with in the judgment. And reference has been made in detail to the various applications and orders on record regarding the attendance of this witness.

Accepting the affidavit as correct and taking it as a fact that the lower Appellate Court did not deal with this question, I think that as all the materials are on the record and the facts have been placed before me in some detail, it would serve no useful purpose to remand the case to the lower Court for a decision as to whether the attendance of this witness was necessary or not and that the point may well be decided in this Court.

I find on a reference to the record that it is true that more than one application was made to summon this witness who is or was apparently a Municipal assessor, and it is also a fact that he did not attend. It is also correct that an application was made to the Court to issue a warrant to enforce his attendance and this application was refused. I am not, however, satisfied that the application for the issue of warrant was made in due time or that the Court of first instance ought to have issued a warrant at the stage of the proceedings when the application for such process was made. Up to the 24th of September 1907 there was apparently some hope of settling the suit amicably and on that date also an application was made for further time to compromise. But the application was refused and on the 25th September the hearing commenced. On that date witnesses were examined and the hearing was continued on the 26th and 27th. The trial proceeded again on the 30th and on that day the tenth witness for the plaintiffs was examined and it was not until the 1st October 1907, that any application was made to enforce the attendance of this witness. The learned Munsif records the following order on that application:—"Plaintiff puts in a petition for warrant of arrest of a witness. No such petition can be allowed at this stage. Application rejected." In my opinion, this order was a proper order, having regard to the facts that the plaintiffs' case was then nearly completed and that no application had been made when the hearing commenced. I am, therefore, unable to say that it was incumbent on the Court to enforce the attendance of this witness and this point is decided against the appellants.

In regard to the second point it is urged and with some force that the map of Mr. Billon upon which reliance has been placed is not a map prepared under the authority of Government as the sovereign power but one prepared by Government as landlord in its own interest, and reference has been made in particular to the cases of *Junmajoy Mullick* v. *Dwarka Nath Maytee* (1) and *Ram Ohunder Sao* v. *Bunseedhar Nath* (2). But, although it is true that Billon's map is not possibly admissible as a public record, it is undoubtedly, in my opinion, admissible under section 13 of the Evidence Act, *quantum valeat*. The document is more than 30 years old. It was apparently produced from proper custody and was, therefore, in my opinion, admissible in evidence. In any case, even if this map is excluded it appears that the plaintiffs have, on the findings of fact arrived at by the lower Courts, entirely failed to adduce satisfactory evidence to discharge the *onus* which lay upon them. On the pleadings it is clearly incumbent on the plaintiffs to prove either a title by adverse possession or that the land was included within their holding. The finding of the learned District

(1) 5 C. 287; 4 C. L. R. 574.
(2) 9 C. 741.

Judge is distinct that the land has not been in the possession of the plaintiffs for twelve years and the evidence of title adduced by the plaintiffs was accepted in neither of the Courts below. In fact, the learned District Judge goes so far as to say that the plaintiffs have deliberately suppressed their title-deeds and have produced other deeds containing boundaries which are obviously wrong and he further states that the appellants have no evidence of title or of possession beyond that afforded by the judgments of Mr. Smart and Mr. Marr in the survey proceedings and these judgments contain a definite finding that the possession of the appellants is a possession by encroachment only. It appears to me that these findings of fact are conclusive against the appellants and that they have failed to prove any title which would justify the Court in making a decree in their favour. It follows, therefore, that this appeal must be dismissed with costs and the decision of the lower Courts must be confirmed.

The plaintiff appealed.

Babus *Susil Madhub Mullick* and *Provash Chander Mitter*, for the Appellant.

Babu *Debendra Chandra Mullick*, for the Respondent.

JUDGMENT.

JENKINS, C. J.—This is an appeal from a decision of Mr. Justice Vincent affirming the decree of the lower Appellate Court, with the result that the plaintiff's suit stands dismissed.

Two objections were taken before us on behalf of the plaintiff; *first*, it was said that there was improper reception of evidence inasmuch as the map prepared by Mr. Billon was admitted. But, in our opinion, that map was admissible, if not under section 83, still under section 13 of the Evidence Act. The value to be attributed to it, when admitted, was a matter to be determined by the Court of fact: so that had matters rested there, we should not have interfered with the decree of the lower Appellate Court. But there is an incident in the case which certainly calls for interference on the part of this Court, and it is this: The plaintiffs were desirous of establishing their possession of the land in suit and it was obviously most material for them to be able to prove that possession. For the purpose of proving that, they desired to call as a witness a servant of the Municipality and to require him to produce certain documents which, they maintained, would go far to show that their contention as to their possession was correct. They made repeated attempts to procure the evidence of that witness: but he absolutely failed or declined to attend. In those circumstances, the plaintiff not unnaturally asked the Court to take measures to compel his attendance, by arrest if necessary. For some reason, which does not appear satisfactory to me, the Court of first instance refused to take this measure. We have asked the learned Pleader who appears on behalf of the defendant Municipality how it was that a servant of the Municipality should have acted in this way and should have practically set the summons of the Court at defiance. He was unable to give any explanation. I can see nothing to excuse such conduct. If, as has been suggested, it was in any way due to the Municipality itself, I need hardly say that it would be most reprehensible conduct. But we are not in a position to form an opinion as to the responsibility of the Municipality although that is the statement made before us.

In the circumstances of the case, the proper course will be to set aside the decrees of the lower Appellate Court and o the Court of first instance and to send back the case for re-hearing and determination, when the attendance of this witness has been compelled, with the production of the documents that were required from him for the purposes of this case.

The Municipality must pay the appellants' costs up to the present time.

D. CHATTERJEE, J.—I agree.

Appeal allowed: Case remanded.

WESTON *v.* PEARY MOHAN DAS.

(s. c. 16 C. W. N. 119.)

CALCUTTA HIGH COURT.

APPEAL FROM EXTRAORDINARY ORIGINAL CIVIL JURISDICTION, No. 61 OF 1911.

November 27, 1911.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Woodroffe.

D. WESTON AND OTHERS—DEFENDANTS—APPELLANTS

versus

PEARY MOHAN DAS—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 10—Security for respondent's costs—Appeal by servant of Government—Interest of Government—Appellants not having means to pay costs—Nature of security—Bond of Secretary of State.

Where it appeared that the respondent's costs which the appellants were ordered to pay amounted to two lacs and fifty thousand rupees, that the appellants have no such means as to be able to pay costs; that the prosecution of the appeal will entail a very heavy expenditure on the part of the respondent, and that the suit was and the appeal is being carried on by the Government on behalf of the appellants, Government servants, at an enormous expense:

Held, that this is eminently a case where the Court of Appeal should exercise its discretion in favour of directing security for costs.

The security was ordered to be taken in the form of a bond of the Secretary of State, the respondent being satisfied with the same.

The suit was brought against a Magistrate and two Polic Officers for damages for extorting a confession from the plaintiff's son. Mr. Justice Fletcher who tried the suit awarded Rs. 1,000 as damages to the plaintiff and costs on scale II. The Government defrayed the expenses of the defendants and intended to bear their costs of the appeal. The respondent prayed that security for costs might be taken from the appellants.

Messrs. *K. B. Dutt* and *H. D. Bose*, for the Respondent Petitioner.

Mr. *W. Garth* for the Appellants, Opposite Party.

JUDGMENT.

JENKINS, C. J.—This is an application to this Appellate Court under Order XLI, rule 10 of the Code of Civil Procedure, which empowers the Court in its discretion to demand from the appellants, security for the costs of the appeal, or of the original suit, or of both, The only materials on which we are entitled to decide this application are the allegations contained in the petition. Those allegations are uncontradicted, and it has been stated before us by Mr. Garth very candidly that they are admitted to be correct. Now, it is stated in that petition that the respondent's costs which have been ordered to be paid amounted to a very large sum, roughly estimated, of about two lacs and fifty thousand rupees; that the appellants have no such means as to be able to pay the costs; that the appellants have no immoveable property from which the costs can be realised, and that the prosecution of the appeal will entail a very heavy expenditure on the part of the plaintiff-respondent, and, then it is said that the suit was and the present appeal is being carried on by the Government on behalf of the appellants at an enormous expense. It appears to me further, having regard to the action of the Government, that the Government is really interested in this litigation for reasons which have been indicated in the course of the argument. In these circumstances, I think this is eminently a case where we should exercise our discretion in favour of directing security for costs, and there will be an order, as prayed, for such security.

The only question that has arisen as to the nature of the security is a doubt which was suggested by Mr. Garth whether the respondent would be satisfied with the bond of the Secretary of State for India in Council. The respondent says that he would be perfectly satisfied with such security, so that if the appellants are prepared to offer such security, then the security, in that form can be taken in the circumstances of the case. In view of the admission of Counsel on behalf of the appellants and the difference in the circumstances of the case, I do not think we need be concerned with the determination of the Court in another case to which a brief allusion was made.

The costs of this application will be costs in the appeal.

WOODROFFE, J.—I agree.

Application granted.

Attorney for the Plaintiff-Respondent: Petitioner: Mr. *J. C. Dutt.*

Attorneys for the Defendants-Appellants: Messrs. *Orr, Dignam & Co.*

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 102 OF 1910.
December 13, 1911.
Present:—Mr. Justice Carnduff.
LAZARANNESSA BIBI—PLAINTIFF—APPELLANT
versus
MAHOMED JAFFAR LASHKAR—DEFENDANT—RESPONDENT.

Mortgage—Usufructuary mortgagee—Suit for money—Transfer of Property Act (IV of 1882), ss. 67, 68.

The remedy of a usufructuary mortgagee to whom possession had not been given is to sue for possession under his contract, or to bring, under section 68 of the Transfer of Property Act, a suit, for money. He cannot turn his usufructuary mortgage into a simple mortgage and sue for sale of the property mortgaged.

Luchmeshar Singh v. *Dookh Mochan Jha*, 24 C. 677, relied upon.

Kangaya Gurukal v. *Kalimuthu Annavi*, 27 M. 526 and *Arunachalam Chetti* v. *Ayyavayyam*, 21 M. 476, referred to.

Appeal from the decree of the Sub-Judge of Dacca, dated August 24th, 1909, reversing that of the Munsif of Munshigunge, dated December 23rd, 1908.

Moulvi *Nur-ud din Ahmed* for Moulvi *L. R. Zahid*, for the Appellant.

Babu *Harendra Narain Mitra*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by a usufructuary mortgagee for recovery of his mortgage-debt by sale of the property mortgaged. The suit was decreed by the Court of first instance but on appeal it has been dismissed on two grounds, the first being that a usufructuary mortgagee cannot sue for sale, and the second that the holding mortgaged was not transferable.

It is argued before me that the decision of the learned Subordinate Judge on the first point is erroneous, and I am referred to the judgment of a Full Bench of the Madras High Court in the case of *Kangaya Gurukal* v. *Kalimuthu Annavi* (1). As regards this case all that I need say is that it is not precisely in point and is distinctly opposed to the ruling of another Full Bench of the same Court in the case of *Arunachalam Chetti* v. *Ayyavayyam* (2). It is also opposed to the law as laid down by a Division Bench of this Court in the case of *Luchmeshar Singh* v. *Dookh Mochan Jha* (3) and it seems to me to be contrary to the express provisions of sections 67 and 68 of the Transfer of Property Act, 1882. The remedy of the mortgagee to whom possession had not been given, was to sue for possession under his contract or to bring, under section 68 of the Act referred to, a suit for money; and he chose to take the latter course. He clearly cannot turn his usufructuary mortgage into a simple mortgage, as is suggested by the learned Vakil on his behalf. There is here no question of the mortgage being anomalous. It is described as usufructuary, and I must treat it as such since it has not been translated or printed by the appellant. The appeal must consequently fail on this first point; and it is not necessary for me to consider the second. It is dismissed with costs.

Appeal dismissed.

(1) 27 M. 526.
(2) 21 M. 476.
(3) 24 C. 677.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 3127 OF 1909.
December 13, 1911.
Present:—Mr. Justice Carnduff.
LAKHI KANT DAS—DEFENDANT No. 3—APPELLANT
versus
BALABHADRA PROSAD DAS—PLAINTIFF—RESPONDENT.

Landlord and tenant—Non-transferable occupancy-holding—Purchase by co sharer landlord—Joint khas possession, claim for, by other co-sharer—Bengal Tenancy Act (VIII of 1885), s. 22 (2).

Section 22 clause (2) of the Bengal Tenancy Act does not apply to a non-transferable occupancy-*jote*.

Therefore, where a co-sharer landlord purchases a non-transferable occupancy-*jote*, his co-sharer is entitled to recover *khas* possession of the *jote* jointly with the purchaser co sharer, on the ground that the *jote* must be treated as having been abandoned.

Girish Chandra Chowdhury v. *Kedar Chand Roy*, 27 C. 473, relied upon.

Ram Mohan Pal v. *Sheikh Kachu*, 32 C. 386; 1 C. L. J. 1; 9 C. W. N. 249 (F. B. and *Jawadal Huq* v. *Ram Das Saha*, 24 C. 143; 1 C. W. N. 166, distinguished.

Appeal from the decree of the District Judge of Cuttack, dated September 10th, 1909, affirming that of the Munsif of Balasore, dated February 24th, 1909.

Moulvi *Nuruddin Ahmed* for Moulvi *L. R. Zahid*, for the Appellant.

Babu *Provash Chandra Mitter*, for the Respondent.

PRAN SINGH *v.* JANARDAN SINGH.

JUDGMENT.—The parties to this appeal are co-sharer landlords. The appellant purchased two occupancy *jotes* and the finding is that such *jotes* are not transferable. The respondent sought to recover *khas* possession of them jointly with the appellant on the ground that they must be treated as having been abandoned. Both the Courts below have concurred in decreeing the suit, the learned District Judge holding on appeal that section 22 (2) of the Bengal Tenancy Act, 1885, on which the appellant has relied, does not apply to non-transferable *jotes*. It seems to me that the learned District Judge is clearly right and that there is no substance in this appeal.

On the words of the section itself, I should say that transferability is implied; and it has been so ruled by this Court in the case of *Girish Chandra Chowdhry* v. *Kedar Chandra Roy* (1). The learned Vakil, who appears on behalf of the appellant, argues that that decision has been practically overridden by a Full Bench of this Court in the case of *Ram Mohan Pal* v. *Sheikh Kachhu* (2), in which it was declared that the ruling in the earlier case of *Jawadal Huq* v. *Ram Das Saha* (3) was good law. It seems to me, however, that neither of the cases last mentioned clashes with or affects the ruling in *Girish Chandra Chowdhry* v. *Kedar Chandra Roy* (1), or is of any avail to the present appellant. For, in the Full Bench case there was the finding that the lands in dispute were transferable by custom with the consent of the landlords, and it is clear that in the case of *Jawadal Huq* v. *Ram Das Saha* (3), the holdings concerned were likewise transferable. This appeal must, therefore, be dismissed with costs.

Appeal dismissed.

(1) 27 C. 473.
(2) 32 C. 386; 1 C. L. J. 1; 9 C. W. N. 249.
(3) 24 C. 143; 1 C. W. N. 166.

(s. c. 14 C. L. J. 541.)

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 481 OF 1910.

August 28, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

PRAN SINGH AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

JANARDAN SINGH AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), *O. XXI, rr.* 66, 90—*Notice to judgment-debtor to settle details in sale proclamation—Effect of non-objection by judgment-debtor —Judicial sale not to be assailed on technical grounds —Sale to be conducted by fair methods—Civil Procedure Code (Act XIV of* 1882), *s.* 291—*Hour of sale to be inserted in sale proclamation—Non-insertion, material irregularity.*

If in a sale proclamation the value of the properties to be sold, is understated, and this is calculated to mislead bidders, and to prevent them from offering adequate prices or from bidding at all, and an altogether inadequate price is offered, the sale is liable to be set aside.

Saadatmand Khan v. *Phool Koer*, 25 I. A. 146; 20 A. 412; 2 C. W. N. 550, relied upon.

Abdul Kashem v. *Benode Lal*, 12 C. W. N. 757, not followed.

An inquiry under Order XXI, rule 66 is intended to be of the most summary character. But the judgment-debtor has notice of the proceeding and has an opportunity to take exception to the statements proposed to be entered in the sale proclamation. If his objection as to under-valuation is not heeded by the decree-holder the latter proceeds with execution, with full knowledge that if he purchases the properties for a small amount, the validity of the sale is sure to be challenged by the judgment-debtor. But if the judgment-debtor, with notice of the proceedings, does not object to the entries in the sale proclamation at that stage, a subsequent objection by him on the ground of inaccuracy or insufficiency of description, is not likely to be entertained by the Court.

Arunachellam v. *Arunachallam*, 15 I. A. 171; 12 M. 19, referred to.

Although the validity of judicial sales, properly conducted, should be supported and should not be allowed to be assailed on technical grounds, yet, at the same time, the purity of judicial proceedings in connection with execution sales should be assured to a reasonable extent; and a decree-holder should not be allowed to employ the machinery of the Court to secure for himself at a grossly inadequate price the properties of his judgment-debtor by methods which will not bear examination.

Obiter dictum.—When a sale is adjourned under section 291 of the Civil Procedure Code of 1882, it is necessary to mention the hour of sale, and an omission to do so is a material irregularity.

Bhikari Misra v. *Rani Surja Moni*, 6 C. W. N. 48, followed.

Surno Moyee v. *Dakhina Ranjan*, 24 C. 291 and *Venkatasubbaraya* v. *Zemindar of Karvetengar*, 20 M. 159. referred to.

PRAN SINGH *v.* JANARDAN SINGH.

Appeal against the order of the Subordinate Judge of Gaya, dated the 18th August 1910.

Babus *Biraj Mohan Mojumdar* and *Harihar Prosad Sinha*, for the Appellants.

Dr. *Rash Behary Ghosh* and Babus *Umakali Mukerji*, *Ganesh Dutt Singh* and *Sheonandan Roy*, for the Respondents.

JUDGMENT.—This appeal is directed against an order by which the Court below has dismissed an application of the judgment-debtor to set aside a sale of six properties in execution of a mortgage-decree. The decree was made by this Court on the 2nd December 1908, in affirmance of the decree of the original Court, dated the 29th June 1907. The first application for execution was made on the 28th March 1908, on the basis of the decree of the Court of first instance, even before it had been confirmed by this Court. That application was dismissed for default on the 15th September 1908. The second application was presented on the 6th February 1909. The sale was proclaimed and for five of the properties the decree-holder was the highest bidder at the sale which took place from the 15th to the 18th March 1909. Before the sale could be completed, however, the decree-holder withdrew on the ground recorded in the bid-sheet and signed by his Pleader that "the decree-holder does not want to get the properties sold fearing irregularity". The execution proceeding consequently fell through. On the 21st September 1909, the decree-holder made the third application for execution. In the course of the proceedings so instituted, the Subordinate Judge, on the 11th October 1909, determined the upset values of the six properties under Order XXI, rule 66, sub-rule 2 (*e*), of the Code of 1908. The judgment-debtors were represented at this summary inquiry and protested against the values suggested by the decree-holder as too low; in fact, they were in some cases lower than the prices offered by the decree-holder himself at the sale held in March 1909. The objection of the judgment-debtors was, however, not heeded, and the sale-proclamation was ordered to issue with the statement of values as suggested by the decree-holder on the basis of the Road-Cess Returns. An appeal to this Court against that order was dismissed on the 13th December 1909. The sale took place on the 21st and 22nd February 1910. The decree-holder was granted leave to bid at the sale "on fair price". At the sale, the decree-holder offered bids through his Pleader, and his principal contestant was one Ram Charan Bajpai. In the case of the first property, the Pleader for the decree-holder does not appear to have offered any bid, and the contest was limited to Ram Charan and four other persons. In the case of the fourth property, one Dilkeswar Singh appears to have offered two bids at an early stage, but he retired from the contest later on. On the face of the papers, therefore, excepting the case of the first property, the contest was between the decree-holder and Ram Charn. Ram Charn succeeded in purchasing all the properties, and on the 25th February 1910, his bids were accepted and the payment of the balance of the purchase-money sanctioned. On the 8th March 1910, however, Ram Charn appeared and stated that he had made the purchase for one Askaran Baid who also appeared and prayed for leave to deposit the balance of the purchase-money. The application was granted, and certificate of sale was directed to be delivered to Askaran Baid. On the 21st March 1910, the judgment-debtors applied to have the sale set aside under rule 90 of Order XXI of the Code of 1908. Various objections were taken to the validity of the sale, the substance of which was that the decree-holder had himself purchased the properties *benami* for a grossly inadequate price, and, with a view to enable him to do so, had committed fraud and various irregularities. One of the irregularities mentioned was that the decree-holder had deliberately undervalued the properties for the purposes of the execution-sale: another was that the sale proclamation had not been duly served, and a third objection was that the sale had been irregularly adjourned without specification of the hour at which the sale was to take place. The Subordinate Judge, on the 18th August 1910, overruled all the objections urged before him and confirmed the sale. The present appeal was lodged by the judgment-debtors on the 21st September 1910, and has been contested by the decree-holder who has on

PRAN SINGH *v.* JANARDAN SINGH.

the 4th November 1910, taken a conveyance from Askaran Baid; the conveyance states, we are informed, that the consideration is Rs. 1,500 in excess of the price paid at the sale. On behalf of the appellants, the validity of the sale has been impeached on several grounds, of which two may be considered as specially important, namely, *first*, that the properties were deliberately undervalued by the decree-holder for the purposes of the sale proclamation, that he himself has thereby succeeded in purchasing the properties for a grossly inadequate sum, and that he misled the Court by setting up a fictitious bidder to indicate that there was a keen contest and the purchase was made by a stranger, whereas there was, as a matter of fact, no contest at all, and the properties were taken by the decree-holder in the name of the fictitious bidder; and *secondly*, that the adjournment of the sale on the 21st February, without specification of the hour at which the sale was to take place the next day, was a material irregularity calculated to mislead intending bidders.

In so far as the first of these contentions is concerned, there can, in our opinion, be no room for doubt that the decree-holder was the real purchaser at the execution-sale impeached by the judgment-debtors. It is not disputed that Ram Charan Bajpai, who was present at the sale, successfully offered the bids and deposited the earnest-money, was not the real purchaser; that is the common case of both the parties; who then was the real purchaser? The decree-holder asserts that it was Askaran Baid, who purchased the properties and paid for them. The judgment-debtors assert, on the other hand, that he is quite as much a shadow as Ram Charan Bajpai, and that both are persons set up by the decree-holder to enable him to seize properties of considerable value at the smallest possible price. This Askaran Baid has not taken the remotest interest in the present proceedings, and has made no endeavour to sustain the validity of the sale; though he was a party to the proceedings, and though the judgment-debtors repeatedly asserted that he was not the real purchaser, he has not even come forward to pledge his oath in support of the allegation that he was the person beneficially interested. Nor has any plausible explanation been attempted as to why Askaran Baid, who had on the 22nd February 1910 purchased the properties for one lac, six hundred rupees after an apparently keen contest with the decree-holder, should on the 4th November 1910, transfer the properties to the decree-holder for a nominal profit of Rs. 1,500. This sum would not cover even a small fraction of interest on the purchase-money for the interval at the current rate, whether that rate be taken to be twelve per cent. or six per cent. per annum. In our opinion, the surrounding circumstances are conclusive that it is the decree-holder who was the real purchaser at the execution-sale, and this aspect of the matter has, indeed, not been seriously controverted in this Court. The position is materially strengthened, when we examine the antecedent proceedings. In the second execution proceedings, as we have already stated, the decree-holder had openly offered the highest bid in the case of each of the five properties sold on that occasion. We tabulate below the values mentioned by the decree-holder in the sale proclamation then issued, and the bids offered by him at the sale. (The properties are numbered as in the present proceeding),—

No.	Value in sale proclamation.	Bid of decree-holder.
1	7,000	7,000
2	25,000	29,100
3	5,000	32,100
4	8,500	32,100
5	8,000	17,000

The bidder who principally entered into a contest with the decree-holder on that occasion, was one Dilkeswar Singh, who is said to be a relation of one of the judgment-debtors. On behalf of the respondents, it has been suggested in this Court that the decree-holder withdrew his bids when he discovered that Dilkeswar was a puffer set up by the judgment-debtors. There is no foundation whatever for this suggestion. In the first place, the ground then assigned by the decree-holder for not adhering to his bids in that proceeding was that he was afraid of irregularity. The suggestion now made that he had been misled by Dilkeswar is clearly an afterthought. In the second place, the decree-holder does not come into

Court to pledge his oath in support of the theory he now sets up. In the third place, the theory itself is futile and will not bear examination for a moment. The decree-holder was not a stranger to the properties; he had accepted them as security for the money advanced by him, and when he did so, he may be assumed, like any reasonably prudent man, to have made an estimate of their value. He had deliberately caused to be inserted in the sale proclamation what, he thought, was the proper value of the properties. We are, therefore, not prepared to adopt the suggestion now made, but not supported by any evidence, that, because the decree-holder imagined Dilkeswar Singh to be a real bidder, he indiscreetly offered bids to the extent of Rs. 32, 100, Rs. 32,100 and Rs. 17,000 for properties valued by himself in the sale-proclamation at Rs. 5,000, Rs. 8,500, and Rs. 8,000 respectively. In our opinion, the bids offered by the decree-holder at the sale held from the 15th to the 18th March 1909, furnish strong evidence as against him as to the minimum value of the properties, and the presumption is not rebutted by an idle explanation, not even remotely suggested at the time but invented subsequently. The learned Vakil for the appellants has suggested a possible explanation as to why the decree-holder withdrew from the bids before their acceptance. It is not necessary for us to speculate as to his real motives, but the theory looks plausible that if Dilkeswar had no money for purchase of the properties, and if the decree-holder discovered it before the acceptance of his bids, he may have repented that he had offered such high bids and have at once decided to withdraw, with a view to take his chance and capture the properties on more favourable terms on a future occasion. But, as we have said, it is needless to find out the true motive which guided the conduct of the decree-holder on that occasion. The fact remains that he deliberately offered to take the properties at certain prices and that the explanation he has now suggested with a view to nullify the effect of this evidence, is wholly inadequate.

We shall now proceed to examine the conduct of the decree-holder in the present proceedings, which have been rendered necessary by the withdrawal of his bids on the former occasion. In spite of the protest of the judgment-debtors, he insists upon the insertion of certain figures in the sale proclamation, as representing the value of the several properties. These sums are calculated on the basis of the assets in the Road-Cess Returns, on which much reliance is placed, because the judgment-debtors admit that the Cess Returns were filed on behalf of some amongst themselves or their predecessors. That the Road-Cess Returns are not always a reliable guide in such matters, is well known; that they have proved very misleading in the present case, is beyond dispute. The decree-holder, who relied upon the Cess Returns, has himself offered much higher values than those deducible from the figures in the Road-Cess Returns. The truth is that the inquiry into the question of value before the Subordinate Judge was of a very summary character, and he too readily accepted the explanation offered by the decree-holder with a view to minimise the effect of the evidence of his previous bids. We tabulate below the values of the several properties as fixed by the Court at the instance of the decree-holder, and the bids as offered by the decree-holder himself through his *benamdars* Ram Charan Bajpai or Askaran Baid.

No.	Value in sale proclamation.	Price at the sale.
1	7,000	2,700
2	25,000	27,500
3	8,000	20,100
4	17,000	29,500
5	4,000	4,700
6	13,000	16,100

The net result is that the five properties, for which the decree-holder, on the 15th March 1909, offered one lac, seventeen thousand, three hundred rupees, are valued as his instance by the Court at Rs. 70,000 and are purchased by him *benami*, on the 22nd February 1910, for Rs. 95,900. The case of the third property is remarkable. In 1909, it is valued by the decree-holder in the said proclamation at Rs. 5,000. He offers a bid for Rs. 32,100. In 1910 he gets the Court to value it for the sale proclamation at Rs. 8,000, and in the sale which follows, purchases it for Rs. 20,100. The case of the fourth property is only a little less striking. In th

PRAN SINGH *v.* JANARDAN SINGH.

sale proclamation of 1909, it is valued at Rs. 8,500, though the decree-holder is able to offer a bid of Rs. 32,100. For the sale proclamation of 1910, he successfully insists that it should be valued at only Rs. 17,000. At the sale which follows, he purchases it *benami* for Rs. 29,500. In the case of two other properties, the second and sixth, there is similar divergence, but not of an equally pronounced character. As regards the first property, it is to be observed that it was valued for the purposes of the sale proclamation at Rs. 7,000 both in 1909 and in 1910. But, while on the former occasion the decree-holder offered a bid of Rs. 7,000, on the present occasion, he acquires it *benami* for Rs. 2,700. Upon a careful scrutiny of the proceedings, two facts, therefore, emerge as firmly established, namely, *first*, that the value of the properties in the sale proclamation has been grossly and deliberately understated by the decree-holder, and *secondly*, that he has set up a fictitious bidder to create the impression that the several properties have been knocked down to a stranger to the proceedings after a keen contest in which he has been defeated; the truth is that all this is a blind, elaborately devised and successfully carried out; except in the case of the first property, the history of the antecedents of the bidders whereof is not known, in every other instance, the decree-holder himself has purchased the property without any contest, and for such sum as he has chosen to offer; the sum, in five instances, has been less than what he had offered on the previous occasion; in two of the instances, the price paid is remarkably inadequate in comparison with the price previously offered. The question now arises whether the decree-holder is entitled to invite the Court to confirm the sale under these circumstances.

In so far as the under-valuation of the properties is concerned, reliance has been placed by the appellants upon the decision of their Lordships of the Judicial Committee in *Saadatmand Khan* v. *Phool Koer* (1) in support of the proposition that as the understatement was calculated to mislead bidders, and to prevent them from offering adequate prices or from bidding at all, and as the sale has resulted in an altogether inadequate price, it is liable to be set aside. The soundness of this contention cannot be disputed, though it may be conceded that the case mentioned on behalf of the respondents, *Abdul Kashem* v. *Benode Lal Dhone* (2), appears to have overlooked the decision of the Judicial Committee which was probably not brought to the notice of the learned Judges; it may be added that this Court has, on more than one occasion, refused to follow the latter case as inconsistent with the exposition of the law on the subject by the Judicial Committee. *Shivadurga* v. *Raj Mohan* (3) and *Rudranund* v. *Pirthi Chand* (4). On behalf of the respondents, it has, however, been contended, that the principle of the decision in *Saadatmand Khan* v. *Phool Koer* (1), can no longer be treated as good law, because, under Order XXI, rule 66, sub-rule (2) of the Code of 1908, the judgment-debtor is entitled to notice before the sale proclamation is drawn up. In our opinion, there is no substance in this contention. Notice to the judgment-debtor only enables him to put his case before the Court, but if, as here, the decree-holder insists that a much smaller valuation should be inserted in the sale proclamation than what is alleged by the judgment-debtor, and the Court accepts his view of the matter, the decree-holder proceeds to the sale at his own risk. The learned Vakil for the respondents warmly repudiated the position that the entry of the valuation in the sale proclamation can, in any way, conclude the judgment-debtor in proceedings for reversal of the sale under Order XXI, rule 90. The inquiry under rule 66 is intended to be of the most summary character, and may possibly be described as "a matter of administration" in the words of Lord Macnaghten in *Ko Tho* v. *Ma Hnin* (5); the order of the Subordinate Judge is also not liable to be reviewed on appeal. *Deoki Nandan* v. *Bansi Singh* (6). The true view of the matter is that, under the new Code, the judgment-debtor has notice of the proceeding: he has opportunity to take exception to the statements proposed to be entered in the sale proclamation, but if his objection as to under

(1) 25 I. A. 146; 20 A. 412; 2 C. W. N. 550.

(2) 12 C. W. N. 757.

(3) 15 C. W. N. 577; 10 Ind. Cas. 475.

(4) 14 C. L. J. 346; 11 Ind. Cas. 438.

(5) 14 C. L. J. 241; 15 C. W. N. 862; 2 M. W. N. 449; 13 Bom. L. R. 694; 38 C. 717; 8 A. L. J. 1117; 6 L. B. R. 26; 4 Bur. L. T. 257; 11 Ind. Cas. 545.

(6) 14 C. L. J. 35; 16 C. W. N. 124; 10 Ind. Cas. 371.

PRAN SINGH *v.* JANARDAN SINGH.

valuation is not heeded by the decree-holder the latter proceeds with execution, with full knowledge that if he purchases the properties for a small amount, the validity of the sale is sure to be challenged by the judgment-debtor. No doubt if the judgment-debtor, with notice of the proceedings, does not object to the entries in the sale proclamation at that stage, a subsequent objection by him on the ground of inaccuracy or insufficiency of description, is not likely to be entertained by the Court. As Sir Richard Couch observed in *Arunachellam* v. *Arunachellam* (7), it would be very difficult to conduct proceedings in execution by attachment and sale of property, if the judgment-debtor could lie by and afterwards take advantage of misdescription which he knew well, but of which the decree-holder might be perfectly ignorant; he cannot, with notice, allow the sale to proceed without objection and then come forward and say that the whole proceedings were vitiated. *Olpherts* v. *Mahabir Pershad* (8). This doctrine has obviously no application to a case of this description. The judgment-debtors did not lie by; they have strenuously protested throughout that their properties, which they were willing should be sold for a proper price, were deliberately undervalued, and that such under-statement of value was likely to prejudice them seriously. Their objection has been disregarded; the decree-holder, with full knowledge of the objection, has purchased the properties for prices smaller than those he had himself previously offered. Here, at any rate, we are not concerned with the position of a stranger to the proceedings who has *bona fide* purchased for value the properties exposed for sale. In our opinion, the proceedings show conclusively that the decree-holder has deliberately understated the values of the properties in the sale proclamation, and that substantial injury has been caused to the judgment-debtors by this material irregularity, whether we accept as the true values of the properties the sums previously offered by the decree-holder himself or the much higher figures suggested and sought to be proved on behalf of the judgment-debtors. That this result has been achieved by the decree-holder, not by accident, but by measures carefully pre-concerted becomes manifest when we examine the bearing of the second conclusion of fact mentioned above.

We have found that the decree-holder was the real purchaser at the sale, and that Ram Charan Bajpai and Askaran Baid were persons introduced by him to give the sale the appearance of a sale to a stranger after severe contest with the decree-holder. In truth, there was no competition. The object of the device is self-evident. The decree-holder was taking out execution for a very large sum nearly one lac of rupees. He had valued the properties for the purposes of the sale proclamation at only Rs. 74,000. The judgment-debtors had protested against this valuation, and had asserted that the value was over two lacs and seventy-five thousand rupees. If at a sale held, under these circumstances, of properties of considerable value, there were no bidders present, and the decree holder attempted to purchase the properties without any competition, suspicion would at once be aroused, and the Court might very well direct the issue of a fresh sale proclamation to make sure that the sale was duly proclaimed and possible bidders afforded an opportunity to bid at the sale. Recourse to the device of an apparently keen competition consequently became necessary. With respect to the fourth property, for instance, the record shows that Ram Charan Bajpai is supposed to have offered at least twenty successive bids against the decree-holder before the property was knocked down to him; we now know that this contest was all a fiction, and that Ram Charan Bajpai was no other than a representative of the decree-holder himself. It is plain that these fictitious bids, by the interposition of a *benamdar*, were intended to create the impression that there was a contested sale to a stranger; the device was successful and effectively misled the Court. *Nanda Kumar Saha* v. *Gobinda Mohan Das* (9). We feel no doubt whatever that a sale held under such circumstances ought not to be maintained. It may be conceded that it is of the utmost importance that the validity of judicial sales, properly conducted, should be supported and should not be allowed to be assailed on technical grounds; at the same time, it is of at least equal importance that

(7) 15 I. A. 171; 12 M. 19.

(8) 10 I. A. 25; 11 C. L. R. 494.

(9) 13 C. L. J. 312; 6 Ind. Cas. 135.

the purity of judicial proceedings in connection with execution-sales should be secured to at least a reasonable extent. It is intolerable that a decree-holder should be allowed, as in the case before us, to employ the machinery of the Court to secure for himself at a grossly inadequate price the properties of his judgment-debtors by methods which will not bear serious examination.

In the view we take of the first ground urged before us, it is not necessary to examine in detail the second ground mentioned by the learned Vakil for the appellants. We need only say that, as at present advised, we do not see any reason to question the correctness of the view adopted by Mr. Justice Ameer Ali in *Bhikari Misra* v. *Rani Suria Moni* (10), namely, that when a sale is adjourned under section 291 of the Civil Procedure Code of 1882, it is necessary to mention the hour of sale, and its non-specification is a material irregularity. See also *Surno Moyee Debi* v. *Dakhina Ranjan* (11), *Venkatasubbaraya* v. *Zemindar of Karvetenagar* (12). It is not necessary, however, to deal with this aspect of the case in further detail. It is also needless to discuss the other points taken in the memorandum of appeal and pressed before us, or to examine in detail the evidence as to the service of the sale proclamation or the actual value of the properties. We need only say that the evidence upon these points cannot be summarily rejected, and in view of the fact that for five of the properties at least no real bidder was present, except the decree-holder himself, if it were necessary to consider the question of the service of the sale proclamation, the evidence in support of it would require very careful scrutiny.

The result, therefore, is that this appeal must be allowed and the order of the Subordinate Judge set aside. The execution proceedings will stand revived, and as soon as the records are received by the Court below, steps will be taken to issue a fresh sale proclamation. The Subordinate Judge will consider afresh the question of the values to be inserted in the sale proclamation, and he may very well act in the light of the bids offered at the two sales, and also of such evidence as may be adduced by the judgment-debtors.

(10) 6 C. W. N. 48.
(11) 24 C. 291.
(12) 20 M. 159.

The Court will also carefully consider the entry to be made as to the amount of Government revenue: there appears to have been error in this respect in the last sale proclamation, which might have been avoided with a little care; after the sale proclamation has been settled, it will be served in accordance with law and the judgment-debtors will assist the Court in effecting a proper service, so that no question of due publication may hereafter arise.

The appellants are entitled to their costs both here and in the Court below. We assess the hearing fee in this Court at five gold *mohurs*.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 403 OF 1910.

December 26, 1911.

Present:—Mr. Justice Johnstone.

TULSI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MADHO RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation—Alienation—Alienor alienating and dying 12 years before suit—Mutation effected within 12 years—Suit for possession by reversioner—Punjab Limitation Act (I of 1900), scope of—Limitation Act (XV of 1877), Sch. II, Art. 144—Punjab General Clauses Act (I of 1898), s. 4.

A. effected an alienation in 1887 and died in 1894. Mutation in respect of alienation was not effected till 23rd February 1897. On 20th February 1909, the customary heirs of *A.* brought this suit for possession of the property alienated:

Held, that the suit was barred under Article 144 of the Indian Limitation Act, the Punjab Limitation Act of 1900 being inapplicable to the case.

If the last male owner alienated and died before Act I of 1900 came into force, the reversioner must sue within 12 years of the alienor's death, regardless of when mutation was effected upon the alienation.

Sahib Dad v. *Rahmat*, 90 P. R. 1904; 88 P. L. R. 1904; *Karam Singh* v. *Mohammad Din*, 11 P. R. 1909; 1 Ind. Cas. 397; 51 P. L. R. 1909; 12 P. W. R. 1909; *Miran Bakhsh* v. *Ahmad*, 145 P. R. 1907, relied upon.

Second appeal from the order of the Divisional Judge, Hoshiarpur Division, dated 10th August 1909, affirming that of the Munsif 1st Class, Hoshiarpur, dated 26th June 1909, dismissing plaintiff's claim.

Bhagat *Govind Das*, for the Appellants.

Lala *Dwarka Das*, for the Respondents.

JUDGMENT.—The sole question for decision in this appeal is whether the suit

instituted on 20th February 1909, is within time or not. Ruldu, the last male owner, died 15 or 16 years before suit, and, if the old Law applies, the suit is barred under Article 144, Act XV of 1877, *cf. Roda* v. *Harnam* (1). But, the alienation having taken place in 1887, mutation was not effected until 23rd February 1897, or less than 12 years before suit, and thus, if Punjab Act I of 1900 rules the case, the suit is not out of time. Both the lower Courts have held, following *Sahib Dad* v. *Rahmat* (2), that the Punjab Act has no application and have dismissed the suit and appeal respectively.

Plaintiffs come up here on revision and their petition has been admitted as a further appeal. They argue that the Full Bench ruling is distinguishable. No doubt the facts are not quite as here, but, in my opinion, the principle laid down is fully applicable in the present case. There mutation was more than 12 years before suit, but the alienor died less than 12 years before suit, and it was held that the new Act (Punjab Act I of 1900) did not, in view of section 4, Punjab General Clauses Act, 1898, deprive plaintiff of his right to sue, under Article 144, Act XV of 1877, any time within 12 years of death of alienor. Here mutation took place less than 12 years before suit, while the alienor died more than 12 years before suit, and the question is whether the new Act can be brought in to save limitation because, when it came into force, plaintiffs still had a subsisting right to sue under the old Law. I have carefully read *Sahib Dad* v. *Rahmat* (2), and also Civil Appeal No. 664 of 1909 (by Shah Din, J., and myself) and Civil Appeal No. 702 of 1905 (by Lal Chand J.), and *Karam Singh* v. *Mohammad Din* (3), (by Reid, C. J.), and *Miran Bakhsh* v. *Ahmad*, (4), (Division Bench) and, in my opinion, all these rulings point really the same way. If the last male owner alienated and died before Act I of 1900 aforesaid came into force, the reversioner must sue within 12 years of alienor's death regardless of when mutation was effected upon the alienation.

(1) 18 P. R. 1895.
(2) 90 P. R. 1904; 88 P. L. R. 1904.
(3) 11 P. R. 1909; 1 Ind. Cas. 397; 51 P. L. R. 1909; 12 P. W. R. 1909.
(4) 145 P. R. 1907.

For these reasons I dismiss the appeal with costs.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE PUNJAB CHIEF COURT.

December 14, 1911.

Present:—Lord Macnaghten, Lord Robson, Sir John Edge and Mr. Ameer Ali.

MUHAMMAD UMAR KHAN AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

MUHAMMAD NIAZ-UD-DIN KHAN—DEFENDANT—RESPONDENT.

Limitation Act (XV of 1877), Sch. II, Art. 118—No declaratory suit instituted—Suit for possession whether barred by the Article—Muhammadan Law—Adoption—Inheritance—Custom—Sheikh Ansari Pathans *of Basti Danishmandan, District Jullundur—Gift of ancestral property by father to daughter—Whether the daughter has only a life-estate—Alienation—Whether daughter has power to gift—Evidence—Inference—Relevancy—Acquiescence.*

The omission to bring a suit, within the period prescribed by Article 118 of the second Schedule of the Limitation Act, 1877, to obtain a declaration that an alleged adoption was invalid, or never, in fact, took place, is no bar to a suit for recovery of possession of property from the person relying on his adoption.

Thakur Tribhuwan Bahadur Singh, v. *Raja Remeskar Baksh Singh*, 33 I. A. 156; 10 C. W. N. 1065; 8 Bom. L. R. 722; 16 M. L. J. 440; 3 A. L. J. 695; 4 C. L. J. 405; 1 M. L. T. 265; 9 O. C. 377; 28 A. 727, relied upon.

Under the general Muhammadan Law an adoption is not allowed, an adoption, if made in fact by a Muhammadan, carries with it no right of inheritance.

The *Sheikh Ansari Pathans* of Basti Danishmandan, District Jullundur, do not belong to a family to which the Punjab agricultural or other similar restrictive customs must be presumed to apply.

There is no custom applying to the said family of *Sheikh Ansari* which limits the ancestral lands which came to a daughter by gift from her sonless father to a mere life-estate, and which prevents daughter from alienating such lands by gift in her lifetime.

Evidence as to the limited rights by custom of a *widow* in her deceased husband's property does not give rise to the inference that a *daughter* also has limited rights in her sonless father's ancestral property gifted to her. Nor has evidence that a Muhammadan father is prevented by some local custom from giving the bulk of his property to one of his sons any bearing on his power to make a gift of the whole of his property to his daughter,

Appeal from the judgment of the Chief Court, Punjab, reported as 1 P. R. 1907.

MUHAMMAD UMAR KHAN *v.* MUHAMMAD NAIZ-UD-DIN KHAN.

JUDGMENT.

SIR JOHN EDGE.—This is an appeal from the decree of the Chief Court of the Punjab, dated the 18th of April 1906, reversing the decree of the District Judge of Jullundur, dated the 13th of January 1902, which had decreed the plaintiff's claim.

The plaintiffs brought this suit on the 11th of May 1900, to obtain possession of certain immoveable property, lands and houses, in Basti Danishmandan, in the Punjab, which they claimed as their ancestral property. In their plaint they alleged that the property in question had been held for her life by *Musammat* Zainab, by virtue of a gift made to her by her father Sarfraz Khan, an uncle of the plaintiffs, and that on her death on the 4th of May 1899, the right of inheritance in the property devolved upon them as reversionary heirs. They also alleged in their plaint that *Musammat* Zainab had not, in fact, transferred the property to the defendant, and that if she had transferred the property to him, such transfer was, by law, according to the custom of the tribe to which the parties belong, and the *Riwaj-i-am*, null and void as against the plaintiffs as reversionary heirs.

The defendant by his pleadings alleged title as owner in himself by gift from *Musammat* Zainab, alleged that *Musammat* Zainab was entitled to the full estate in the property in question, and not merely to an estate for her life, denied that the plaintiffs had any right to the estate, denied that the property was ancestral, denied that any law or tribal custom existed which made the gift to the defendant unlawful or void, and amongst other things alleged that he had been adopted as her son by *Musammat* Zainab.

The parties to the suit are *Sheikh Ansaris* of a *Pathan* tribe of Punjab Muhammadans. The defendant is in possession of the property in dispute under a gift from *Musammat* Zainab made to him in her life-time. The plaintiffs' case, the only case on which they could have succeeded, is that, according to a custom which they alleged to be existing and binding in their family, no woman could take by gift more than a mere interest for her life without any power of alienation in any ancestral property of the family, and consequently that the gift by *Musammat* Zainab to the defendant was void. Many issues, some of which, in the view which their Lordships take of this case, were immaterial or irrelevant, were raised by the parties, and much evidence was recorded. The District Judge of Jullundur gave the plaintiffs a decree for possession. From that decree the defendant appealed to the Chief Court of the Punjab. The Judges in the Chief Court mainly directed their attention to a question of acquiescence, which their Lordships consider did not arise on the facts, and to the alleged adoption of the defendant by *Musammat* Zainab, which was an immaterial issue, and having, apparently, although somewhat uncertainly, found that *Musammat* Zainab had adopted the defendant, they applied Article 118 of the second Schedule of the Indian Limitation Act, 1877, to the case, allowed the appeal, and dismissed the suit with costs.

Although their Lordships consider that the question of an adoption was an immaterial issue, they think it advisable to say that the omission to bring, within the period prescribed by Article 118 of the second Schedule of the Indian Limitation Act, 1877, a suit to obtain a declaration that an alleged adoption was invalid, or never, in fact, took place, is no bar to a suit like this for possession of property. Their Lordships need only refer to *Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh* (1). Under the general Muhammadan law an adoption cannot be made; an adoption, if made in fact by a Muhammadan, could carry with it no right of inheritance.

It may be further observed that, even if an adoption by a Muhammadan was permissible by any valid custom in the Punjab, the Chief Court found that it had not been proved that the parties to the suit belonged to a family to which the Punjab agricultural or other similar restrictive customs must be presumed to apply.

In order to understand the material evidence in this case, it is necessary to refer to the pedigree of the plaintiffs. Muhammad Ali Sher, the common ancestor of the plaintiffs and *Musammat* Zainab, had three sons, one of whom, Jehangir Khan, had by his wife,

(1) 33 I. A. 156; 10 C. W. N. 1065; 8 Bom. L. R. 722; 16 M. L. J. 440; 3 A. L. J. 695; 4 C. L. J. 405; 1 M. L. T. 265; 9 O. C. 377; 28 A. 727.

Musammat Fatima, a daughter, *Musammat* Maryam, who married her cousin, Sarfraz Khan. Alamgir, another son of Muhammad Ali Sher, had three sons, one of whom was Sarfraz Khan, who married his cousin *Musammat* Maryam; another son of Alamgir was Shahbaz Khan; and the other son of Alamgir was Siraj-ud-Din, otherwise called Sheraz-ud-Din Khan, who was the father of the plaintiffs. Another son of Muhammad Ali Sher was Sarwar Khan, who had two sons, one of whom was Muhammad Said; the other son of Sarwar Khan was Muhammad Bahadur Khan. Sarfraz Khan had by his wife *Musammat* Maryam, a daughter *Musammat* Zainab, who married Ghulam Mohy-ud-Din *alias* Baghe Khan. The defendant is a son of Jamal-ud-Din, who was a son of a sister of Sarfraz Khan. Jamal-ud-Din Khan was a brother of Mohy-ud-Din *alias* Baghe Khan.

On the 3rd *Ramzan* 1248 A. H., Jehangir Khan, by his deed of gift, gave to his daughter *Musammat* Maryam, wife of Sarfraz Khan, absolutely all his one-third share of the property of his ancestors which had fallen to his lot according to law, in lieu of the dower of her mother *Musammat* Fatima. *Musammat* Maryam obtained possession of the property which had been given to her by her father Jehangir Khan, and remained in possession for 15 years, when she gave that property to her husband Sarfraz Khan, who took possession on her death. *Musammat* Maryam died in 1846 or 1847. After her death Sarfraz Khan's right to the possession of the property which had come to him from *Musammat* Maryam was challenged by Muhammad Said Khan and Muhammad Bahadur Khan, sons of Sarwar Khan, and Sheraz-ud-Din Khan, the father of the plaintiffs, who contested the alienation to Sarfraz Khan, alleging that by custom daughters had no right of succession. Sarfraz Khan brought a suit for maintenance of possession in the Court of the Deputy Collector against Muhammad Bahadur Khan, Muhammad Said Khan, and Sheraz ud-Din. In that case Sheraz-ud-Din, Shahbaz Khan, and Muhammad Bahadur Khan, proved that *Musammat* Maryam had been in possession of the property and had, through the agency of her husband Sarfraz Khan and his brother Sheraz-ud-Din, received the rents of the land together with *zemindari* dues and had paid the Government revenue. In that case Muhammad Said Khan testified to the facts of the gift and delivery of possession to *Musammat* Maryam, and Sheraz-ud-Din admitted that a deed of gift had been executed and that possession had been delivered to *Musammat* Maryam. Several other witnesses, including the marginal witnesses to the deed of gift, proved that the property had remained in the possession of *Musammat* Maryam for her life-time, and had, after her death, passed to Sarfraz Khan, her husband. On the 16th of May 1849, the Deputy Collector ordered that a decree for Sarfraz Khan's claim be passed to the effect that Sarfraz Khan should retain possession of the land then in suit. From that order of the Deputy Collector, Muhammad Bahadur Khan appealed to the Settlement Officer, who, on the 3rd of August 1849, dismissed the appeal, holding that the inquiry before the Deputy Collector had established Sarfraz Khan's possession, occupation of, and title to the land, and that if Muhammad Bahadur Khan had any claim to the land he was at liberty to lodge a suit in a Civil Court. No suit was brought in a Civil Court to contest the right or title of Sarfraz Khan to the land which had come to him from *Musammat* Maryam. The facts above referred to afford, in their Lordships' opinion, strong evidence that there was no custom applying to this family which limited the estate in ancestral lands which came to a daughter by gift to a mere life-estate, and which prevented a daughter alienating such lands by gift in her life-time.

On the 15th of December 1851, Sarfraz Khan, who was then in possession of the lands which had come to him by gift from his wife *Musammat* Maryam, and was also in possession of his own third share of three shares in the ancestral property which had come to him by lot according to law, made a deed of gift by which he gave to his daughter *Musammat* Zainab absolutely his entire property of every kind, and gave her possession. To that deed Shahbaz Khan, son of Alamgir, was one of the witnesses. Sarfraz Khan died on the 10th of May 1852, and on that day the *patwari* of Basti Danishmandan, on inquiry of *Musammat* Zainab, was directed by her to enter the entire share of Sarfraz Khan, which had come to her, in the official papers in the name of her husband

Ghulam Mohy-ud-Din, whose name was accordingly entered on the 10th of May 1852. In or about 1859, Muhammad Bahadur Khan and Muhammad Said Khan brought a suit in the Revenue Court of the Extra Assistant Commissioner of Jullundur against Ghulam Mohy-ud-Din, in which they claimed possession of the lands which had come through *Musammat* Maryam and Sarfraz Khan to *Musammat* Zainab. The plaintiff in that suit alleged that Sarfraz Khan had not executed the deed of gift in favour of *Musammat* Zainab, that the property in suit could not have passed through his wife *Musammat* Zainab to Ghulam Mohy-ud-Din, and that as Sarfraz Khan had died without a son the property had vested in them, Muhammad Bahadur Khan and Muhammad Said. In that suit the *patwari* of Basti Danishmandan was examined as a witness, and in reply to the question—"In Basti Danishmandan what custom prevails in respect of an estate left by a sonless proprietor?" said—

"The following custom prevails:—The estate of a proprietor dying childless goes to his daughters. Should he make a gift of his property during his life-time in favour of his daughters, they succeed to their father's estate. If he does not make a gift in favour of his daughters during his life-time, his brothers and brothers' sons succeed to his estate."

Ghulam Mohy-ud-Din gave evidence in that suit; he claimed no title in himself; he said that his wife *Musammat* Zainab was the proprietor, and that she had full authority to have her own name inserted in the official papers or to allow the entry in his name to stand. Many other witnesses were examined in that suit, and on the 25th of June 1859 the Extra Assistant Commissioner of Jullundur dismissed the suit. From that order dismissing the suit, Muhammad Siraj-ud-Din (Sheraz-ud-Din Khan) who had apparently come into the suit as a plaintiff, Muhammad Bahadur Khan, and Muhammad Said Khan, appealed to the Deputy Commissioner, who on the 31st of December 1859 rejected the appeal but holding that as *Musammat* Zainab alone was the proprietor, directed that her name should be entered in the column of owners. From the order rejecting their appeal, Muhammad Siraj-ud-Din (Sheraz-ud-Din Khan), Muhammad Bahadur Khan, and Muhammad Said Khan, appealed to the Commissioner of Jullundur, who on the 25th of February 1860 dismissed their appeal.

On the 6th of May 1887, Baghe Khan (Ghulam Mohy-ud-Din) executed a deed in which he stated that he had adopted Niaz-ud-Din when he was two years old and that he and his wife had brought him up. Niaz-ud-Din, who is mentioned in the deed, is Muhammad Niaz-ud-din Khan, the defendant in this suit.

On the 22nd of May 1888, Ghulam Mohy-ud-Din Khan and his wife *Musammat* Zainab executed a deed of settlement by which Ghulam Mohy-ud-Din gave certain property of his in Basti Danishmandan, which is not in dispute in this suit, to Muhammad Niaz-ud-Din Khan, and *Musammat* Zainab gave to Niaz-ud-Din Khan the property which is in dispute in this case. In that deed it is stated that Muhammad Niaz-ud-Din Khan had been placed in possession. An application was made to enter the name of the defendant Muhammad Niaz-ud-Din Khan in the column of proprietors in respect of the property in dispute in this suit, and *Musammat* Zainab having stated to the Tahsildar that Muhammad Niaz-ud-Din Khan was in possession, and no objector appearing, the Tahsildar sanctioned the mutation of names, and the name of Muhammad Niaz-ud-Din Khan was accordingly entered in the column of proprietors.

In 1895 and 1896 the principal lands which had been held in unpartitioned shares by Muhammad Niaz-ud-Din Khan, Muhammad Umar Khan, and Muhammad Pirdad Khan, were by agreement between them partitioned, each having allotted to him lands which represented his share. Muhammad Niaz-ud-Din's shares in the partition represented shares which had come to him by the gift of *Musammat* Zainab. *Musammat* Zainab was then alive; she died on the 4th of May 1899.

Their Lordships consider that these partition proceedings between Muhammad Umar Khan, Muhammad Pirdad Khan, and Muhammad Niaz-ud-Din Khan, who were the original parties to this suit, afford very strong evidence in favour of Muhammad Niaz-ud-Din, who is the defendant in the suit, and respondent in this appeal. The evidence which was given on behalf of the plaintiffs to prove

that a custom existed and applied to this family, by which a female could take only a life-interest in the ancestral property which had come to her by gift from her sonless father and had in such property no power to alienate it by a gift in her lifetime, was of the most shadowy description and failed to prove the custom alleged by them. Evidence as to the limited rights by custom of a widow in her deceased husband's property was not evidence from which the custom alleged by the plaintiffs in this suit could be inferred. Nor was evidence that a Muhammadan father had been prevented by some local custom from giving the bulk of his property to one of his sons, evidence which had any bearing on the issue in this case. The evidence, to which reference has been made by their Lordships, relating to the devolution of Jehangir Khan's share to *Musammat* Zainab, is entirely inconsistent with the existence of the custom which has been alleged by the plaintiffs.

Their Lordships find that not only have the plaintiffs failed to prove the custom alleged by them, but the alleged custom has been disproved. They also find that *Musammat* Zainab had a full proprietary estate in the property in dispute, and that she made a valid gift of that property to the defendant.

Their Lordships will humbly advise His Majesty that the decree of the Chief Court of the Punjab dismissing the suit of the plaintiffs should be affirmed and this appeal be dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

CIVIL REFERENCE No. 44 OF 1911.

December 23, 1911.

Present:—Mr. Justice Chevis.

DEVTA JAMLU—PLAINTIFF

versus

HARI DAS AND ANOTHER—DEFENDANTS.

Jurisdiction of Civil or Revenue Court—Suit for fixation of rent due from occupant of water-mill—Water-mill not land—Punjab Tenancy Act (XVI of 1887), s. 3—Tenant.

A suit for the fixing of rent due from the occupant of a water-mill is cognizable by a Civil Court.

The site of a water-mill cannot be said to be used for agricultural purposes or for purposes subservient to agriculture. The occupant of such a mill does not hold "land" as defined in the Punjab Tenancy Act. His rights are, therefore, not governed by the Act.

Farman Ali v. *Imam Din*, 77 P. R. 1904, followed.

Case referred by the Commissioner, Jullundur Division, with his Letter No. 3330, dated the 10th July 1911, for orders of the Chief Court of the Punjab.

ORDER.—This order will also cover the connected case, Reference No. 45 of 1911.

The plaintiff lodged two suits claiming that he was the owner and defendants were the tenants of two mills, that the defendants were entered in the Revenue Records as paying no rent, but that the tenants of neighbouring mills paid rent at a certain rate to the landlords and that rent should similarly be fixed as regards these mills.

The cases were instituted in the Court of the Assistant Commissioner, Kulu, who has the powers of a Collector and also of a District Judge. He decided the cases on the Revenue side, and appeals were preferred to the Commissioner, who has referred the cases to this Court under section 100, Tenancy Act, quoting *Farman Ali* v. *Imam Din* (1). (The number of the ruling has by a slip been given as 76 in the Commissioner's order of reference). The Commissioner is quite right in saying that *Farman Ali* v. *Imam Din* (1) is authority for holding that such suits are cognizable by the Civil Courts. As pointed out in that judgment, the site of a water-mill cannot be said to be used for agricultural purposes or for purposes subservient to agriculture, and the occupant of such a mill is not holding "land" as defined in the Act, and his rights are therefore, not governed by the Tenancy Act.

I direct that the decrees passed in these two cases be registered as decrees of the District Judge of Kulu. The Commissioner should return the appeal for presentation to the Civil Appellate Court.

(1) 77 P. R. 1904.

RAMDEO PROSAD v. GOPI KOERI.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NOS. 167 AND 279 OF 1908.

December 14, 1911.

Present:—Mr. Justice Coxe and Mr. Justice N. Chatterjea.

RAMDEO PROSAD SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

GOPI KOERI AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Hindu Law—Mitakshara—*Interest—Liability of grandson to pay interest on grandfather's debt—Joint decree against father and grandfather—Distinction between interest at birth and that acquired by survivorship.*

A decree was passed against the grandfather and the father of the appellant, a Hindu governed by the *Mitakshara*, for recovery of possession of land with mesne profits, costs and interest:

Held, that, although a grandson may not be liable to pay interest on the grandfather's debts, yet, as the decree was passed against both the grandfather and the father, the latter was liable for the whole of the interest and mesne profits decreed and that, therefore, the appellant is liable for the same.

Held, also, that, after the death of the grandfather and father, there did not remain any distinction between interest which was vested in the appellant at his birth and the interest that he acquired by survivorship and that, therefore, the decree-holder should not be compelled to proceed first against what was the share of the grandfather and the father at the time of the decree, and only in the event of that being insufficient, to proceed against the interest that then belonged to the appellant.

Kishun Pershad Chowdhury v. *Tipan Pershad Singh*, 34 C. 735, 11 C. W. N. 613; 5 C. L. J. 569, distinguished.

Appeal from the order of the Sub-Judge of Monghyr, dated April 4th, 1911.

Babus *Umakali Mukherjee* and *Ganesh Dutt Singh*, for the Appellant.

Babu *Kulwant Sahai*, for the Respondents.

JUDGMENT.—In this case the respondent obtained a decree against Ajodhya and Damodar, the grandfather and father respectively of the appellant, for recovery of possession of land, with mesne profits, costs and interest. The mesne profits were subsequently ascertained and decreed in 1902 against Damodar and Ajodhya. At that time all three members of the family were in existence. The respondent took out execution of the decree; and the case ultimately came up to this Court in appeal. The Court below had excluded certain evidence; and the case was remanded in order that an opportunity might be given to the appellant to show that the debt with respect to which execution was sought was not one for which he was liable. On remand the Court below has come to the decision that the appellant is liable; and this finding has been returned to this Court.

Two points have been taken on behalf of the appellant. The first is that, in any case, the decree-holder is not entitled to interest; and reference has been made to a passage at page 232 of Babu Golap Chandra Sarkar Shastri's book on Hindu Law, in which it is said that the grandson is not liable to pay interest on the grandfather's debts. It is argued that the dispossession which created the liability to account for mesne profits was effected by Ajodhya, the grandfather; that, therefore, it was he that was liable for the interest, and that that liability does not descend to the present appellant, who is his grandson. But it is clear that the decree for mesne profits was passed against both Damodar and Ajodhya, and there is nothing to show that the dispossession which formed the cause of action was not effected by Damodar just as much as by Ajodhya. In any case, it is clear that Damodar was liable for the whole of the interest and mesne profits decreed; and, that being so, the passage we have quoted does not relieve the present appellant from a similar liability.

The second point taken is based, to a great extent, on the decision in *Kishun Pershad Chowdhury* v. *Tipan Pershad Singh* (1). That was a suit by a mortgagee against a father and son, to enforce a mortgage; and the order was that the plaintiff should have the usual mortgage-decree against the share of the father and, if that was not sufficient, should be entitled to realise the balance by the sale of the share of the son in the ancestral property. It is argued that, following the principle of this decision, the decree-holder ought to proceed first against what was the share of Damodar and Ajodhya in the ancestral property at the time of the decree, and only in the event of that being insufficient, should be allowed relief against the interest that then belonged to the present appellant. The case, however, which has been cited was a suit upon a mortgage; and it seems open to considerable doubt whether, if it had been a case of a simple money-

(1) 34 C. 735; 11 C. W. N. 613; 5 C. L. J. 569.

decree, the Court would have made any distinction between the interest of the father and that of the son. But, whether that be so or not, we are certainly not prepared to hold that after the death of Damodar and Ajodhya there remains any such distinction between the interest which was vested in the appellant at his birth and interest that he acquired by survivorship, from Damodar and Ajodhya, as would justify the application of the case cited. The case, therefore, does not appear to us to sustain the contention of the learned Pleader for the appellant; and there is certainly no direct authority in favour of that contention.

No attachment of the property had been effected during the life-time of Damodar and Ajodhya.

It has been argued that the appellant is not entitled to take these pleas at the present time. But, as we have decided that they are not well founded, it is not necessary to give any opinion on that point.

The appeal will be dismissed with costs.

This decision will also govern Appeal No. 279 of 1908.

The hearing fee for both the appeals is assessed at five gold *mohurs*.

Appeal dismissed.

ALLAHABAD HIGH COURT.
LETTERS PATENT APPEAL No. 66 OF 1911.
December 22, 1911.
Present:—Sir Richards, K. C., Chief Justice, and Mr. Justice Banerji.
Mirza ABDULLAH BEG AND OTHERS—PLAINTIFFS—APPELLANTS
versus
ABDUL HASAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I, r. 10—Suit instituted by a person having no interest in the property—Right person added as plaintiff subsequently by order of Court—Discretion.

A. and *K.* were brother and sister living in the same house. Defendants built a construction encroaching upon a portion of the house in which *A.* and *K.* lived. *A.* brought a suit for injunction and demolition of the construction. Later on, it turned out that *K.* was the owner of the house and that *A.* had no interest in it. The Court made *K.* also a plaintiff in the suit and proceeded to decide the case:

Held, that the suit could proceed between the parties, and that having regard to the circumstances of the case and to the fact that *A.* was living in the same house with his sister *K.*, the joining of *K.*, as a plaintiff by the Court was not an unreasonable or illegal exercise of the powers conferred on the Court by Order I, rule 10 of the Civil Procedure Code.

Appeal against the order of the Hon'ble Sir George Knox, Judge, Allahabad High Court, under section 10 of the Letters Patent, in Second Appeal No. 852 of 1910, dated the 9th May 1911. See 11 Ind. Cas. 223.

Mr. *Govind Pershad*, for the Appellants.

Mr. *Gulam Mujtaba*, for the Respondents.

JUDGMENT.—The suit out of which this appeal arises was a suit instituted by one Mirza Abdulla Beg, claiming a mandatory injunction for the demolition of certain constructions which he alleged the defendants had wrongfully made. He claimed to be entitled to a certain house which he alleged had been encroached upon. The defendants denied his title and claimed that the house was not his house but their house. Mirza Abdullah Beg was examined, and in the course of his examination he admitted that his sister, one Kulsum Bibi, had an interest in the house. The Court of first instance thereupon made an order, presumably under the provisions of Order I, rule 10 of the Code of Civil Procedure, and added of his own motion Kulsum Bibi and other residents in the house as co-plaintiffs in the suit. The learned Judge of this Court before whom the suit came in second appeal had some doubt as to whether or not Kulsum Bibi really consented to join in the proceedings, and he says in one part of his judgment that it does not appear that Kulsum Bibi was in any way related to Mirza Abdulla Beg, the original plaintiff. He was clearly in error in this respect. There is not the smallest doubt that Kulsum Bibi was the sister of the plaintiff Abdulla Beg, that both lived together in the house, and that she consented to be added as a plaintiff and adopted the proceedings which had been initiated by her brother. The learned Munsif having added Kulsum Bibi as a plaintiff proceeded to go into the merits of the case. He found that the real owner of the property was Kulsum Bibi and not Abdullah Beg. We do not think that it was necessary for the learned Munsif to have gone into the question of the legal ownership of the house excepting so far

as it was necessary to find whether the plaintiffs between them were entitled to the property. The question of their rights *inter se* did not arise. It was not convenient to try such rights in a case where the plaintiffs were joining in a common action against alleged wrong-doers. Having heard the case on the merits, he decided the suit partly in favour of the plaintiffs and partly in favour of the defendants. The defendants have not in any way been prejudiced by the adding of Kulsum Bibi as a co-plaintiff; rather the contrary. She having been made a party to the proceedings, was bound by the decision of the Court in so far as it was in favour of the defendants. However, both parties appealed to the learned District Judge. Most of the grounds of appeal on behalf of the defendants were strictly on the merits of the case. In the last ground of appeal, however, it was contended that as the original plaintiff Abdulla Beg had no title, according to the finding of the Court, the decree should not have been granted. The learned District Judge did not go into the merits of the case, nor did he set aside the order adding Kulsum Bibi as a co-plaintiff but summarily dismissed the suit on the ground that Kulsum Bibi ought not to have been joined, and that, inasmuch as the Court of first instance had found that Abdullah Beg had no title, he dismissed the suit not only against Abdullah Beg but also against Kulsum Bibi. Upon second appeal to this Court the decision of the learned District Judge was confirmed. We doubt very much whether our learned brother would have taken the view he did, had he been aware of the fact that Abdullah Beg and Kulsum Bibi were brother and sister living together in the very house in question. It is to be admitted here that the dismissal of the suit against Kulsum Bibi, who was added by the Court, cannot possibly be sustained. We think further that, under the circumstances of the present case, and having regard to the fact that Abdullah was living in the house with his sister, the joining of Kulsum Bibi as a plaintiff by the Court was not an unreasonable or illegal exercise of the powers conferred on the Court by Order I, rule 10. It enabled the Court to do complete justice between the parties and prejudiced no one, all persons who were in physical possession of the house would have been bound by the result of the suit, whether that result was in their favour or in favour of the defendants. The order that the learned Munsif made was calculated to settle disputes once for all between all parties. We think that after the evidence has been taken, that it would be deplorable if the case was now dismissed on the technical point of the want of legal title in Abdullah and the parties driven to commence their litigation all over again. We think this appeal ought to be allowed. We accordingly set aside the decree of this Court and also of the lower Appellate Court. The case was decided on a preliminary point. Accordingly, it will be remanded under the provisions of Order XLI, rule 23, with directions to the learned District Judge to re-admit the appeal, and to proceed to hear and determine the same on the merits. Costs here and heretofore will be costs in the cause.

Case remanded.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2317 OF 1909.

September 4, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

Moharani JANKI KOERI—PLAINTIFF—APPELLANT

versus

BASDEO OJHA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Res judicata—*Suit for rent—Previous Certificate cancelled on ground that* bona fide *claim of right is involved—No adjudication on merits—Public Demands Recovery Act (I B. C. of* 1895), *s.* 7 *sub-s.* (1) *cl.* (*c*), *s.* 10, *s.* 12 *sub-s.* (1), *s.* 32, *sub-s.* (1)—*Civil Procedure Code (Act XIV of* 1882), *s.* 13.

A certificate for arrears of rent was made on behalf of a landlord who was a Ward of Court. The tenant objected on the ground that he held the land rent-free. The certificate officer decided in favour of the landlord. Upon an appeal by the tenant, the Collector, without entering into the merits, cancelled the certificate on the ground that there was a *bona fide* claim of right involved in the proceedings. The landlord then brought a suit for rent in respect of which the certificate had previously been made:

Held, that the suit is not barred by the doctrine of *res judicata* as the Collector did not cancel the certificate on the merits.

Appeal from the decree of the Sub-Judge of Mozaffarpur, dated June 24th, 1909, re-

JANKI KOERI *v.* BASDEO OJHA.

versing that of the Munsif of Sitamorhi, dated April 23rd, 1908.

Babus *Ram Charan Mitra*, Senior Government Pleader, and *Dwarka Nath Mitra*, for the Appellant.

Babu *Luchmi Narain Singh*, for the Respondents.

JUDGMENT.—The question of law which calls for our decision in this appeal is, whether the trial of a suit for rent is barred by reason of an order made by a Collector under the Public Demands Recovery Act by which he cancelled a certificate on the ground that there is a *bona fide* claim of right involved in the proceedings. The appellant claims to be the landlord of the defendants. She is a Ward of the Court and a certificate for arrears of rent was made upon an application presented on her behalf under section 7, sub-section (1) clause (*c*) of the Public Demands Recovery Act of 1895. Under section 8, subject to the other provisions of the Act, the certificate so made acquire the force and effect of a decree of the Civil Court as regards the remedies for enforcing the same and for that purpose alone. Notices were thereafter served upon the judgment-debtors under section 10. They appeared and objected under section 12, sub-section (1), that they were not liable to pay any portion of the amount for which the certificate had been made against them inasmuch as they held the land rent-free. The certificate officer thereupon heard the petition and decided in favour of the landlord. An appeal was preferred by the tenants to the Collector under sub-section (1) of section 32 of the Public Demands Recovery Act. The result was that the Collector cancelled the certificate, inasmuch as he was of opinion that substantial questions of title were in controversy between the parties. The landlord thereupon commenced the present action for recovery of the rent in respect of which the certificate had previously been made at her instance. The tenants objected that the claim was barred by the doctrine of *res judicata*. This contention was overruled by the Court of first instance but upon appeal has found favour with the Subordinate Judge. The landlord has now appealed to this Court, and on her behalf it has been contended that the doctrine of *res judicata*, as embodied in section 13 of the Code of Civil Procedure of 1882, has no application to the circumstances of the present case. In our opinion this contention is obviously well founded. We may state at the outset that it has not been argued by the learned Vakil for the appellant that if a certificate has been made and the matter has been decided on the merits by the certificate officer and in appeal by the Collector, the question can be re-agitated in a suit for rent. Such a view cannot possibly be maintained on first principles. A litigant who is allowed two alternative remedies cannot, if he elects in favour of one of them and pursues it unsuccessfully, take recourse to the other remedy. Here, however, the case is different. There was no adjudication on the merits by the Collector. In fact, the Collector proceeded in substance under the proviso to section 13 of the Public Demands Recovery Act. That proviso lays down that if in the opinion of the certificate officer the petition involves a *bona fide* claim of right he shall refer the petition to the District Collector for orders and the District Collector, if he is satisfied that a *bona fide* claim of right is involved, shall make an order cancelling the certificate. In the case before us, the Collector has cancelled the certificate not upon a reference by the certificate officer but in the exercise of his appellate jurisdiction. This, in our opinion, does not make any substantial different in the position of the parties. The essence of the matter is, that there has been no adjudication on the merits by the Collector and consequently there is nothing to prevent the plaintiff from seeking relief in the present suit.

The result, therefore, is that this appeal is allowed, the decree of the Subordinate Judge set aside and the case remanded to him in order that the appeal may be heard on the merits. The costs of this appeal will abide the result.

Appeal allowed.

MAHAMMAD MEHDI HASSAN KHAN *v.* SHEOSHANKAR PERSAD SINGH.

(s. c. 14 C. L. J. 552.)

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL No. 542 OF 1908.

August 23, 1911.

Present:—Mr. Justice Brett, Mr. Justice Mookerjee and Mr. Justice Vincent.

MAHAMMAD MEHDI HASSAN KHAN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SHEOSHANKAR PERSAD SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Revenue Sale Law Act (XI of 1859), *ss.* 10, 11, 53—*Bengal Land Registration Act (VII B. C. of* 1876), *s.* 70—*Separate accounts, opening of, by Collector without jurisdiction, effect of—Civil Procedure Code (Act XIV of* 1882), *s.* 575—*Civil Procedure Code (Act V of* 1908), *s.* 98, *sub-s.* (2)—*Point of law only to be referred.*

Per *Mookerjee and Vincent, JJ. (Brett, J. dissenting.)*—A proprietor, who is not a recorded sharer of a joint estate held in joint tenancy, within the meaning of section 10 of Act XI of 1859, nor a recorded sharer whose share consists of a specific portion of the land of the estate within the meaning of section 11, but is recorded as proprietor of an undivided interest held in common tenancy of a specific portion of the lands of the estate but not extending over the whole estate, within the meaning of section 70 of the Bengal Land Registration Act, 1876, is not entitled to claim the benefit of the exception made in section 53 of Act XI of 1859 in favour of sharers with whom the Collector has, under section 10 or section 11 of the Act, opened separate accounts.

Per *Mookerjee, J.*—Where jurisdiction is usurped in contravention of statutory provisions, the act performed is a nullity. Therefore, if a Collector opens a separate account in clear contravention of the provisions of sections 10 and 11 of Act XI of 1859, that is, if he applies the provisions to cases to which the Legislature never intended that they should be applied, his act is without jurisdiction and cannot confer upon the person who obtains a separate account opened under such circumstances, the statutory privilege created by section 53.

Share-holders in some only of the villages constituting an estate, cannot claim to have a separate account opened under either section 10 or section 11.

Nunho Shahee v. *Ram Pershad*, 21 W. R. 38, followed.

Under section 575 of the Civil Procedure Code, 1882, it was the appeal that was referred to a third Judge, when the Judges hearing an appeal differed in opinion on a point of law; under the present Code of 1908, only the point of law is to be referred.

Appeal against the decree of the Subordinate Judge of Chapra, dated the 10th September 1908.

Babus *Umakali Mookerjee* and Moulvis *Mustafa Khan* and *Sowgat Ali*, for the Appellants.

Babu *Shoroshi Charan Mitter*, Dr. *Sarat Chunder Bysack* and Babu *Harendra Krishna Mukerji*, for the Respondents.

JUDGMENT.

BRETT, J.—The entire Mehal Raiputti bearing Towji No. 3143 in the Saran Collectorate was sold for arrears of revenue by the Collector, proceeding under the provisions of section 14, Act XI of 1859, and was purchased in the name of defendant No. 7, Babu Gopal Das.

Fifteen separate accounts or Khatas, besides one for the residuary share, had been opened many years ago by the Collector, and defendant No. 2 being the *malik* of Khata No. 1 executed three deeds of mortgage in favour of Babu Sheo Shankar Prosad Singh, defendant No. 1 on the 9th December 1886, 13th December 1886 and 1st July 1893, respectively. Afterwards, the share in respect of which Khata No. 1 had been opened was sold for arrears of revenue due on that share, and purchased by Pardip Narain Singh, defendant No. 6 subject to encumbrances. Defendant No. 1 afterwards brought a suit on the three mortgage-bonds, No. 67 of 1897, against defendants Nos. 2 to 6 and obtained a decree by consent for Rs. 17,231-10.

On the 25th March 1899, the share, in respect of which Khata No 4 had been opened, and which belonged to Kalika Prosad Singh, was put up for sale for arrears of revenue due on that share. No bids being offered, the Collector proceeded under section 14 of Act XI of 1859 and put up the entire estate, No. 3143, for sale and it was purchased by defendant No. 7 for Rs. 1,600.

Defendant No. 1 then took out execution of his mortgage-decree obtained against the proprietors of the share in respect of which Khata No. 4 had been opened, praying for sale of that share in execution of his decree. Thereupon, defendant No. 7 brought a Suit No. 51 of 1904 to have it declared that his purchase of estate No. 3143 was free of all encumbrances, and asked for a temporary injunction restraining the defendant No. 1 from selling the share. The injunction was granted on condition of defendant No. 7 depositing Rs. 1,454-8, being the amount of interest due on defendant No. 1's mortgage up to 1st August 1906. In that suit defendant No. 1 pleaded that it was incompetent as defendant No. 7 was merely a *benamdar* of the two plaintiffs. The plea was allowed and the suit was dismissed. Defendant No. 1 then drew out the Rs. 1,458-8 from deposit.

MAHAMMAD MEHDI HASSAN KHAN *v.* SHEOSHANKAR PERSAD SINGH.

On the 2nd March 1907 defendant No. 7 executed a deed of conveyance of the entire estate No. 3143 in favour of the plaintiffs for Rs. 12,000, the deed to be treated either as a deed of sale or a deed of release.

Defendant No. 1 again took out execution of his mortgage-decree and the share in respect of which Khata No. 4 had been opened was advertised for sale on the 5th August 1907.

Plaintiffs instituted the present suit on the 30th July 1907 for a declaration that defendant No. 1 is not entitled to sell the share in respect of which Khata No. 4 had been opened on the ground that plaintiffs had purchased the entire estate free of all encumbrances. They also claimed, as assignees of defendant No. 9, to be entitled to recover from defendant No. 1 the sum of Rs. 1,451-8 deposited by defendant No. 7 to cover interest on the mortgage-debt of defendant No. 1.

The plaintiffs' case as set out in their plaint was that as the entire estate had been sold for arrears of Government Revenue and purchased by defendant No. 7 a stranger, and subsequently purchased from him by the plaintiffs, the plaintiffs acquired the estate free from all incumbrances. In the suit brought by defendant No. 7, No. 51 of 1904, to which reference has already been made, it was held that defendant No. 7 was merely a *benamdar* for the plaintiffs, but at the same time the opinion was expressed in the judgment that, as the plaintiffs were sharers in respect of whom a separate account had been opened by the Collector under the provisions of sections 10 and 11 of Act XI of 1859, they came within the exception stated in section 53 of the same Act and they purchased the estate free of all incumbrances.

This latter ground, though not expressly stated in the plaint, was the one on which the plaintiffs relied in support of their suit in the lower Court.

Numerous issues were framed in the lower Court, but those which are of importance for the purposes of this appeal are Nos. 5, 10, 11 and 6.

Issue No. 5 is as follows: Are the plaintiffs purchasers of this estate free from incumbrances?

Issue No. 10 runs as follows: Were the plaintiffs such sharers in Mehal Raiputti, Towji No. 3143 before the Revenue sale dated the 5th June 1890, as to come within the exception mentioned in section 53 of Act XI of 1859?

Issue No. 11 is as follows:—Was there any separate account validly and legally opened under sections 10 and 11 of Act XI of 1859 on behalf of the plaintiffs? If not, whether the defendant No. 1 is competent to question the validity and legality of the separation of the account effected before the Revenue sale.

Issue No. 6 is as follows:—Are plaintiffs as assignees of defendant No. 7 entitled to get a refund of Rs. 1,454-8 deposited by defendant No. 7 in Court and withdrawn by defendant No. 1?

The Subordinate Judge decided all these issues against the plaintiffs.

The plaintiffs claimed to be sharers in the share in the estate in respect of which Khata No. 5 had been opened by the Collector. In fact, that separate account was opened on the 16th April 1872 by an order of the Collector of Saran. The original petition for the opening of a separate account was made by Ram Anugrah Singh, Rama Kanta Singh and *Musammat* Sarawan Koer (apparently the widow of a deceased brother of the two first-mentioned persons.) The Mehal Raiputti estate No. 3143 consists of 17 *mouzahs* and the petition stated that Ram Anugrah and Rama Kanta were proprietors of certain shares in 15 of these and that *Musammat* Sarawan Koer was the proprietor of the same share in the remaining two *mouzahs*. An objection seems to have been raised in the office of the Collector to the three persons joining in one petition, and accordingly an amended petition was filed, as ordered by the Collector, excluding *Musammat* Sarawan Koer, and on this amended petition the order was passed on the 16th April 1872 directing that the separate account be opened.

Subsequently, a portion of the shares of the heirs of Ram Anugrah Singh and of Rama Kanta Singh was sold by auction in satisfaction of decrees obtained against them by the plaintiffs, and were purchased by the plaintiffs and sale-certificates were obtained by them on the 13th June 1896. The plaintiffs appear to have been registered afterwards in the Collectorate. So far as the materials on the record go, the plaintiffs appear to have purchased only a portion of the shares which descended to the heirs of Ram Anugrah Singh

and Rama Kanta. That point is not clearly dealt with in the lower Court. All that the Subordinate Judge says in his judgment is that "the plaintiffs are fractional sharers in 8 or 9 *mouzahs* out of the 15 or 16 included in Khata No. 5." No argument appears, however, to have been raised on the point that the plaintiffs were not purchasers of the entire shares of Ram Anugrah and Rama Kanta, the sharers in whose favour the separate account No. 5 was originally opened.

The learned Judge held that because Ram Anugrah and Rama Kanta Singh were persons who owned shares only in 15 or 16 *mouzahs* out of the 17 or 18 comprised in the *mehal*, and as such were neither sharers in all the *mouzahs* making up the *mehal*, nor the sole owners of the 15 or 16 *mouzahs* which go to make up with the shares of the other *mouzahs* the entire *mehal* Towji No. 3143, therefore, they were not sharers who, under sections 10 and 11 of Act XI of 1859, could apply to the Collector to have a separate account opened in their favour. In consequence, the Collector had no jurisdiction to open a separate account under sections 10 and 11 of Act XI of 1859 with them. In support of this finding, he relied on the decision of this Court in the case of *Nunhoo Shahee* v. *Ram Pershad* (1), and arriving at these conclusions the Subordinate Judge held that the plaintiffs not being sharers in whose favour separate account had been legally opened by the Collector they were not entitled to claim the benefit of the exception in section 53 of Act XI of 1859, and that, therefore, their purchase of the entire estate was not free from incumbrances.

Further, he held that even if the separate account opened by the Collector in favour of Ram Anugrah Singh and Rama Kanta Singh could be held to be one opened under section 70 of Act VII B. C. of 1876, Land Registration Act, they could not claim the benefit of section 53 of Act XI of 1859 as that section only included sharers in respect of whom separate shares had been entered under sections 10 and 11 of Act XI of 1859.

Accordingly, he held that the plaintiffs were not entitled to the declaration sought for in the suit, nor to recover from defendant No. 1 the sum of Rs. 1,454-8 deposited by defendant No. 7.

(1) 21 W. R. 38.

The suit was dismissed with costs and plaintiffs have appealed.

It appears that separate account or Khata No. 1 was originally opened on the 6th January 1872 in the name of Kishendeo Singh, who is represented in the present case by defendants Nos. 2 to 5. This is the share against which defendant No. 1 has obtained the mortgage-decree.

Separate account or Khata No. 4 was opened on the 21st March 1872 in the name of Kalika Prosad Singh. This is the share which defaulted.

Separate account or Khata No. 5 was opened on the 16th April 1872 in the names of Ram Anugrah and Rama Kanta Singh on the 16th April 1872. This is the share in which the plaintiffs claim rights by purchase.

Now, rightly or wrongly, these separate accounts had been opened for 35 years before the present suit was brought; revenue had been all along paid in respect of these shares into the separate accounts, and it would appear that the shares in respect of which these separate accounts had been opened, had been put up for sale, each separately, in respect of arrears due on its separate account. The proprietors of these shares in respect of which the separate accounts had been opened had dealt with them separately, and there have been transfers and alienations of the shares as shares in respect of which separate accounts have been opened.

It is first argued in support of this appeal that the Subordinate Judge was in error in holding that the order of the Collector opening the separate account No. 5 in respect of the share on which the plaintiffs are part purchasers could be questioned after the lapse of 35 years. No authority other than the Collector had power under the law to open a separate account and the law gave him full power to open an account. If, in ordering that an account be opened, he committed an error in law that could not make his order bad for want of jurisdiction. In the case of Khata No. 5 the record shows that the provisions of the law were fully complied with before the order was passed directing that the account be opened. The necessary notices were served and no objection was taken by any one who would at the time have been interested in opposing the application. Nor was any appeal preferred against

MAHAMMAD MEHDI HASSAN KHAN v. SHEOSHANKAR PERSAD SINGH.

his decision to the higher Revenue authorities as might have been done. His order, therefore, became final.

Furthermore, if the order opening this separate account be now interfered with, the order relating to all the other accounts would be equally open to question with the result of disturbing rights long recognized and of creating uncertainty, confusion and hardship.

Undoubtedly, the separate account has been opened and has been in existence for 35 years. It is impossible now to treat it as though it had never had any existence, indeed the defendant No. 1's own decree is based on the existence of the separate account No, 1, against the share covered by which he is seeking to enforce his mortgage-decree. That share was in fact sold for its own arrear after the decree had been obtained by defendant No. 1.

Also, it is argued that defendant No. 1 being the transferee by mortgage of the rights of some co-sharers in the estate, it is not open to him now to question the legality of an order of the Collector which his transferors accepted and have acquiesced in for 35 years. There was a remedy in the superior Revenue Courts when the Collector's order was passed and that remedy never having been sought and on the contrary the order having been acquiesced in for 35 years it cannot now be questioned and declared invalid by a Civil Court.

It is also contended that even accepting, though not admitting, that the separate account could not have been opened under the provisions of sections 10 and 11 of Act XI of 1859 [still any defect would be covered by section 70 of Act VII B. C. of 1876, and section 71 of that Act which makes the provisions relating to sale included in sections 13 and 14 of Act XI of 1859] applicable to accounts opened under section 70 of Act VII B.C. of 1859 would also operate to bring the sharers in respect of whom the separate share had been opened within the exception provided by section 53 of Act XI of 1859.

It has also been suggested that defendant No. 1 is bound by the finding of the Court in the Suit No. 51 of 1904 to which he was a party.

As to this last contention we have only to observe that it has no weight. The suit was dismissed for other grounds and the opinion expressed by the Judge was not necessary for the decision of that suit and so cannot bind the defendant.

The most important question is certainly whether, after the lapse of 35 years, a Civil Court can call into question the order of a Revenue Court, which order was originally passed with all the formalities required by the law, which was not appealed against and so became final as regards the parties affected by it, and which has been acquiesced in by the persons through whom the defendants, who now desire to dispute the order, claim title. In consequence of that order of the Collector and of other similar orders for the opening of separate accounts in respect of other shares in the same estate, rights have been lost, sold, or transferred, and to disturb the order after the lapse of so many years would be to render uncertain titles long existing and to create confusion and hardship.

In my opinion, the Collector certainly had jurisdiction to open the separate account. If, at the time of opening the account, he misunderstood the provisions of the law that would not necessarily make his order void but voidable by the persons affected thereby. In the present instance none of the persons who were affected by the order have ever raised any objection to it, and the question is whether the defendant No. 1 as mortgagee of defendant No. 2 whose share, in respect of which Khata No. 1 was originally opened, has subsequently been sold, can be allowed to raise the objection in this suit.

In my opinion, the order of the Collector, acquiesced in and acted on for 35 years, is not now open to question by a Civil Court, and, if it were, the defendant No. 1, who acquiesced in the order all along, cannot be allowed in this suit to dispute the legality of the order.

The contention that the order is illegal depends entirely on the decision of this Court in the case of *Nunhoo Shahee* v. *Ram Pershad* (1). That decision was delivered on the 15th December 1873. The judgment states that plaintiff comes into Court upon a statutable cause of action and that his suit must be dismissed unless he brings himself either within section 10 or section 11 of Act XI of 1859. Exactly what the cause of action was is not stated. Apparently, he sued

to have it declared that he had a right to have a separate account opened in respect of his share in the estate. As, however, he was only an eight-annas share-holder in 4 *mouzahs* out of the 6 which constituted the whole estate it was held that he was not "a recorded sharer of a joint estate in common tenancy within section 10." It was further held that he could not come under section 11 because he was not recorded sharer of a joint estate whose share consists of a specific portion of the land of the estate because he had only an undivided moiety of 4 *mouzahs* out of 6. If he had been joined with his co-sharers in the 4 *mouzahs* he might possibly have come before the Court with them as a party entitled to sue under section 11.

In the present case, the original petition for opening a separate account was made by Ram Anugrah Singh, Rama Kanta Singh and *Musammat* Sarawan, who together, apparently as members of one family, held shares in all the *mouzahs* included in the estate. The name of *Musammat* Sarawan was withdrawn by order of the Collector on a report from an officer of this Court. In the judgment relied on it is not stated what would be the effect if, in a case like the present, the defendants had shares in 15 out of 17 *mouzahs* and joined in their application those co-sharers who had shares in the other two *mouzahs*. Apparently, the application would then have fulfilled the requirements of section 10 of Act XI of 1859. There is nothing to support the view that shares in a joint estate held in common tenancy must have equal shares in all the *mouzahs*. Unequal shares in the different *mouzahs* might be consistent, too, with definite shares held in common in the whole estate.

There is no provision of the law that I am aware of, which lays down that the shares of tenants in common must be equal, either in every one of several *mouzahs* making up the estate, or in the entire estate.

In these circumstances, it seems open to doubt whether, on the basis of the decision relied on, the original application for the opening of the separate account did not fulfil the requirements of the law.

I am unable to agree, therefore, in the view taken by the lower Court that the suit of the plaintiffs must fail because they could not be regarded as sharers with whom the Collector under sections 10 and 11 of Act XI of 1859 had opened separate estates.

The question arises whether they are entitled to claim to come within the exception provided by section 53, by reason of the fact that they are only fractional share-holders of the share in respect of which the separate account was opened. There is nothing in the section to restrict the operation of the section to sharers holding the entire interest in the share; in these circumstances, I see no reason to hold that they do not come within the exception.

The result of these findings is that I hold that the plaintiffs are entitled to the relief claimed in this suit, that is to say, to have it declared that they purchased the estate No. 3143 free of all incumbrances. In these circumstances, I hold that they, as assignees of defendant No. 7, are also entitled to recover from defendant No. 1 the sum of Rs. 1,454-8 which had been deposited by defendant No. 7 in order to obtain the injunction in this suit, with interest at 6 per cent. per annum on that account up to the date of realization.

I would accordingly set aside the judgment and the decree of the lower Court and grant the plaintiffs a decree to the above effect. Plaintiffs are entitled to costs from defendant No. 1 in both the Courts.

As, however, my learned brother holds a different opinion, the appeal must be referred to the Hon'ble the Chief Justice under the provisions of section 98 of the Code of Civil Procedure in order that it may be referred to a third Judge for hearing.

VINCENT, J.—The facts of the case which has given rise to this appeal are as follows:—Mehal Raiputti is an estate borne on the Revenue Roll of the District of Saran with a revenue of Rs. 7,233 and odd. In the year 1899 fifteen separate accounts had been opened by different sharers in that estate under the provisions of section 70 of Act VII (B.C.) of 1876. One of these shares, *viz.*, that covered by separate account No. 5 was opened by the plaintiffs. In January 1899, separate account No. 4 fell into arrears and was put up for sale on 25th March. The highest bid for the share was not sufficient to cover the arrears and, therefore, the Collector ordered that the sale of the share should be stayed and the whole *mehal*

put up to sale under section 14 of the Revenue Sales Act.

On 6th June 1899, the whole estate was sold and bought for Rs. 16,200 in the name of the defendant No. 7.

The defendant No. 1 had a mortgage-decree for Rs. 17,281 against 13 villages included in the *mehal*, and in 1899 he advertised the mortgaged property for sale in execution of that decree.

The defendant No. 7 then sued for a declaration that his purchase at the revenue sale was free of incumbrances and that the property could not be sold in execution of the mortgage-decree and on a deposit of Rs. 1,454 as security against any loss the defendant No. 7 on the 14th March 1906 secured from the High Court, a temporary injunction staying the sale. That suit was dismissed as it was found that the defendant No. 7 Gopal Dass was a *farzidar* for the plaintiffs, whereupon the mortgagee, defendant in that suit, withdrew the Rs. 1, 454 in deposit. On 2nd March 1907 the defendant No. 7 executed a conveyance of all his rights in the *mehal* and in the Rs. 1,454 to the plaintiffs; and the plaintiffs now sue for a declaration that the defendant No. 1 has no right to sell the estate in execution of his mortgage-decree and that the purchase at the revenue sale was free of all incumbrances. The plaintiffs further seek to recover from the defendant No. 1 Rs. 1,454-8 *plus* interest on that sum alleging that the defendant No. 1 wrongly withdrew that amount from deposit in satisfaction of his decrees.

The real contending defendant is defendant No. 1. In the Court of first instance he raised a number of objections to the suit, which it is not necessary to set forth at length in this judgment, as only one point has been discussed in the argument before us.

It suffices to say that on the 10th September 1908, the plaintiffs' suit was dismissed by the Subordinate Judge on the ground that these plaintiffs, who were the real purchasers at the revenue sale, had bought the property subject to incumbrances.

The learned Subordinate Judge found that the plaintiffs were co-sharers in the *mehal* and was, therefore, of opinion that their purchase was under section 53 of Act XI of 1859 subject to incumbrances unless it is shown that they were sharers with whom the Collector had opened separate accounts under sections 10 and 11 of the Act. He further found, that although there was a separate account opened in the name of the predecessor-in-interest of plaintiffs in 1872 by the Collector for their share in this *mehal*, nominally under section 10 of Act XI of 1859, yet that account was opened without jurisdiction and that it could not, therefore, be said that the plaintiffs were persons with whom separate accounts had been opened under that section.

It this view of the facts, the plaintiffs' suit was dismissed and hence this appeal has been filed.

The only point argued in the appeal is whether the purchase by the plaintiffs through defendant No. 7 was a purchase free of incumbrances under section 53 of Act XI of 1859,

Now, the decision of the learned Subordinate Judge is based on the wording of section 10 of Act XI of 1859. That section enacts that a recorded sharer of a joint estate, held in common tenancy, if he desires to pay in his share of the revenue of the estate separately may submit an application to the Collector to that effect; and the Collector may after notifying the facts in a particular manner after a period of six weeks if no objections are made, open a separate account as desired. If any objection of any kind is raised by any other co-sharer, the Collector must at once refuse to take further action and refer the matter to the Civil Court under section 12.

Under section 53 of the same Act, if a co-sharer in an estate purchases the estate at a revenue sale, he acquires it subject to incumbrances except in the case of sharers with whom the Collector has opened separate accounts under sections 10 and 11 of the Act.

The Subordinate Judge finds that the predecessors-in-interest of the plaintiffs were not in fact sharers in a joint estate held in common tenancy, because they owned shares in 14 or 15 *mouzahs* only out of the various villages, 18 in number, comprising the estate and were not interested in every village in the estate. The Subordinate Judge is of opinion in these circumstances that the Collector had no jurisdiction to open a separate account with

the predecessor-in-interest of the plaintiffs under section 10 of Act XI of 1859, and that the plaintiffs cannot be accepted as co-sharers with whom the Collector had opened separate accounts under that section, there being no jurisdiction under that section and that, therefore, their purchase was not free of, but subject to, incumbrances.

On appeal it is argued that the expression "estate held in common tenancy" has been misunderstood by the learned Subordinate Judge; that in any case the Collector had jurisdiction to open a separate account under section 10 and has done so, and that the order cannot be said to have been made without jurisdiction and further that as all the sharers in the estate including the persons from whom the defendant derives title made no objection at the time and as the separate account was opened and accepted for 27 years before the sale, the validity of the order cannot now be questioned. It is further urged that in any case the separate account could have been opened under section 70 of Act VII (B.C.)of 1876, and that it should be held to have been opened under that section if necessary, and that the effect then would be same as if it had been opened under section 10 of Act XI of 1859.

None of these arguments appear to me to be of very great weight. Section 53 of Act XI of 1859 lays down that if a sharer in an estate purchases the estate at a revenue sale, he does so subject to all incumbrances existing at the time of the sale unless the purchasing co-sharer or sharers are persons with whom the Collector has opened separate accounts under sections 10 and 11 of the Act. Section 10 of the Act empowers a Collector to open separate accounts in joint estates held in common tenancy, on the application of a recorded co-sharer. If there is no joint estate held in common tenancy then, in my view of the law, section 10 has no application and the Collector has no jurisdiction to open a separate account under that section and if he does open a separate account without jurisdiction then it cannot be said that the separate account is one opened under section 10 of the Act. Before that section can apply at all it is necessary that the estate should be one held in common tenancy, and if the estate is not so held the section has no application. Now *mehal* Raiputti is not an estate of that description. The expression "estate held in common tenancy" is defined in section 30 of Regulation XIX of 1814 as meaning an estate where all the sharers have a common right and interest in the whole of the estate. Where, therefore, various co-sharers have certain interests, not in the whole estate but only in particular villages in that estate, it cannot be said that the estate is held in common tenancy; this view has also been accepted in this Court in the case of *Nunhoo Shahee* v. *Ram Pershad* (1). Mr. Justice Phear in that case says that the plaintiff confessedly cannot bring himself under section 10 of Act XI, because only an eight-annas share-holder in four *mouzahs* out of the six which constitute the whole estate and he is, therefore, not "a recorded sharer of a joint estate held in common tenancy" within the meaning of section 10. The same view has been accepted by the revenue authorities in the Board's Miscellaneous Proceeding No. 306, dated 21st September 1876, quoted at page 19 of the Revenue Sale Manual where the Hon'ble Members of the Board of Revenue take the definition of an estate of this character as given in Regulation XIX as applicable to section 10 of Act XI of 1859, and state that a separate account cannot be opened under section 10 unless there is an estate held in common tenancy as set forth in section 30 of Regulation XIX of 1814.

Finally, in 1876 the Legislature recognised the difficulties that existed in regard to separate accounts in estates like the present one, and section 70 of that Act was enacted apparently to specifically provide for the opening of separate accounts in the case of proprietors who were recorded as owning an undivided interest held in common tenancy in any specific portion of the lands of an estate but not extending over the whole estate. If there previously had been any right to open separate accounts in such cases, there would have been no need for this change in the law.

In these circumstances, I hold that the separate account in this estate was improperly opened under section 10 of Act XI of 1859 in 1872, and that the Collector had no jurisdiction under that Act to open any such separate accounts in this estate, and it cannot be said, in my opinion, that any separate account opened by him was a separate account opened under the provisions of section 10 of

Act XI of 1859, and the owner of any separate account opened without jurisdiction is not, in my opinion, entitled to claim the benefit of section 53 of Act XI of 1859 which merely relates to the case of co-sharers with whom separate accounts have been opened under sections 10 and 11.

It is true that a separate account No. 5 was opened 27 years before the sale and the validity of the order of the Collector was not questioned, but this does not in my view of the law affect the case or give validity to an order which was made without jurisdiction. Nor can the defendants in the suit be prejudiced by any such act of the Collector.

It is then urged that as the account remained open after Act VII of 1876 was passed, it should be held to be a separate account under that section. I do not think, however, that this contention has any force. The separate account No. 5 was not opened under section 70 of Act VII (B.C) of 1876, and does not purport to have been opened under that section, and, further, no notices were issued under that section to the sharers interested in the estate after the Act of 1876 was passed. Moreover, the privileges given under section 53 of Act XI of 1859 to the owner of a separate account opened under sections 10 and 11 of that Act are not apparently extended to those who have opened separate accounts under section 70 of Act VII of 1876 (B. C.). Section 71 of the Act extends the provisions of section 13 and 14 of Act XI to separate accounts opened under Act VII of 1876, but it is at least open to doubt how far this section makes section 53 of Act XI apply to those who have opened separate accounts under the Land Registration Act.

In this view of the facts and the law, the plaintiff in this suit who is a co-sharer in the estate of Raiputti and bought the estate at a revenue sale not being a co-sharer who has opened a separate account under section 10 or 11 of Act XI of 1859, purchased the estate subject to any incumbrance that there was on it and he, therefore, bought the share mortgaged to the defendant subject to the lien created by that mortgage and is not entitled to any relief in this case. In my opinion, therefore, the appeal should be dismissed with costs.

It is true that the defendant No. 7 had no right to withdraw the deposit of Rs. 1, 454 before the sale of the mortgaged property was complete and it was found that the sale-proceeds were not sufficient to liquidate his claim, but this amount would be in any case payable out of the mortgaged property and the amount will, no doubt, be deducted from the mortgage dues when the decree is executed.

It seems, therefore, that it is unnecessary and would be improper for the Court to order a refund of the amount in the present suit.

MOOKERJEE, J.—This is a reference under section 98, sub-section (2), of the Civil Procedure Code of 1908. The reference is not strictly in form, because the learned Judges have omitted to state specifically the point of law upon which they differed. The difference between section 575 of the Code of 1882 and section 98 of the Code of 1908 appears to have been overlooked. Under the former Code, it was the appeal that was referred to a third Judge, when the Judges hearing the appeal differed in opinion on a point of law, and on such reference, the whole appeal was open for argument, and not merely the point of law on which the Judges had differed in opinion. Under the Code of 1908, the proper procedure is to state the point of law upon which the Judges differ; the appeal is then to be heard upon that point only, and what is to be decided is not the appeal but the point of law only. In the case before me, this procedure has not been followed; but the parties are agreed that there is only one point of law involved in the appeal, upon which the learned Judges who heard the appeal in the first instance, have differed, as is manifest from their recorded opinions. That point may be formulated as follows:

Is a proprietor, who is not a recorded sharer of a joint estate held in joint tenancy, within the meaning of section 10 Act XI of 1859, nor a recorded sharer whose share consists of a specific portion of the land of the estate within the meaning of section 11, but is recorded as proprietor of an undivided interest held in common tenancy of a specific portion of the lands of the estate but not extending over the whole estate, within the meaning of section 70 of the Bengal Land Registration Act, 1876, entitled to claim the benefit of the exception made in section 53 of Act XI of 1859 in favour of sharers with whom the Collector has, under section 10 or section 11 of the Act, opened separate accounts?

MAHAMMAD MEHDI HASSAN KHAN *v.* SHEOSHANKAR PERSAD SINGH.

My learned brother Brett is of opinion that this question ought to be answered in the affirmative. My learned brother Vincent, on the other hand, is of opinion, that the question ought to be answered in the negative. To determine which of these two conflicting views should prevail, the provisions of the Revenue Sale Law (Act XI of 1859) and of the Land Registration Act (VII of 1876, B. C.) must be examined.

It is necessary to premise at the outset that one of the proprietors of a joint estate may be in enjoyment of his interest therein, in one of three ways, namely, *first*, he may be a recorded sharer of the whole joint estate held in common tenancy; *secondly*, he may be a recorded sharer of the joint estate and his share may consist of a specific portion of the land of the estate; or, *thirdly*, he may be recorded as proprietor of an undivided interest held in common tenancy in a specific portion of the land of the estate but not extending over the whole estate. If his interest is of the first description he may apply to have his share separated and a separate account opened under section 10 of Act XI of 1859. If his interest is of the second description, he may have his share separated and a separate account opened under section 11 of Act XI of 1859. If his interest is of the third description, he may have his share separated and a separate account opened under section 70 of the Land Registration Act. In this connection, it is important to bear in mind that, under section 71 of the Land Registration Act, section 12 of Act XI of 1859 is made applicable to an application under section 70, and further provided that the effect and consequences of opening a separate account under section 70 shall be such and the same as are described in sections 13 and 14 of Act XI of 1859. It is manifest, therefore, that the consequences of the opening of a separate account in cases covered by section 70, (that is, where the applicant is proprietor of an undivided interest held in common tenancy in a specific portion of the land of the estate, but not extending over the whole estate), are assimilated to the consequences of opening a separate account under section 10 or section 11 of Act XI of 1859, only in so far as sections 13 and 14 are concerned, that is, only in respect of the sale of the separated share and of the entire estate under certain specified conditions. Now, when we turn to section 53 of Act XI of 1859, we find that it defines the rights of a purchaser at a revenue sale, who is a recorded or unrecorded proprietor or co-partner. Such person, whether he purchases the property at a revenue sale or acquires it by re-purchase from the purchaser, acquires the estate, to put the matter briefly, subject to all its incumbrances existing at the time of the sale. An exception, however, is made in favour of sharers with whom the Collector has opened separate accounts under sections 10 and 11 of the statute; they stand in a position of advantage, which is denied to the purchaser co-partner who has not opened a separate account under either of these sections. I am not concerned with the policy of the Legislature in this respect; but it is remarkable that the privilege is not extended to persons who have opened separate accounts under section 70 of Land Registration Act. Section 71 as I have just observed, makes sections 13 and 14, but not section 53 of Act XI of 1859, applicable to the proprietor who has obtained a separate account opened under section 70. The inference is irresistible that the co-partner whose interest is of the description mentioned in section 70, and whose separate account has been opened under that section, can purchase the estate at a revenue sale, only as subject to incumbrances. The question, then arises, does it make any real difference if a separate account, which could not be opened under section 10 or section 11 of Act XI of 1859, because the interest of the proprietor was not of either of the two descriptions mentioned in these sections, has been opened by the Collector without any jurisdiction? In my opinion, it makes no difference whatsoever. The position of the proprietor who has obtained a separate account so opened in contravention of section 10 or section 11, is not identical for purposes of section 53 with the position of the proprietor whose separate account has been properly opened. The expression "sharers with whom the Collector has opened separate accounts under sections 10 and 11" plainly means "sharers with whom the Collector has opened separate accounts acting in conformity with sections 10 and 11." To accept any other interpretation, would be to acquiesce in a fraud on the statute. The Collector, when

he opens a separate account under section 10 or 11, performs a statutory duty; his act must be in strict conformity with the legislative provisions on the subject. If the Collector opens a separate account in clear contravention of the provisions of section 10 and section 11; in fact, if the Collector applies the provisions to cases to which the Legislature never intended that they should be applied, his act is without jurisdiction, and cannot confer upon the person who obtains a separate account opened under such circumstances, the statutory privilege created by section 53. If any authority is needed in support of the proposition that where jurisdiction is usurped in contravention of statutory provisions, the act performed is a nullity, reference may be made to the decisions of the Judicial Committee in *Ledgard* v. *Bull* (2), *Minakshi* v. *Subramania* (3), *Fischer* v. *Secretary of State* (4), and of this Court in *Achha Mian* v. *Durga Churn* (5), *Golab Sao* v. *Chowdhury Madho Lal* (6), *Gurdeo* v. *Chandrikah Singh* (7), and *Ananda Kishore* v. *Daije* (8). In my opinion, the view adopted by Mr. Justice Vincent is correct, and I entirely agree in his conclusion that the question of law formulated above must be answered in the negative. This view is in accordance with that taken in the case of *Nunhoo Shahee* v. *Ram Pershad* (1), which, so far as I have been able to discover, has never been doubted in this Court. I observe that, with reference to this decision, my learned brother Brett remarks that the judgment does not state what the cause of action was. I have accordingly examined the records of that case. It appears that an estate Chilowley consisted of six villages. The plaintiffs were interested in an one-half share of four only of the six villages. They applied to the Collector to open a separate account for the half share of the four villages. Upon objection of the defendants, co-proprietors, the application was refused by the Collector on the 17th April 1871. On the 15th May following, the plaintiffs sued for declaration of title and for separation of the Government Revenue of their share of the four villages. The first Court held that the suit was maintainable under section 12 of Act XI of 1859, and made a decree in favour of the plaintiffs, though the revenue assigned was calculated on a basis other than that suggested by the plaintiffs. Upon appeal by the plaintiffs, the decree of the Subordinate Judge was affirmed by the District Judge. Upon second appeal to this Court by the plaintiffs (which related to the amount of revenue assignable in respect of the half share of the four villages), it appears to have been argued by the defendants-respondents (by way of cross-objection, though a memorandum of cross-objection is not to be traced on the part of the record still in existence) that the suit was not maintainable under section 12 of Act XI of 1859, as the plaintiffs were not entitled to have a separate account opened under either section 10 or section 11. Phear and Morris, JJ., gave effect to this contention and dismissed the suit. The learned Judges held that as the plaintiffs were share-holders in some only of the villages constituting the estate, they could not claim to have a separate account opened under either section 10 or section 11. It is superfluous to add that upon a plain reading of the sections, no other conclusion was possible.

Let me now consider the effect of this view of the law upon the present question. The records of the Collector which have been called for upon the joint application of both the parties, show conclusively that, not merely the fifth separate account, the proprietor of which purchased this estate at the revenue sale held on the 6th June 1899, but all the fifteen separate accounts, had been opened during the years 1871-1874 in contravention of the provisions of sections 10 and 11 of Act XI of 1859; the applicants were neither sharers in the whole estate nor proprietors of specific lands, but they were share-holders in some only of the many villages comprised in the entire estate, as is clearly shown by the details of the shares and villages in respect of which the separate accounts were opened This state of things has continued for many years, and has not been questioned by the various proprietors. The reason is obvious. When the Land Registration Act of 1876 came into force, it became clear that what had been done before

(2) 13 I. A. 134; 9 A. 191.
(3) 14 I. A. 160; 11 M. 26.
(4) 26 I. A. 16; 22 M. 270; 3 C. W. N. 161.
(5) 25 C. 146; 2 C. W. N. 137.
(6) 2 C. L. J. 384; 9 C. W. N. 956.
(7) 5 C. L. J. 611; 36 C. 193; 1 Ind. Cas. 913.
(8) 10 C. L. J. 189; 36 C. 726; 1 Ind. Cas. 549.

irregularly, because not falling within the scope of sections 10 and 11 of Act XI of 1859 might be validly done under section 70 of the Land Registration Act. It would have been idle, therefore, for the parties to challenge the validity of the separate accounts at any time after 1875. If objection had been taken by any of the proprietors, the then existing arrangement might have been validated by the presentation of applications under section 70 of the Land Registration Act. It is not right to say that the parties now attempt to invalidate what had been done at their instance during the years 1872-74, and no such question arises as was considered by this Court in *Rai Mohan Saha* v. *Sasanka Mohan Roy* (9), namely, the right of a proprietor to question the validity of a settlement of an estate irregularly made. If we look at the substance of the matter, the position of the parties is identical with what would have been their position if the separate accounts had been, as they could have been, opened under section 70 of the Land Registration Act. There is no controversy that, if they be deemed to have been opened under section 70 of the Land Registration Act, the purchaser at the revenue sale is not entitled to claim the benefit of the exception in section 53 of Act XI of 1859. The conclusion follows that the view adopted by Mr. Justice Vincent, in concurrence with the Court of first instance, that the purchaser has acquired the property subject to encumbrances, is correct and must be upheld.

It is satisfactory to find that this view of the law is manifestly in accord with the justice of the case. We have some indication of the value of the property, when we remember that the mortgagees advanced more than Rs. 13,000 on security of the share of the villages comprised in the first separate account which may be assumed to be worth at least that sum. The value of that share, as shown by the proportion of the total Government Revenue assigned to it, is about one-sixth of the value of the entire estate. The whole estate, therefore, is worth, at a very moderate estimate, at least Rs. 78,000. The purchaser has acquired it for Rs. 16,200; the charge claimed by the mortgagee amounts approximately to Rs. 20,000; even if the purchaser has to pay this charge, as, in concurrence with Mr. Justice Vincent, I hold that he is bound to do, he has made an excellent bargain; in fact, the very small price paid by the purchaser indicates plainly that he, at any rate, must have thought that he was acquiring the property subject to incumbrances.

The result, therefore, is that in concurrence with Mr. Justice Vincent, I hold that the decree of the Subordinate Judge must be affirmed, and this appeal dismissed with costs. The hearing fee of the two hearings is assessed at Rs. 1,000.

Appeal dismissed.

(9) 12 C. L. J. 407; 8 Ind. Cas. 786.

AJMER MERWARA JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPLICATION No. 42 OF 1911.

August 21, 1911.

Present:—Mr. Colvin, J. C.

GHISU—DEFENDANT—APPLICANT

versus

RAM BALLABH—PLAINTIFF—OPPOSITE PARTY.

Succession Certificate Act (VII of 1889), s. 4—Separate Hindu family—Certificate necessary—Revision—Irregularity.

It is a serious irregularity not to require the plaintiff to produce the certificate required by section 4 of the Succession Certificate Act in the case of a separate Hindu family.

Petition for revision against the order of the Judge, Court of Small Causes, Ajmer.

ORDER.—The lower Court seems to have committed a serious irregularity in not requiring the plaintiff to produce the certificate required by section 4 of the Succession Certificate Act. Plaintiff's own witnesses state that he lived separate from his brother Gordhan; and it was, therefore, not correct to grant a decree without production of a succession certificate. The application must be accepted; and the case is remanded to the lower Court for a fresh decision, after plaintiff has been given due opportunity of producing the required certificate.

Application accepted.

ABDUL KARIM *v.* ABDUL RAHMAN.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 1040 of 1909.
July 18, 1911.
Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

ABDUL KARIM PATWARI—PLAINTIFF—APPELLANT

versus

ABDUL RAHMAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Landlord and Tenant—Agricultural raiyat *letting out homestead portions—Incidents of sub-tenancy to be governed by Bengal Tenancy Act, not by Transfer of Property Act—Contract for grant of new lease on expiry of nine years—Effect of Contract—Ejectment of under-*raiyat *after term.*

Where the land included in the holding of an agricultural *raiyat*, consists partly of agricultural and partly of homestead lands and the portion which is used as homestead is let out for use as homestead, the under-tenant is an under-*raiyat* within the Bengal Tenancy Act, and the provisions of the Transfer of Property Act have no application.

Baburam Roy v. *Mohendra Nath Samanta*, 8 C. W. N. 454, relied upon.

A contract of tenancy between a *raiyat* and an under-*raiyat* that upon the expiration of the first nine years of the tenancy, a new settlement of rent would be made, and till such settlement was made, rent would continue to be paid at the rate mentioned in the contract, is valid in law, so far as the contracting parties are concerned.

Tamijuddi v. *Ajgar*, 36 C. 256; 13 C. W. N. 183; 1 Ind. Cas. 942, *Bipin Bihari Hati* v. *Amrita Lal*, 9 C. L. J. 76; 3 Ind Cas. 685 and *Manik Borai* v. *Bani Charan Mandal*, 10 Ind. Cas. 469; 13 C. L. J. 649, relied upon.

Basaratulla v. *Kasirunnessa*, 11 C. W. N. 190, not followed.

The effect of the clause for the grant of a new lease upon the expiry of the term of the first nine years, is to prevent the landlord from seeking to eject the under-*raiyat* upon the expiry of the nine years.

Ali Mahomed Bepari v. *Nyan Raja Bhuyan*, S. A. No. 906 of 1900, relied upon.

Appeal from the decree of the Sub-Judge of Noakhali, dated February 20th, 1909, reversing that of the Munsif of Lakhimpur, dated August 11th, 1908.

Babu *Prokash Chandra Majumdar*, for Babu *Romesh Chandra Sen*, for the Appellant.

Babu *Jyotish Chandra Sarkar*, for Moulvi *Serajul Islam*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the plaintiff in a suit commenced by him for ejectment of the defendant under section 49 of the Bengal Tenancy Act on the ground that he held under a lease the term whereof had expired. It appears that three persons, by name, Zahiruddin, Abdur Rahim and Samiruddin were tenants of a *ryati* holding. Samiruddin transferred his one-third interest in the holding to the plaintiff on the 9th May 1899, and took from him a sub-lease of the homestead for a term of 9 years. The case for the plaintiff is, that although the term has expired the defendant has not vacated the land. The defendant resists the claim on the ground that under the terms of the lease he is entitled to continue in occupation even after the expiry of the term thereof.

The Court of first instance held that the incidents of the tenancy were regulated by the provisions of the Bengal Tenancy Act and that under section 49 clause (*a*) the defendant was liable to be evicted. Upon appeal the Subordinate Judge has held that the incidents of the tenancy are regulated by the provisions of the Transfer of Property Act and the defendant is consequently not liable to be ejected.

In the present appeal it has been contended on behalf of the plaintiff that the view taken by the Subordinate Judge as to the applicability of the provisions of the Transfer of Property Act is erroneous and that the defendant is liable to be ejected under section 49 (*a*) of the Bengal Tenancy Act. In our opinion the view taken by the Subordinate Judge as to the applicability of the provisions of the Transfer of Property Act cannot be supported, but the decree he has made is correct and ought to be affirmed.

The Subordinate Judge has held that the holding which belonged to the three persons named was an agricultural holding and that as the defendant has taken a sub-lease only of the homestead portion of the holding, the incidents of the sub-tenancy are governed by the provisions of the Transfer of Property Act. This position is clearly untenable. Section 182 of the Bengal Tenancy Act provides that when a *raiyat* holds his homestead otherwise than as part of his holding as a *raiyat*, the incidents of his tenancy of the homestead shall be regulated by local custom or usage: and, subject to local custom or usage, by the provisions of the Bengal Tenancy Act applicable to land held by a *raiyat*. No suggestion was made by either of the parties to the present suit that there was any local custom or usage applicable to this matter. Consequently, the homestead portion of the holding is governed by the provisions of the Bengal Tenancy Act precisely in the same

RAGHUBAR DAYAL SUKUL *v.* JADU NANDAN MISSIR.

manner as the portion under actual cultivation. The view we take is supported by the decision in *Baburam Roy* v. *Mohendra Nath Samanta* (1). It was ruled in that case that where the land included in the holding of an agricultural *raiyat* consists partly of agricultural and partly of homestead lands and the portion which is used as homestead, is let out for use as homestead, the under-tenant is an under-*raiyat* within the Bengal Tenancy Act and the provisions of the Transfer of Property Act have no application. Mr. Justice Mitra pointed out that the Bengal Tenancy Act was passed for the protection of *raiyats* as well as under-*raiyats* and if a *raiyat* holds lands partly agricultural and partly homestead the incidents of the holding will regulate the incidents of the sub-lease created by the *raiyat*. The Transfer of Property Act is not applicable to lands used for agricultural purposes and in considering whether the one Act or the other would apply, we have to look to the nature of the original tenancy and not the nature of the sub-tenancy with reference to a particular piece of land within the holding. If the contrary view were maintained, considerable anomaly might result. It follows, therefore, that the incidents of the tenancy of the defendant must be determined with reference to the provisions of the Bengal Tenancy Act. Now, it has been argued on behalf of the plaintiff that as the sub-lease of the 19th May 1908 was for a period of 9 years he is entitled to eject the defendants upon the expiry of the term. This contention, however, is not supported by the terms of the written instrument. The lease provides in one portion that the sub-tenant could not, at any time, be ejected from the *raiyati* holding of the landlord. In another portion, it provides that upon the expiry of the term of the *qabuliat* a fresh settlement would be made and till a fresh settlement was made the condition of the *qabuliat* would continue in force. These two clauses taken together plainly indicate that the intention of the parties was not to have the tenancy terminable upon the expiry of the period of 9 years. The lease in fact was permanent: the true intention of the parties was that upon the expiration of the first nine years of the tenancy a new settlement of rent would be made and till such settlement was made, rent would continue to be paid at the rate mentioned in the contract. That a contract of tenancy of this description between a *raiyat* and an under-*raiyat* is valid in law so far as the contracting parties are concerned, cannot be disputed in view of the decision of this Court in the cases of *Tamijuddi* v. *Ajgar* (2), *Bipin Bihari Hati* v. *Amrita Lal* (3) and *Manik Borai* v. *Bani Charan Mandal* (4). The contrary view taken in *Basaratulla* v. *Kasirunnessa* (5) cannot be supported, upon a true interpretation of the terms of section 85 of the Bengal Tenancy Act. That decision is inconsistent with at least two previous decisions of this Court and, so far as we have been able to discover, it has not been followed in any subsequent decision. We may further point out that the effect of the clause for the grant of a new lease upon the expiry of the term was to prevent the landlord from seeking to eject the defendant upon the expiry of nine years. This is conclusively shown by the decision of this Court in the case of *Ali Mahomed Bepar* v. *Nyan Raja Bhuyan* (6) (decided by Rampini and Handley, JJ.). We are consequently of opinion that, although the incidents of the tenancy of the defendants are regulated by the provisions of the Bengal Tenancy Act under the terms of the contract between the parties, the plaintiff is not entitled to a decree for ejectment.

The result is that the decree made by the Subordinate Judge is affirmed, but not on the ground stated by him and the appeal is dismissed with costs.

Appeal dismissed.

(1) 8 C. W. N. 454.

(2) 36 C. 256; 13 C. W. N. 183; 1 Ind. Cas. 942.
(3) 9 C. L. J. 76; 3 Ind. Cas. 685.
(4) 13 C. L. J. 649; 10 Ind. Cas. 469.
(5) 11 C. W. N. 190.
(6) S. A. No. 906 of 1900.

(s. c. 15 C. L. J. 89.)

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 543 OF 1910.

June 28. 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

RAGHUBAR DAYAL SUKUL AND OTHERS—DECREE-HOLDERS—AUCTION-PURCHASERS—APPELLANTS

versus

JADU NANDAN MISSIR AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 174—Party

RAGHUBAR DAYAL SUKUL *v.* JADU NANDAN MISSIR.

litigant if permitted to assume inconsistent positions—Appellant before L. A. Court not permitted to object that no appeal lies in case—Civil Procedure Code (Act V of 1908), s. 47, O. XXI, rr. 11 (3), 89, 91, 92—Execution of rent-decree—Decree-holder auction-purchaser—Application to set aside sale—Order or decree are appealable—Court's power to extend time for making deposit under section 174, Bengal Tenancy Act—Act of Court not to prejudice any one—Five per cent. on purchase-money to be paid even when decree-holder is auction-purchaser—Copy of decree, or Vakalatnamah, not necessary in execution proceedings—Poundage fee, refund of, on sale being set aside.

The decree-holders purchased at auction property of the judgment-debtors and the purchase-money was set off against the judgment-debt. The judgment-debtors applied to have the sale set aside under section 174 of the Bengal Tenancy Act. The application was dismissed and the judgment-debtors appealed to the District Judge who set aside the sale. From that order a second appeal was preferred to which the judgment-debtors objected that no appeal lay:

Held, first, that it is not open to a party litigant to assume inconsistent positions: the respondents, having succeeded in the lower Appellate Court on the assumption that the order of the original Court was of a particular description and appealable, cannot now be permitted to turn round and assume an entirely different and inconsistent position and say that that order is not appealable.

Held, secondly, that the order of the original Court is one under section 47 of the Code of Civil Procedure, 1908, and in the nature of a decree against which a first appeal and a second appeal lie.

Joytara v. *Pran Krishna Seal*, 7 Ind. Cas. 769; 13 C. L. J. 257; 15 C. W. N 512, referred to.

Chundi Charan Mandal v. *Banke Behary Lal*, 26 C. 449; 3 C. W. N. 283 and *Sital Rai* v. *Nand Lal*, 1 Ind. Cas. 304; 13 C. W. N. 591; 11 C. L. J. 202, relied upon.

Asimuddi Sheikh v. *Sundari Bibee*, 10 Ind. Cas. 345; 38 C. 339; 15 C. W. N. 844; 14 C. L. J. 224, distinguished.

It is not open to the Court to extend the time within which the judgment-debtor is required to make a deposit under section 174 of the Bengal Tenancy Act.

Amir Hussain Khan v. *Manakchand*, 6 Ind. Cas. 424; 14 C. W. N. 882; 12 C. L. J. 62 and *Golab Chand* v. *Bahuria Rammurat Koer*, 13 C. L. J. 432; 10 Ind. Cas. 268, distinguished.

Sharopan v. *Mahomed Habibuddin*, 10 Ind. Cas. 148; 13 C. L. J. 535; 15 C. W. N. 685, followed.

But the position may be different if the party has been prevented from making the deposit by reason of the action of the Court, for an act of the Court can prejudice no one.

Akbar Jaman Khan v. *Sukhdeo Pandey*, 10 Ind. Cas. 51; 13 C. L. J. 467 and *Dulhin Mothura Koer* v. *Bansidhar Singh*, 10 Ind. Cas, 830, relied upon.

A judgment-debtor who applies to have a sale set aside under section 174 of the Bengal Tenancy Act is bound to deposit 5 per cent. of the purchase-money even where the decree-holder is the auction purchaser and the purchase-money is set off against the judgment-debt.

Chundi Charan Mandal v. *Banke Behary Mandal*, 26 C. 449; 3 C. W. N. 283; *Mendai Lal* v. *Bhujja Singh*, A. W. N. (1895) 140 and *Tirumal Rao* v. *Syed Dastaghiri Miyah*, 22 M. 286, relied upon.

A copy of the decree is not necessary for the purpose of the execution proceedings.

Gunga Gobind Gooptoo v. *Makhul Lal Hattee*, 9 W. R. 362, *Ramdhan Rakhit* v. *Panchanan Chuckerbutty*, 10 W. R. 144; 1 B. L. R. (S. N.) 9; *Khettur Mohan Chuttopadhaya* v. *Ishuur Chunder Surma*, 11 W. R. 271, *Madhoo Dossia* v. *Nobin Chunder Roy*, 16 W. R. 25 and *Rajgir* v. *Ishurdhar*, 11 C. L. J. 243; 5 Ind. Cas. 660 (under name *Ishurdhar* v. *Rajgir*) relied upon.

The authority of a Pleader engaged in the suit, does not terminate with the decree, and it is competent to him to appear on behalf of his client in the course of execution proceedings without a fresh authority which is unnecessary.

Sadashiv Ganpatrao v. *Vitthaldas Nanchand*, 20 B. 198, *Gopal Jayachand* v. *Hargovind*, 5 B. H. C. R. A. C. J. 83, *Thakur Prasad* v. *Fakirullah*, 17 A. 106; 22 I. A. 44 and *Mohini Mohan Patra* v. *Ram Narain Patra* and *Baroda Kanta Sircar*, 14 C. L. J. 415; 12 Ind. Cas 780, relied upon.

The poundage-fee paid by the decree-holders auction-purchasers in respect of an execution sale is refunded on the sale being set aside.

Therefore, the decree-holders auction-purchasers are not entitled to charge the amounts spent by them in obtaining a copy of the decree, in the Court-fee of a fresh *Vakalatnamah* in the execution proceeding, and in payment of the poundage-fee, as part of the costs mentioned in section 174 of the Bengal Tenancy Act.

Appeal from the order of the District Judge of Darbhanga, dated July 28th, 1910, reversing that of the Munsif of Samastipur, dated February 15th, 1910.

Babu *Khetter Mohun Sen*, for the Appellants.

Babu *Joy Gopal Ghosha*, for the Respondents.

JUDGMENT.—This appeal is directed against an order by which the Court of Appeal below in reversal of the order of the Court of first instance has set aside an execution sale. It appears that the appellants obtained a decree for rent on the 12th August 1909. They applied for execution on the 14th September following and themselves purchased the properties at the execution sale on the 13th December 1909 for Rs. 99-11. The purchase-money was not brought into Court but was set off against the judgment-debt. On the 10th January 1910, the judgment-debtor applied to have the sale set aside under section 174 of the Bengal Tenancy Act and on the next day deposited Rs. 100-3. On the day following, the Court directed the judgment-debtors to deposit an additional sum of Rs. 4-8 inasmuch as the office had reported that the amount deposited was insufficient. Thereupon, the judgment-debtors paid into Court Rs. 5

RAGHUBAR DAYAL SUKUL *v.* JADU NANDAN MISSIR.

on the 13th January 1910. Two days later, upon the objection of the decree-holders auction-purchasers, the Court dismissed the application, as the judgment-debtors had failed to deposit the decretal amount with compensation in full within 30 days of the sale as required by section 174 of the Bengal Tenancy Act. The judgment-debtors appealed against that order. The District Judge, upon this appeal, has held, on the authority of the decision in *Amir Hussain Khan* v. *Nanak Chand* (1), that the Court had authority to extend the time within which the deposit was to be made and that it was consequently unfair to refuse to set aside the sale after the judgment-debtors had carried out the order of the Court for payment of the balance of the sum due. In this view the District Judge has allowed the appeal and reversed the sale.

The decree-holders-purchasers have now appealed to this Court and on their behalf the decision of the District Judge has been assailed on the ground that it was not competent either to the original Court or to the Court of Appeal below to extend the time within which the judgment-debtors were required by law to make the necessary deposit. In support of this proposition reliance has been placed upon the case of *Sharofan* v. *Muhamed Habibuddin* (2). On behalf of the judgment-debtors it has been suggested that the appeal is incompetent because the order of the original Court could not rightly be treated as an order under section 47 of the Code of 1908. It has also been argued that the judgment-debtors had deposited within the time allowed by law whatever sum was justly payable by them and the decree-holders were consequently not entitled to resist the application for reversal of the sale. Before we deal with the case on the merits, it is necessary to examine briefly the objection to the competency of the appeal taken on behalf of the respondent.

The preliminary objection ought to be overruled, in our opinion, on two grounds. In the first place, the judgment-debtors appealed to the District Judge on the assumption that the adverse order of the Court of first instance had been made under section 174 of the Bengal Tenancy Act read with section 47 of the Code of Civil Procedure of 1908. It is, therefore, not competent to them to urge before this Court that the order in their favour by the District Judge was, as a matter of fact, made without jurisdiction and that although the appeal preferred by them was incompetent, it is not open to the decree-holders to assail that order by way of appeal. It was pointed out by this Court in the case of *Bindeswari Prosad Singh* v. *Lakpat Nath Singh* (3), that it is not open to a party litigant to assume inconsistent positions of this character. As we have just explained, the respondents have succeeded in the Court of the District Judge on the assumption that the order of the original Court was of a particular description: they cannot now be permitted to turn round and assume an entirely different and inconsistent position. In the second place, we are of opinion that the order of the original Court must be treated as one within the scope of section 47 of the Code of 1908 and in the nature of a decree against which a first appeal and a second appeal lie under the law. It was pointed out by this Court in the case of *Joytara* v. *Pran Krishna Seal* (4), that the answer to the question, whether an order in execution proceedings is within the scope of section 47 of the Code of 1908 must depend upon its nature and contents. If it decides a question relating to the execution, satisfaction or discharge of the decree and if the decision has been given between parties to the suit or their representatives-in-interest, the order of the Court falls within the scope of section 47 and is a decree within the meaning of section 2. Tested in the light of this principle, there can be no room for serious controversy that the order of the original Court in the case before us was a decree, and in support of this position it is sufficient to refer to the cases of *Chundi Charan Mandal* v. *Banke Behary Lal Mandal* (5) and *Sital Rai* v. *Nanda Lal* (6). In both these cases the decree-holder was the auction-purchaser. The sale has been held in execution of a decree for arrears of rent and the order of which the propriety was called in question,

(1) 6 Ind. Case. 424; 14 C. W. N. 882; 12 C. L. J. 62.
(2) 10 Ind. Cas. 148; 13 C. L. J. 535; 15 C. W. N. 685.
(3) 15 C. W. N. 725; 8 Ind. Cas. 26.
(4) 7 Ind. Cas. 769; 15 C. L. J. 257; 15 C. W. N. 512.
(5) 26 C. 449; 3 C. W. N. 283.
(6) 1 Ind. Cas. 304; 13 C. W. N. 591; 11 C. L. J. 202.

RAGHUBAR DAYAL SUKUL v. JADU NANDAN MISSIR.

had been made under section 174 of the Bengal Tenancy Act. In both instances, it was held that the order was appealable as a decree. The recent decision of this Court in *Asimuddi Sheikh* v. *Sundari Bibee* (7) does not militate against that view. That decision merely points out that in cases under rule 89 of Order XXI of the Code of 1908, which corresponds to section 310A of the Code of 1882, only a first appeal is allowed under the new Code. That is so, because the order is made appealable under rule 1, clause (1) of Order XLIII of the Code, and consequently a second appeal is barred under the provisions of sub-section 2 of section 184. But an order under section 174 of the Bengal Tenancy Act is not appealable under Order XLIII of the Code of 1908 and sub-section 2 of section 104 does not, therefore, bar a second appeal. The result is that the preliminary objection must be overruled and the propriety of the order of the District Judge examined on the merits.

It cannot be seriously disputed that the view adopted by the District Judge is erroneous. He has held, upon the authority of the decision in *Amir Hossain Khan* v. *Nanak Chand* (1), that it is open to the Court to extend the time within which the judgment-debtor is required to make a deposit under section 174 of the Bengal Tenancy Act. The case mentioned, however, is clearly distinguishable. It was ruled in that case as also in the case of *Golab Chand* v. *Bahuria Rammurat Koer* (8), that when full Court-fees have not been paid upon a plaint or memorandum of appeal, it is competent to the Court to extend the time for payment. That principle has plainly no application to cases under section 174 of the Bengal Tenancy Act. As was explained in *Sharofan* v. *Muhomed Habibuddin* (2), the Court has no authority to extend the time within which the deposit has to be made under section 174 of the Bengal Tenancy Act, as rule 89 of Order XXI of the Code of 1908. A similar view has in substance been taken in *Kabilaso Koer* v. *Raghunath Saran* (9) and *Akbar Zaman Khan* v. *Sukhdeo Pandey* (10). No doubt the position may be different if the party has been prevented from making the deposit by reason of the action of the Court, because, as observed in *Mohamed Akbur Zaman Khan* v. *Sukhdeo Pandey* (10) and *Dulhin Mothura Koer* v. *Bansidhar Singh* (11), in such contingency the Court is guided by the principle that an act of the Court prejudices no man. The case before us, however, does not fall within the scope of this doctrine. It has not been suggested that if there has been any default on the part of the judgment-debtors that it can be rightly attributed to any act of the Court. We must consequently hold that the ground upon which the order of the District Judge is based cannot be supported.

The learned Vakil for the respondent-judgment-debtors has, however, strenuously endeavoured to support the order of the District Judge on other grounds, and has contended that the amount deposited by the judgment-debtor was amply sufficient under section 174 of the Bengal Tenancy Act; it has been urged in substance that the amount claimed by the decree holders was excessive and could not be legally obtained from the judgment-debtors.

It has been argued, in the first place, that as the decree-holders themselves were purchasers at the execution sale, they were not entitled to receive 5 per cent. of the purchase-money under section 174 of the Bengal Tenancy Act. The learned Vakil for the respondents has sought to support this position by a reference to sub-section 2 which provides that in the case of a reversal of the sale, the provisions of rule 93 of Order XXI, of the Code of Civil Procedure shall apply. That rule provides that when a sale is so set aside, the purchaser shall be entitled to an order for re-payment of his purchase-money. The learned Vakil for the respondent has contended that as in this case the purchase money was less than the decretal amount and as no part of it was brought into Court by the decree-holders, the provisions of rule 93 cannot apply, and consequently the decree-holders were not entitled to receive 5 per cent. of the purchase-money. In our opinion, this contention is not well founded. It is sufficient to point out that section 174 is so framed as to apply to all purchasers, whether they are decree-holders or strangers to the execution proceedings.

(7) 10 Ind. Cas. 345; 38 C. 339; 15 C. W. N. 844; 14 C. L. J. 224.
(8) 10 Ind. Cas. 268; 13 C. L. J. 432.
(9) 18 C. 481.
(10) 10 Ind. Cas. 51; 13 C. L. J. 467.
(11) 10 Ind. Cas. 880; 15 C. J. L. 82.

RAGHUBAR DAYAL SUKUL *v.* JADU NANDAN MISSIR.

The question now argued before us was raised with reference to section 310A of the Code of 1882 and it was held by this Court as also by the High Court of Bombay and Allahabad that the decree-holder auction-purchaser was entitled to get 5 per cent. upon the purchase-money just like any other auction-purchaser. *Chundi Charan Mandal* v. *Banke Behary Lal Mandal*(5); *Mendai Lal* v. *Bhujja Singh*(12); *Tirumal Rao* v. *Dastaghiri Miyah*(13). We are not prepared to question the correctness of these decisions and upon the plain language of section 174 of the Bengal Tenancy Act we cannot accept the contention of the respondent as well founded.

It has been argued on behalf of the respondents, in the second place, that the decree-holders are not entitled to several items included by them in the statement of costs. It will be observed that section 174 makes it obligatory upon the judgment-debtors to deposit the amount recoverable under the decree with costs. The costs here referred to are obviously costs properly incurred by the decree-holders subsequent to the decree and in the course of execution proceedings.

One of the items claimed by the decree-holders is the costs incurred by them in obtaining a copy of the decree. It has been argued on behalf of the respondent that a copy of the decree was not necessary for the purpose of the execution proceedings. In support of this position, reliance has been placed upon the cases of *Gunga Gobind Gooptoo* v. *Makhun Lal Hottee* (14); *Ramdhan Rakhit* v. *Panchanan Chuckerbutty* (15); *Khettur Mohan Chuttopadhya* v. *Ishur Chunder Surma* (16) and *Modhoo Dossia* v. *Nobin Chunder Roy* (17). These cases were decided under the Code of 1859 and were repeatedly treated as good law under the Codes of 1877 and 1882 [*Rajgir* v. *Ishwardhari*, *Ishwardhari* v. *Rajgir* (18)]. Under the Code of 1903 the position is still clearer. Rule 11 of Order XXI specifies the contents of the written application for execution of decrees. Sub-rule 3 of that rule provides expressly that the Court to which an application is made under sub-rule (2) may require the applicant to produce a certified copy of the decree. It has not been suggested in the case before us, that the Court made any such order. In fact such order would be wholly needless, because the Court in which the application for execution was made, was the very Court which had made the decree and if any reference to the decree was needed, the original could easily have been examined. We must consequently hold that the decree-holders are not entitled to charge the amount spent by them in obtaining a copy of the decree as part of the costs mentioned in section 174 of the Bengal Tenancy Act.

Another item claimed by the decree-holders is the amount of Court-fees paid by them upon the *Vakalatnama* which they attached to their application for execution. It has been contended on behalf of the respondent that the *Vakalatnama* was wholly unnecessary and in support of this view reference has been made to the case of *Sadashiv Ganpatrao* v. *Vithaldas Nanchand* (19) and *Gopal Jayachand* v. *Hargobind* (20). These cases affirm the doctrine that the authority of a Pleader engaged in the suit does not terminate with the decree, but that it is competent to him to appear on behalf of his client in the course of execution proceedings without a fresh authority. This principle is supported by the decision of the Judicial Committee in the case of *Thakur Prasad* v. *Fakirullah* (21) where it was pointed out that an execution proceeding is essentially a continuation of the suit. We may further point out that, as observed by this Court in the case of *Mohin Mohan Patra* v. *Ram Narain Patra and Baroda Kanta Sircar* (22), the proposition cannot be maintained that the authority af a Pleader necessarily terminates with the decree in the suit in which he has been engaged. This principle is also supported by the cases of *Lady Dela Pole* v. *Dick* (23) and *Bagley* v. *Mople & Co.* (24). The contention of the respondent that the *Vakalatnama* was unnecessary must, therefore, prevail.

The third item claimed by the decree-holders is the poundage-fee paid by them in respect of the execution sale at which they

(12) A. W. N. (1895) 140.
(13) 22 M. 286.
(14) 9 W. R. 362.
(15) 10 W. R. 144; 1 B. L. R. (s. N.) 9.
(16) 11 W. R. 271.
(17) 16 W. R. 25.
(18) 5 Ind. Cas. 660; 11 C. L. J. 243.
(19) 20 B. 198.
(20) 5 B. H. C. R. A. C. J. 83.
(21) 17 A. 106; 22 I. A. 44.
(22) 14 C. L. J. 445; 12 Ind. Cas. 780.
(23) (1885) 29 Ch. D. 351; 54 L. J. Ch. 940; 52 L. T. 457; 33 W. R. 585.
(24) 27 T. L. R. 284.

purchased. This poundage-fee is a per centage of the gross amount realised by the sale and is calculated at the rate of 2 per cent. upon sums not exceeding Rs. 1,000. The decree-holders urge that they were obliged by the rules and circular orders of this Court to pay the amount at the time when they applied for permission to set off the purchase-money against the decretal amount and, as they have actually paid that money, they are legitimately entitled to claim it from the judgment-debtors as part of the costs incurred by them. In our opinion, this contention is not well founded. The rules and circular orders of this Court (Vol. I. p. 129) provide that when a sale of immoveable property is set aside under Order XXI, rules 89, 91 or 92, Code of Civil Procedure or under section 174 of the Bengal Tenancy Act, the decree-holder becomes entitled to a refund of the fee. It is, therefore, not right to contend that the decree-holders are entitled, in spite of the reversal of the sale, to recover from the judgment-debtor the poundage-fee. But it has been urged that as the sale has not been reversed, the decree-holders are entitled to treat the poundage-fee as an integral part of the costs incurred by them. This contention is fallacious. If the contingency mentioned happens, namely, if the sale is reversed, the decree-holders will forthwith become entitled to a refund of this money. If, on the other hand, the sale is not set aside, he will not be entitled to a refund. In either event, it is clear that he is not entitled to claim the money from the judgment-debtors.

There are other items also claimed by the decree-holders in respect of which objection has been taken by the judgment-debtors: they relate to the fees paid for the service of processes. It is not necessary, however, to examine this part of the case in detail, because it is clear that if the amount claimed for copy of the decree, for *Vakalatnama* and for poundage-fee is disallowed, the amount paid by the judgment-debtors is amply sufficient for the reversal of the sale under section 174 of the Bengal Tenancy Act. But we may add that we are by no means satisfied that the amount claimed by the decree-holders in the shape of fees for service of processes is not excessive.

The conclusion follows that although the order of the District Judge cannot be supported on the ground assigned by him, the order is substantially right on the merits and must be affirmed. The appeal is, therefore, dismissed, but, under the circumstances of the case, there will be no order for costs in any of the Courts.

Appeal dismissed.

(S. C. 38 C. 797.)

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL No. 37 OF 1910.

June 9, 1911.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Woodroffe.

McINERNY, J. F. H.—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA—DEFENDANT—RESPONDENT.

Plaint, amendment of—Original plaint based on negligence—Proposed amendment based on nuisance—Different cause of action—Suit against Government—Notice of suit—Civil Procedure Code (Act V of 1908), s. 80—Withdraw, leave to

The plaint in a suit against the Secretary of State originally proceeded upon negligence, and the notice which was served as a preliminary to the plaint pointed to a suit based on negligence. Afterwards, the plaintiff prayed for an amendment of the plaint and the new proposed plaint proceeds upon nuisance:

Held, that the cause of action being different, no permission to amend the plaint can be given.

Leave to withdraw with liberty to bring a fresh suit, is granted.

Appeal from the judgment of Fletcher, J., who dismissed the action of the plaintiff brought against the Government for Rs. 40,000 as damages for personal injuries, by the following

JUDGMENT.—This is a suit brought by the plaintiff against the Secretary of State claiming damages for negligence in respect of an accident which happened to him on the public highway.

The first point to be decided is whether the plaint discloses any cause of action. Now, the allegations made in the plaint are as follows. On the 24th August 1908, the plaintiff says, he was injured by falling over a post which, in the plaint, is stated to be placed on the maidan (now Counsel for the plaintiff says it was on the public highway) on the western side of the Chowringhee Road. The plaint

then alleges that the post is the property of Government and is maintained and kept in position by Government. These are the material allegations, except one that relates to the ownership of the maidan, which the plaintiff says is the property of Government and subject to the trusts for the benefit of the public of Calcutta. In paragraphs 9, 10 and 11 the plaint sets forth particulars of the unfortunate accident which happened to the plaintiff on the evening of the 28th August, and it is admitted that his hand was very seriously injured by a tramcar.

Now, there is one proposition of law that cannot be doubted, and that is that no suit can lie against the Crown unless that right is given by statute. It requires no authority to support that. In this case the plaintiff has got to show that the statutes have given him a right against the Secretary of State in Council as representing the Crown. The first statute that is material is the statute of 3 and 4 William IV, Chapter 85, section 9. That was the statute which put an end to the commercial undertaking and general trading business of the East India Company and continued the Charter for a short time. Section 9 enacts that "from and after the said twenty-second day of April one thousand eight hundred and thirty-four all the Bond-debt of the said Company in Great Britain, and all the Territorial debt of the said Company in India, and all other debts which shall on that day be owing by the said Company, and all sums of money, costs, charges and expenses which, after the said twenty-second day of April, one thousand eight hundred and thirty-four, may become payable by the said Company in respect or by reason of any covenants, contracts or liabilities then existing, and all debts, expenses and liabilities whatever which, after the same day, shall be lawfully contracted and incurred on account of the Government of the said territories, and all payments by this Act directed to be made, shall be charged and chargeable upon the revenues of the said territories."

Then comes the "Act for the Better Government of India," 21 and 22 Vict., Chapter 106. Section 65 enacts: "That the Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate; and all Persons and Bodies Politic shall and may have and take the same suits, remedies, and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the said Company; and the property and effects hereby vested in Her Majesty for the purposes of the Government of India or acquired for the said purposes, shall be subject and liable to the same judgments and executions as they would while vested in the said Company have been liable to in respect of debts and liabilities lawfully contracted and incurred by the said Company."

Now, if these two sections stood alone, I should have shared the doubts expressed by the present Chief Justice, when he was the Chief Justice of Bombay, in the case of *Shivabhajan* v. *Secretary of State for India* (1). I should have thought that the word "lawfully" governed not only the word "contracted" in section 65, but also the words "liabilities incurred." That I should have thought so was because the liabilities to which the East India Company were liable after the passing of the Act of 1883, were liabilities which should have been incurred on account of the Government of the said territories. There is, however, a decision of this Court in the case of *P. & O. S. N. Co.* v. *Secretary of State for India* (2), in which it is expressly laid down that the suits which may be brought against the Secretary of State in this Court are not limited to the suits which may be brought against the Crown, but beyond that I do not think that this case is an authority for the wide proposition that the learned Counsel for the plaintiff has tried to establish. The other case in this Court is the case of *Nobin Chunder Dey* v. *The Secretary of State for India* (3), which is a decision of Chief Justice Garth and Mr. Justice Macpherson on appeal from the Original Side, and laid down expressly what is the nature of the liability of the Secretary of State under section 65 of the Act of 1858, and the headnote expresses precisely what was the result of that judgment, that suits such as might,

(1) 28 B. 314.
(2) 5 B. H. C. R. App. 1.
(3) 1 C. 11.

previously to the passing of the Statute 21 and 22 Vict. Chapter 106, have been brought against the East India Company are limited to suits for acts done in the conduct of undertakings which might be carried on by private individuals. That case is binding upon me. The case of *The Secretary of State for India* v. *Hari Bhanji* (4) is not a decision of this Court. The case of *Nobin Chunder Dey* v. *The Secretary of State for India* (3) is binding upon the Judges of the original side. That being so, the only point one has to consider in this case is, is this a suit brought as stated in the decision of Chief Justice Garth and Mr. Justice Macpherson in *Nobin Chunder Dey* v. *The Secretary of State for India* (3)? In my opinion, obviously it is not. This case is a case to make the Government liable to pay compensation out of Government revenues. What for? For an act which happened to the plaintiff on the public highway. What commercial undertaking or other trading operation were the Government of India carrying on in maintaining the public path on the public highway? It is clear that it does not appear that this case comes within the decision of *Nobin Chunder Dey* v. *The Secretary of State for India* (3), and the plaint discloses no cause of action.

Learned Counsel for the plaintiff has asked leave to amend the plaint. If there was any real *bona fide* intention to amend the plaint, so that the unfortunate plaintiff might recover compensation for the injuries he has suffered, I should have immediately granted it. I am satisfied, however, on the statement of the plaintiff, that this plaint cannot be amended so as to show any cause of action against the defendant. That being so. there remains nothing for me but to dismiss the suit. The general costs of this suit must go to the Government. The costs will be taxed on scale No. 2.

The plaintiff appealed.

Messrs. *B. Chakravarti* and *Chatterjee* instructed by Messrs. *Pugh & Co.*, for the Appellant.

Mr. *Kenrick K. C.*, Advocate-General, and Mr. *B. C. Mitter*, Standing Counsel, instructed by Mr. Kesteven, for the Respondent.

JUDGMENT.

JENKINS, C. J.—This case comes before us by way of appeal from a decree of Mr. Justice Fletcher who dismissed the plaintiff's suit.

On the case being placed before us it was perceived that, apart from the difficulty that there might be in bringing a suit against the Secretary of State for India in Council for a tort, alleged to have been committed by an agent of the Government, there was a further obstacle in the plaintiff's way that the facts as alleged in his plaint could not be supported by evidence, inasmuch as it had been discovered and was the case that the obstacle in respect of which the plaintiff claimed, was not, as the plaint alleged, on the land of the Crown; in other words, on a part of the maidan but on a part of the highway which was adjacent to the maidan. Therefore, leave was sought from us to amend the plaint so as to bring it into conformity with the facts which the plaintiff believed he could prove, and we required as a condition of this application that the proposed plaint should be drafted and placed before us. That has now been done. The plaint as now proposed by way of amendment differs in an essential degree from the original plaint. The original plaint proceeded upon *negligence*, whereas the new plaint proceeds upon *nuisance* in the form of obstruction on the highway, so that it is impossible to say that the cause of action is the same. This brings in the plaintiff's way the difficulty created by section 80 of the Code which prescribes that "no suit shall be instituted against the Secretary of State for India in Council. . . . . until the expiration of two months next after notice in writing has been delivered to, or left at the office of, a Secretary to the Local Government or the Collector of the district. . . . . stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims." The notice which was served as a preliminary to the plaint as originally framed pointed to a suit based on *negligence* and it stated a cause of action different from that on which the plaintiff would rely in his proposed plaint. It follows, therefore, that it is not open to us to give the plaintiff permission to amend his plaint.

In these circumstances, Mr. Chatterjee on behalf of the plaintiff has asked for leave to withdraw the suit under Order XXIII, rule 1 of the Code of Civil Procedure, and he desires

(4) 5 M. 273.

that he should have permission to withdraw from the suit with liberty to institute a fresh suit in respect of the subject-matter of this suit.

The defendants give no opposition to this application, though they do not encourage it, and their attitude is, no doubt, referable to the terms of rule 2 of Order XXIII of the Code. What the effect of that rule may be on the proposed new suit, it will be out of place for me now to discuss. But, in the circumstances, we give the plaintiff permission to withdraw the present suit with liberty to institute a fresh suit in respect of the subject-matter of this suit.

We do not interfere with the decision of Mr. Justice Fletcher as to costs, which will stand, and the plaintiff-appellant will pay the costs of this appeal.

WOODROFFE, J. concurred.

(s. c. 4 Bur. L. T. 272.)

LOWER BURMA CHIEF COURT.

CIVIL REVISION No. 69 OF 1910.

June 14, 1911.

Present:—Mr. Justice Twomey.

MG PO THWE AND OTHERS—DEFENDANTS—APPLICANTS

versus

MA BAW AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Buddhist Law—Guardian—Minor—Grand-uncle acting as guardian in the life-time of grand-father—De facto *guardian—Contract made in good faith for minor's benefit binding on minor.*

Failing the father and mother and their appointees, no person however nearly related is of right entitled to the custody of a minor Buddhist or to the guardianship of his property.

The grand-uncle of a minor undertook the duties of guardian of minor's property without opposition on the part of the minor's grand-father. In the capacity of guardian the grand-uncle made a contract on behalf of the minor in good faith for the minor's benefit:

Held, that the grand-uncle acted as a *de facto* guardian of the minor and as the contract was made in good faith for the minor's benefit, it was binding on the minor.

Application for revision of the decision of the District Court of Toungoo, in Civil Appeal No. 94 of 1909, dismissing the appeal against the judgment and decree of the Township Court of Yedas, in Civil Suit No. 187 of 1909.

Mr. *Palit*, for the Applicants.

Mr. *Rahman*, for the Respondents.

JUDGMENT.—The chief point taken in revision is that Thet She who made the contract on behalf of the minors was not their natural guardian. He was their grand-uncle and as their grand-father was a nearer living relative, the latter was the natural guardian. I am asked to infer that Thet She acted merely as agent of the minors and that as a minor cannot appoint an agent, the contract made by Thet She was unenforceable. There is evidence that Thet She reaped the crop with the minors. His reaping the crop with them, his nearness of kin, and his action in making the compromise with Ma Baw are facts justifying the Court in treating him as *de facto* guardian of the minors' property. Failing the father and mother and their appointees, no person, however nearly related, is of right entitled to the custody of minor Buddhists or to the guardianship of their property. There is no necessity, unless the interests of the minor demand it, to interfere with a *de facto* guardianship not improperly obtained. See Trevelyan's Law relating to Minors, Third Edition, page 77.

There can be no doubt that it was in the capacity of guardian of the minor's property that Thet She purported to act and that the other party to the agreement regarded him as such. A guardian is merely a person having the care of a minor's person or property and it appears that Thet She undertook the duties of guardianship of the minors' property in this case without opposition on the part of his brother who was the minors' grandfather. Thus he was *de facto* guardian.

As to the contract itself, it is clear that it was made in good faith and was for the benefit of the minors. Their step-mother had possession of the land. She allowed Thet She and the minors to take the crop on condition that they would pay Rs. 146 debts due by their father and 55 baskets of paddy for herself. They got at least 500 baskets of paddy from the land and could have paid the debts and still had a large surplus.

I think the lower Courts were right in

enforcing the agreement. Application dismissed with costs.

Application dismissed.

(s. c. 14 C. L. J. 603.)

CALCUTTA HIGH COURT.

CIVIL RULE No. 2432 OF 1911.

July 14, 1911.

Present:—Mr. Justice Holmwood and Mr. Justice D. Chatterjee.

JASODA DASSI—DECREE-HOLDER—PETITIONER

versus

RAMESWARI DASSI—DEFENDANT—OPPOSITE PARTY.

Ex parte *decree—Defendant's case partly gone into—Refusal of application for adjournment—Withdrawal of Counsel for defendant from case—Whether decree is* ex-parte—Ex parte *decree obtained by fraud—Defendant's remedy*—Ex parte *final decree, after preliminary decree—Defendant unavoidably absent, whether decree is* ex parte—*Decree for accounts—Opportunity to defendant to prove what amount due.*

Where the case of a defendant is partially entered into and his Counsel applies for adjournment and on such adjournment being refused he withdraws from the case, and the Judge in his absence gives judgment on the merits of the case, such decree cannot be held to be *ex parte*.

Kadar Khan v. *Juggeswar Prasad Singh*, 35 C. 1023, followed.

If the decree was obtained by fraud, the defendant's remedy would be by way of review or by a suit properly framed for the purpose.

A decree for accounts is not a mere direction to inquire and report. It proceeds and must always proceed upon the assumption that the party calling for it is entitled to the sum found due. It is a decree affirming his rights, only leaving it to be ascertained how much is due to him from the party accounting; and such a decree directing the defendant to account is a final decree.

Janokey Doss v. *Brindabun Doss*, 3 M. I. A. 175 and *Rahimbhoy* v. *Turner*, 18 I. A. 6; 15 B. 155, relied upon.

After the passing of a preliminary decree for accounts, if the final decree be passed in the absence of the defendant who is unavoidably absent, the final decree would be held to have been passed *ex parte* and liable to be set aside and the defendant would have an opportunity of being heard on the question of how much is due.

Rule against an order of the First Subordinate Judge of 24-Pergunnahs, dated the 24th April 1911.

Mr. *B. C. Mitter* and Babu *Provas Chandra Mitter*, for the Petitioner.

Babu *Atul Krishna Roy*, for the Opposite party.

JUDGMENT.—This was a Rule calling on the other side to show cause why the order of the first Subordinate Judge, Alipore, dated 24th April 1911, setting aside the decree should not be set aside on the ground that the decree so expressed to be set aside was not passed *ex parte* and so there was no jurisdiction to make the order.

Now it is perfectly clear that the order of the 24th April 1911 and the Rule both refer to the preliminary decree in this case and that on the authorities cannot be held to have been passed *ex parte*; for the evidence of the defendant was taken on commission and that evidence was evidently considered by the Court in its judgment where it says that it is proved and admitted that the plaintiff now represents the estate of the deceased Sib Nandan Lal, and on the authority of *Kadar Khan* v. *Juggeswar Prasad Singh* (1), where the case of the defendant has been partially entered into and the Counsel for the defendant applied for adjournment which was refused and thereupon withdrew from the case, and the Court in his absence passed its judgment on the merits of the case, such decree cannot be held to be *ex parte*. No doubt, if the decree was obtained by fraud which the defendants maintain, they have their remedy by way of review or by a suit properly framed for the purpose. But the learned Judge goes further in his order of the 24th April. He holds that, apart from the fraud which appears to have been practised upon the defendants in respect of the preliminary decree, their agent continues to deceive them after the passing of the preliminary decree, and he says, it appears from the evidence that even after the preliminary decree Jugger Nath went on representing to the lady defendant that the case was going on well and that she had no cause for anxiety. Under those circumstances, the lady, who was at Gazipur, of course, did not return and was certainly unavoidably absent at the final hearing so that the final decree which settled the amount due was certainly passed *ex parte* and the defendant has succeeded in showing that she was unavoidably absent and unrepresented at that final hearing.

We must, therefore, make the Rule absolute as regards the preliminary decree holding, on

(1) 35 C. 1023.

the authority of *Janokey Dass* v. *Brindabun Doss* (2), and of *Rahimbhoy* v. *Turner* (3), that a decree for accounts is not a mere direction to inquire and report. It proceeds, and must always proceed, upon the assumption that the party calling for it is entitled to the sum found due. It is a decree affirming his rights, only leaving it to be inquired into how much is due to him from the party accounting; and such a decree directing the defendant to account is a final decree and one which is appealable to the Privy Council. But, while we hold that the order directing the defendant to furnish account is final and that the plaintiff has a right to obtain those accounts, we can see no reason for differing from the learned Judge that the defendant ought to have an opportunity of being heard on the question of how much is due, and we, therefore, discharge the Rule as regards the so-called final decree which ought more properly to be called a supplementary decree, and direct that the parties be given a further opportunity to show what is the amount due on the account which has been ordered. There can be no hardship to the plaintiff who alleges that he has obtained much less than he was entitled to and takes credit to himself for having remitted a large amount on the account.

As each party has partially succeeded, each party will bear his own costs.

Rule made absolute.

(2) 3 M. I. A. 175.
(3) 18 I. A. 6; 15 B. 155.

(s. c. 4 Bur. L. T. 265).

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL APPEAL No. 272 OF 1910.

April 25, 1911.

Present:—Mr. McColl, A. J. C.

NGA PAW—PLAINTIFF—APPELLANT

versus

NAG LU GALE AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Redemption suit—Limitation—Mortgagee alleging transaction to be sale—Mortgagor contending fraud and asserting mortgage—Donees from mortgagee—Limitation Act (IX of 1908), Sch. I, Arts. 91, 134, 142, 148—*Evidence Act (I of* 1872), s. 92.

A suit for redemption against donees from the mortgagee is not governed by Article 134 of the Limitation Act as this Article does not apply to persons who are not transferees for valuable consideration.

In a suit for redemption of mortgage, the mortgagee pleaded that the property had been sold to him by a registered deed-sale and not mortgaged. The contention on behalf of the plaintiff was that though the deed was executed by him it was a fraudulent one inasmuch as he had been induced to sign it by a false representation that it was a mortgage-deed:

Held, that the suit was governed by Article 148 of the Limitation Act and that the plaintiff was entitled to prove the fraud and the fact that the transaction was a mortgage.

Held, further, that Article 91 or 142 of the Limitation Act was inapplicable to the case.

Appeal against the judgment of the District Court, Magwe, in Civil Suit No 5 of 1909.

Mr. *S. Mukerjee*, for the Appellant.

Mr. *J. M. Xavier*, for the Respondents.

JUDGMENT.—The plaintiff-appellant and his wife Ma Me sued the defendant-respondents and another for redemption of two oil wells alleged to have been mortgaged to the first defendant-respondent by Ma Me for Rs. 70 in 1265. The 2nd and 3rd defendants-respondents were made defendants as they proposed to have acquired the wells by gift from the 1st defendant-respondent and the Burma Oil Company was also made a defendant as they had purchased one of the wells from the 2nd defendant-respondent:

The first defendant-respondent pleaded that the wells had been sold to him by a registered deed of sale and not mortgaged. The plaintiff-appellant, however, contended that though she had executed this deed, it was a fraudulent one, inasmuch as she had been induced to sign it by a false representation that it was a mortgage-deed, that she was illiterate and the deed had been wrongly read out to her.

The lower Court framed two preliminary issues as to whether it had jurisdiction and whether the suit was barred by limitation. The first issue was decided in the affirmative by this Court on appeal and the suit was remanded for trial on the merits. The lower Court then examined witnesses and dismissed the suit on the ground that it was barred by limitation.

The point has been very inadequately dealt with by the lower Court. The learned Additional Judge said that he had no doubt whatever that the suit was barred by limitation but he did not even set out what Article of the first Schedule of the Limitation Act, in his opinion, governed the case. From this remark that the plaintiff-appellants had

not even alleged possession within 12 years of the suit and from the rulings quoted by him, it would appear that he applied Article 142. This Article, however, has no application. The plaintiffs-appellants were not dispossessed whilst in possession, nor can it be said that they discontinued possession.

Article 91 relied upon by the other side does not apply either. The plaintiffs-appellants did not sue to set aside the deed of sale; and they were not bound to do so. Their suit was for redemption.

The second plaintiff Ma Me's case as against the 1st, 2nd and 3rd defendants-respondents is governed by Article 143. She alleges that there was a mortgage and she claims the right to prove by oral evidence that the deed of sale relied upon by the defendants-respondents does not correctly represent the transaction under the 1st proviso to section 92, Evidence Act, on the ground of fraud, and if she can prove the fraud, she is entitled to prove the remainder of her allegation. Her suit as against the 4th defendant, the Burma Oil Company, would have been governed by Article 134, but apparently the plaintiffs-appellants have withdrawn the suit as against the 4th defendant. The suit as against the 2nd and 3rd defendants-respondents is not governed by Article 134, because they are not transferees for valuable consideration. They allege a gift.

So far as the present appellant's interests are identical with those of his wife, *ie.*, so long as he claims the right to redeem, he must prove the fraud and then the mortgage and the suit is still governed by Article 148. He, however, claims that his wife mortgaged the wells without his knowledge or consent and that even if the transaction were a sale and not a mortgage, it could not affect his share of the property, which he alleges to be *Hnapason*. He, therefore, claims that even if the transaction be found to have been a sale he is entitled to recover half the property and that his claim is not time-barred as the defendants-respondents' possession would not be adverse to him until they affected him with notice. This contention raises difficult points as to whether this part of the case is governed by Article 134, Ma Me being looked upon as a trustee or by Article 142 or by Article 144 and as to whether the present appellant had actual or imputed notice or not that the defendants-respondents claimed an adverse title. If Ma Me acted without her husband's consent, express or implied, apparently notice to her would not be notice to him (section 229, Contract Act) and it would be necessary to prove actual notice.

For the present plaintiff-appellant to succeed on this ground, however, it would be necessary for him to amend the plaint. This can be done in the lower Court and it is unnecessary for me to say any more as the suit has been erroneously dismissed on the preliminary point that on the allegations in the plaint, it is time-barred, whereas on those allegations, the suit is governed by Article 148 and is within time.

The learned Counsel for the respondents has urged some arguments on the merits, but the suit has not been tried and issues have not been framed on the merits.

I set aside the decree of the lower Court and remand the suit to that Court in order that it may be re-admitted under its original number and disposed of on the merits.

Decree set aside;
Case remanded.

(s. c. 14 C. L. J. 646.)

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 507 OF 1909.
July 14, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

NAGENDRA KUMAR NATH AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

HARA CHANDRA PODDAR AND OTHERS —DEFENDANTS—RESPONDENTS.

Co-owner—Joint property—Liability to be ejected—Sale of joint property by one member as his exclusive property—Hostile title.

One co-owner is not liable to be ejected from joint property at the instance of his co-sharer unless there has been an ouster in the technical sense of the term.

Dijendra Narain v. *Purnendu Narain*, 11 C. L. J. 189; 5 Ind. Cas. 171, followed.

Where one co-owner dealt with joint property as if it belonged exclusively to himself and alienated the whole property to a stranger, there was an assertion of hostile title on his part, and inasmuch as the transferee has claimed the entire property in denial of the rights of the co-owners of the transferor, the co-owners are entitled to be restored to possession of their share of the property.

HEDLOT KHASIA *v.* KA RAN KHASIANI.

Appeal from the decree of the Subordinate Judge of Chittagong, dated the 18th December 1908, modifying that of the Munsif of Chittagong, dated the 5th February 1908.

Babu *Baldeo Narain Singh* (for Moulvi *Serajul Islam*) and Babu *Jyotis Chundra Sarkar*, for the Appellants.

Babus *Mahendra Nath Roy*, *Krishen Prosad Sarbadhikari* and *Biraj Mohan Mojumdar*, for the Respondents.

JUDGMENT.—The subject matter of the litigation which has given rise to this appeal is a small parcel of land owned originally by three brothers Aukhil, Nagen and Rajani. Rajani is dead and his interest has passed by inheritance to his mother Subarna. Aukhil transferred the property to the father of the defendants-respondents on the assumption that the property belonged exclusively to him and he was competent to deal with it as his own. At that time his brothers Nagen and Rajani were infants. Upon attainment of majority Nagendra and his mother Subarna have brought this suit for declaration of title to two-thirds share of the land and for recovery of possession thereof. The defendants have sought to resist the claim substantially on the ground that Aukhil was the person exclusively entitled to the property and that the plaintiffs have no title to enforce against them. That defence has completely failed and it has been established that Aukhil was interested to the extent of a third share only. On these facts, the Court of first instance made a decree in favour of the plaintiffs for recovery of possession and mesne profits. Upon appeal, the Subordinate Judge has held that the plaintiffs are entitled merely to a declaration of title and cannot claim to eject the defendants. In our opinion this view cannot be supported.

The learned Vakil for the respondents has explained that the decision of the Subordinate Judge is based on the doctrine that one co-owner is not liable to be ejected from joint property at the instance of his co-sharer unless there has been an ouster in the technical sense of the term. *Dijendra Narain* v. *Purnendu Narain* (1). But even if this principle be assumed to have been applied in this case, it is obviously of no assistance to the defendants. As already stated, Aukhil dealt with the property as if it belonged exclusively to himself. The moment he alienated the whole of the property to the father of the defendants there was an assertion of the hostile title on his part, and that assertion has continued up to the time of the institution of the present suit inasmuch as the transferees have claimed the entire property in denial of the rights of the two brothers of Aukhil. Consequently, they or their representatives-in-interest are entitled to be restored to possession of their share of the property. The Subordinate Judge also seems to have held that the defendants as purchasers from Aukhil might be entitled to claim the whole of this property if upon a partition it fell entirely in the share of Aukhil. No doubt, such a claim on the part of the defendants as against Aukhil might be sustained on the principle recognised in section 43 of the Transfer of Property Act. As between them and their vendor, the latter might not be in a position to deny that he had a good title to the whole of the property. But that contingency has not yet happened and the defendants cannot anticipate events which may never happen. At any rate, even upon partition, it is conceivable that the whole of this property may not be allotted to them alone. Under these circumstances, we are of opinion that the defendants cannot resist a decree for possession of the immoveable property.

The result is, that this appeal is allowed, the decree of the Court below set aside and that of the Court of first instance restored. This order will carry costs both here and in the Court below.

Appeal allowed.

(1) 11 C. L. J. 189; 5 Ind. Cas. 171.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 989 OF 1909.

JULY 18, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

U. HEDLOT KHASIA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

KA RAN KHASIANI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Ex parte *decree—Appeal by contesting defendants—Confirmation of decree of first Court—Application by defendants against whom* ex parte *decree was made to set it aside—Jurisdiction of primary Court to entertain*

HEDLOT KHASIA v. KA RAN KHASIANI.

application—Presentation of returned plaint to competent Court—Suit to be treated as instituted when presented in competent Court—Civil Procedure Code (Act XIV of 1882), s. 57—Limitation (Act XV of 1877), s. 14—Lease for term—Death of lessee—Expiry of lease—Changes in title pendente lite—Regulation Act (I of 1886), s. 8 sub-s. (1) cl. (b), ss. 39, 62—Khasias—Inheritance—Sister to be preferred to brother.

Where an Appellate Court affirms a decree of the first Court, which was made *ex parte* against some of the defendants and on contest against the others, it is competent to the primary Court to set aside the *ex parte* decree at the instance of those defendants against whom the decree had been made *ex parte* and who had not been made parties to the appeal preferred at the instance of the contesting defendants.

Dhanai Sardar v. *Tarak Nath Chowdhuri*, 5 Ind. Cas. 525; 12 C. L. J. 53, distinguished.

Indu Meah v. *Dar Baksh*, 10 Ind Cas. 275: 14 C. L. J. 42; 15 C. W. N. 798, relied upon.

Kumdu Nath Roy Chowdhuri v. *Jatindra Nath Chowdhury*, 9 Ind. Cas. 189: 15 C. W. N. 399; 13 C. L. J. 221;38 C. 394, distinguished.

The combined effect of section 57 of the Civil Procedure Code of 1882 and section 14 of the Limitation Act of 1877 is that when a plaint which has been returned is presented in a Court of competent jurisdiction, the suit must be taken to be instituted on the date of such presentation.

The Court may for the sake of justice take into consideration changes in the title *pendente lite*.

Ram Ratna v. *Mohant*, 6 C. L. J. 74; 11 C. W. N. 732 and *Ramyad* v. *Bindeswari*, 6 C. L. J. 102, followed.

A lease for a term of years does not terminate with the life of the grantee.

The mere recognition by the lessor of a wrong person as successor of the original grantee does not prejudice the position of the lawful successor.

Section 8, sub-section (1), clause (*b*) of Regulation I of 1886 applies to a case in which a person has acquired land, not merely because it has been directly settled with him by the Government, but also because he has obtained it from the original grantee by transfer, succession or otherwise.

The clause includes a case in which a person has before the Regulation acquired land by inheritance from a person with whom it had been settled by the Government under a lease for a term not less than ten years.

Amongst the *Synting Khasias* a sister inherits the property of her brother in preference to a brother.

One *T.* a *Khasia* obtained a settlement of certain lands from the Government on October 21st, 1884, for a term of ten years. *T.* died shortly after, and left behind him a brother *H.* and two sisters *S* and *L.* Immediately after his death, his brother in 1886 got his own name entered as his successor-in-interest and continued in possession. In 1895 the two sisters sued for recovery of possession:

Held, that the case is completely covered by clause (*b*) of sub-section (1) of section 8 of Regulation I of 1886, that upon the death of *T.* and in spite of the hostile act of his brother, his sisters became owners of the interest originally vested in him, that as soon as the Regulation came into force on July 1st 1886, the sisters became land-holders within the meaning of clause (*b*) of sub-section (1) of section 8 and were entitled to claim settlement from the Government, that although they did not do so, their rights have not been affected by the settlement made with their brother, and that they are entitled to recover the property from the hands of the brother.

Madub Nath Surma v. *Myarani Medhi* 17 C. 819 and *Patan Maria* v. *Bahibaram*, 24 C. 239; 1 C. W. N. 94, relied upon.

Appeal from the decree of the District Judge of Sylhet, dated March 24th, 1908, affirming that of the Sub-Judge of that district, dated June 1st, 1908.

Babus *Tarakishore Chowdhury* and *Brojo Lal Chakravarti*, for the Appellants.

Babu *Harendra Narain Mitra* and *Birendra Chandra Das*, for the Respondents.

JUDGMENT.—The subject-matter of the litigation which has given rise to this appeal is a tract of land whereof settlement was obtained by one U. Timon from the Government on the 21st October 1884, under a *qabuliat* executed for a term of ten years. The grantee died shortly after, and left behind him a brother U. Hedlot and two sisters Ka Sengai and Ka Laban. Immediately after his death, his brother, in 1885, got his own name entered in the *qubuliat* as his successor-in-interest and apparently continued in possession thereafter. U. Hedlot transferred a portion of his interest in the disputed land to some of the defendants on the 22nd March 1887. On the 13th November 1895, the two sisters of U. Timon commenced an action for declaration of title to the disputed land and for recovery of possession. Their case in substance was, that they were *Khasias* and that under the customary rules of inheritance prevalent amongst them, sisters were entitled to succeed in preference to brothers. The defendants to the suit were U. Hedlot and six other persons who claimed to have derived an interest in the disputed land from him. Apart from objections in bar, one of which related to the jurisdiction of the Court, the claim was resisted substantially by the second and third defendants on the ground that the plaintiffs were not entitled to any interest in the land as it had been acquired by U. Hedlot. The other defendants did not enter appearance. The Court first tried the objection of jurisdiction based upon the value of the subject-matter of the litigation, and came to the conclusion that the value of the property was within the limits of its pecuniary jurisdiction. The case was then tried on the

HEDLOT KHASIA *v.* KA RAN KHASIANI.

merits, and a decree made in favour of the plaintiffs on the 18th April 1896. Upon appeal that decree was affirmed by the Subordinate Judge on the 21st September 1897 and a second appeal to this Court was dismissed on the 20th April 1900. Subsequently, the defendants other than the second and third defendants applied to have the *ex parte* decree made against them discharged. That application was successful and the suit was revived in so far as they were concerned. They resisted the claim on the ground that the Court had no jurisdiction to entertain the suit because the pecuniary value of the subject-matter of the land in dispute exceeded the limits of the pecuniary jurisdiction of the Court. This contention was successful, and the result was that on the 15th January 1906, the Court returned the plaint for presentation to the Court of Subordinate Judge, the plaint was duly presented to that officer on the day following. The case was then tried on the merits. The substantive defence to the claim was two fold; namely, *first*, that the plaintiffs did not acquire any valid interest in the disputed property, because upon the death of U. Timon there was no interest left which could pass to them by succession; and *secondly*, that if the interest of U. Timon was transmissible by inheritance, the plaintiffs were not the heiresses of their brother. The Court of first instance decided in favour of the plaintiffs on the 1st June 1908 and that decision was affirmed on appeal by the District Judge on the 24th March 1909. Two of the defendants, the fifth and the seventh, have now appealed to this Court and on their behalf the decision of the District Judge has been assailed on four grounds namely, *first*, that the suit has not been properly framed, because after the plaint had been returned for presentation to the proper Court, the pleadings ought to have been amended with reference to the circumstances as they stood on the 16th January 1906; *secondly*, that the suit is barred by limitation; *thirdly*, that the plaintiffs have acquired no title to the disputed property, because upon the death of U. Timon there was no interest left to be transmitted to them; and *fourthly*, that if the interest of U. Timon was transmissible, the plaintiffs are not the heirs of their brother. These arguments have been strenuously contested by the respondents and a preliminary point has been raised on their behalf that the *ex parte* decree was improperly set aside, inasmuch as after the decree of the original Court had been affirmed on appeal by the Subordinate Judge and on second appeal by this Court, it was not competent to the primary Court to discharge that decree and direct a re-trial of the suit. We must first examine the validity of the objection taken on behalf of the respondents.

It appears from an examination of the record that the decree was originally made upon contest as against the second and third defendants, and was made *ex parte*, as against the others. The second and third defendants alone appealed against the adverse decision of the Subordinate Judge. To that appeal, the only respondents were the successful plaintiffs. The Sub-Judge affirmed the decision of the original Court. A second appeal was presented to this Court by the second and third defendants, and, as in the Court of Appeal below, the only respondents in this Court were the plaintiffs. The decision of the Court of first instance, which has been affirmed on appeal, was confirmed by this Court. Upon these facts, the learned Vakil for the respondents has contended, upon the authority of the decision in *Dhonai Sardar* v. *Tarak Nath Chowdhuri* (1) that the decree of the original Court was superseded by the decree of the Appellate Court, and that, consequently, after the appeal had been decided, it was not competent to the primary Court to set aside the *ex parte* decree even at the instance of persons against whom the decree had been made *ex parte* and who had not been made parties to the appeal preferred at the instance of the contesting defendants. It may be conceded that the contention of the respondents is apparently supported by the decision upon which reliance is placed, but we are of opinion that this position cannot be maintained on principle. No doubt, when a decree is attached by way of appeal to a superior Court, if the decision of the Court of Appeal affirms that of the Court of first instance, the original decree becomes merged in the decree of the Court of Appeal. But the application of this general principle may be modified by special circumstances. Here, as we have already explained, the decree of the primary Court was challenged on behalf of the contest-

(1) 12 C. L. J. 53; 5 Ind. Cas. 525.

ing defendants. They assailed that decree only in so far as they themselves were concerned and this is conclusively evidenced by the circumstance that they did not join the other defendants as parties to the appeal. When, therefore, their appeal was dismissed and the decree of the Court of first instance was affirmed, it must be taken that the decree of the primary Court was merged in the decree of the Appellate Court only in so far as the original decree affected the two contesting defendants. In so far as that decree affected the other defendants, who had not entered appearance, the Court of Appeal was not invited to consider the matter and to pronounce any judicial opinion thereupon. A similar observation applies to the decree made by this Court. Consequently, the view cannot be maintained that merely because the appeal of the two contesting defendants was unsuccessful, the other defendants were deprived of their remedy, available under section 108, to have the *ex parte* decree made against them discharged on proper grounds. The view we take is in accordance with that taken by this Court in the case of *Indu Meah* v. *Dar Baksh Bhuiyan* (2). Much reliance was placed upon the decision in *Rumud Nath Roy Chowdhry* v. *Jatindra Nath Chowdhry* (3); but that case is clearly distinguishable, because there the application to set aside the *ex parte* decree was made during the pendency of an appeal. Consequently, the question did not arise for consideration, whether it would have been competent to the primary Court to set aside the *ex parte* decree upon the invitation of the defendants who had not entered appearance, after the appeal preferred by the contesting defendants had been dismissed. We are clearly of opinion that the preliminary point urged by the respondents cannot be supported. We are further of opinion that it is too late for them to take this objection. The suit has been revived and re-tried. If the plaintiffs were of opinion that the *ex parte* decree ought not to have been set aside by the primary Court, they ought to have applied to this Court to discharge that order as made without jurisdiction. The objection which the plaintiffs, as respondents, now seek to urge, is not taken, with a view to support the decree in their favour; if it is allowed to prevail, the decree, though in their favour, must be discharged as made without jurisdiction. The preliminary objection is, therefore, overruled, and we proceed to consider the points urged by the defendants in support of their appeal.

The first point taken by the appellants is that the suit has not been properly constituted because the plaint, as it now stands, seeks relief on the basis of events as they happened before the 13th November 1895 (the date of the original presentation of the plaint) and all intermediate transactions between that date and the date of the presentation of the plaint in the Court of the Subordinate Judge have been ignored. In support of this proposition reliance has been placed upon section 57 of the Code of Civil Procedure of 1882 and section 14 of the Indian Limitation Act of 1877. Section 57 of the Code of 1882 provides that the plaint shall be returned to be presented to the proper Court if a suit has been instituted in a Court whose grade is lower or higher than that of the Court competent to try it, where such Court exists or where no option as to the selection of the Court is allowed by law. Section 14 of the Indian Limitation Act provides that in computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence in another civil proceeding, whether in a Court of first instance or in a Court of Appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is presented in good faith in a Court which from defect of jurisdiction or other cause of a like nature is unable to entertain it. It has been argued on behalf of the appellants, that the combined effect of these two sections is that when the plaint which has been returned is presented in a Court of competent jurisdiction, the suit must be taken to be instituted on the date of such presentation. In our opinion, this contention is well founded and is not opposed to the decision in *Huri Mohun* v. *Naimuddin* (4), which was a case of amendment and not of return of plaint [*Greesh Chunder* v. *Pran Kishen* (5); *Ram Coomar* v.

(2) 14 C. L. J. 42; 15 C. W. N. 798; 10 Ind. Cas. 275.

(3) 13 C. L. J. 221; 38 C. 394; 9 Ind. Cas. 189; 15 C. W. N. 399.

(4) 20 C. 41.

(5) 7 W. R. 157.

HEDLOT KHASIA *v.* KA RAN KHASIANI.

Dwarkanath (6) ; *Sham Chand* v. *Kally Kanth* (7); *Husrutoollah* v. *Aboo Mahomed* (8)]. In fact, if the contrary view were adopted, the inference would follow that the provisions of section 14 of the Indian Limitation Act were superfluous. It would have been needless to formulate the rule embodied in section 14, unless the theory were adopted that the suit was instituted only when the plaint was presented in the Court of competent jurisdiction. Consequently, the view may well be maintained that the plaint in this case ought to have been amended and the plaintiffs required to base their claim to relief on the footing of circumstances as they stood on the 16th January 1906. We are clearly of opinion, however, that the suit ought not to fail on this ground. No such objection was taken in the Court of first instance after the plaint had been presented. If the objection had been taken, the plaintiffs might easily have amended their allegations. It is further plain that the defendants have not been in any manner prejudiced by reason of the omission of the plaintiffs to amend the plaint. The events upon which the defendants rely have all been investigated by the Courts below. The most important of these, is the settlement with them by the Government after the institution of the suit in 1895. The defendants have, as a matter of fact, throughout contended that the plaintiffs are entitled to relief, if any, on the footing that the defendants are now settlement-holders for a term of 15 years under a lease granted to them on the 1st April 1898. The defendants will be amply protected, as we propose to take this fact into account, and determine thereon the relative rights and liabilities of the parties, this is in accord with the principle that the Court may, for the sake of justice, take into consideration changes in the title *pendente lite* ; *Ram Ratan* v. *Mohant Schu* (9) and *Ramyad* v. *Bindeswari* (10). The first contention of the appellants, though technically correct, must consequently be overruled.

In support of the second contention of the appellants it has been argued that the view is barred by limitation, because admittedly defendants and their predecessor U. Timon have been in possession of the disputed land from 1885, while the present suit, for the purpose of limitation, must be deemed to have been commenced on the 16th January 1906. The plaintiffs, however, are clearly entitled to the benefit of the provisions of sub-section (1) of section 14 of the Indian Limitation Act. It cannot be disputed that the plaintiffs have prosecuted with due diligence the original suit as against these defendants, and that they have been obliged to institute the present suit, because the first suit could not be entertained by the Court on account of defect of jurisdiction. There can be no controversy that the plaintiffs have throughout acted in good faith. As already stated, the second and third defendants raised the objection of valuation at the original trial. Upon evidence, the Court held that the objection was groundless. At the instance of the present appellants, however, the Court subsequently, on the revival of the suit came to the conclusion that the objection was well founded. Under these circumstances, in view specially of the divergence of opinions, expressed by the Court on the two occasions, it is clear that absence of good faith cannot be imputed to the plaintiffs. It is further plain, that as against the present defendants, the suit must be treated to have been pending from the 12th November 1895 when the suit was instituted up to the 15th January 1906 when the plaint was ordered to be returned for presentation to the proper Court. This is so, irrespective of the proceedings by way of appeal at the instance of the second and third defendants to which the present defendants were not parties. If the period, between the 13th November 1895 and 15th January 1906, is excluded, it is clear that no question of limitation arises, because the dispossession by the defendants took place after the death of U. Timon in 1885. The view we take is in accord with that previously taken by this Court [*Takhuroodeen* v. *Kurimbux* (11) *Khellat Chunder Ghose* v. *Nusseeb-un-nissa* (12)]. The second contention of the appellants must, therefore, be overruled as untenable.

In support of the third ground, it has been urged that upon the death of U. Timon his interest terminated and consequently

(6) 5 W. R. 207.
(7) (1863) 2 Hay 314.
(8) 6 W. R. 39.
(9) 6 C. L. J. 74 ; 11 C. W. N. 732.
(10) 6 C. L. J. 102.
(11) 3 W. R. 20.
(12) 16 W. R. 477.

HEDLOT KHASIA *v.* KA RAN KHASIANI.

even if it be assumed that his sisters were the heiresses-at-law, they did not acquire any interest by inheritance. In our opinion, this contention is not well founded. In the first place, it is clear that as the lease in favour of U. Timon was for a term of years, it did not terminate with the life of the grantee. As was observed by their Lordships of the Judicial Committee in the cases of *Tej Chand* v. *Sreekanth Ghose* (13), *Raja Burdakanth Roy* v. *Aluk Munjoore Dasiah* (14) and *Gobind Lal Roy* v. *Hemendra Narain Roy Chowdhury* (15), in the absence of a specific provision to that effect, a lease for a fixed term of years does not terminate upon the expiration of the stipulated term by the mere fact of the death of either the lessor or the lessee. Upon the death of U. Timon, therefore, there was a transmissible interest which vested in his heirs by succession. We shall assume, for the present, that his two sisters were the heiresses. Notwithstanding the fact that they were heiresses, the brother of U. Timon took possession of the property and got his name entered in the *qubuliat* as the successor-in-interest of the original grantor. This happened in May 1886, before Regulation I of 1886 had come into operation on the 1st July 1886. It cannot be disputed that before the Regulation came into force the rights of the parties were governed by the terms of the contract between the grantor and grantee, as also the customary rules of inheritance to which the parties were subject. The mere recognition by the grantor of the brother as successor of the original grantee, obviously, did not prejudice the position of the heiresses. The question, therefore, arises whether when the Regulation came into force, it altered the status and rights of the parties. Now section 8 of the Regulation deals with the question of the status of land-holders and the mode in which that status may be acquired. Sub-section (1) of section 8 is divided into two clauses (*a*) and (*b*) which deals with two different set of circumstances. Clause (*a*) provides for the case in which a person has, before the commencement of the Regulation, held immediately under the Government for 10 years continuously any land not included either in a permanently settled estate or in a revenue free estate, and who has during that period paid to the Government the revenue due thereon, or held the same under an express exemption from revenue. Clause (*b*) deals with the case in which a person, whether before or after the commencement of the Regulation, acquired any such land under a lease granted by or on behalf of the Government the term of which is not less than 10 years. Each of such persons is under section 8 deemed to have acquired the status of a land-holder in respect of the land. It is obvious that clause (*a*) has no application to the circumstances of the present case because U. Timon did not, before the commencement of the Regulation, hold for 10 years continuously the disputed land under the Government. Clause (*b*), on the other hand, plainly applies to the case; but it has been argued that in view of sub-section (2) of section 8, the operation of clause (*b*) is excluded. Sub-section (2) provides that when land held by one person has come, immediately by transfer or succession to be held by another, the holding shall, for the purpose of sub-section (1), clause (*a*), be deemed to have been continuous, and the latter person may, in reckoning the length of his holding, add the holding of the former to his own. It has been argued in substance for the appellants that as sub-section (2) is limited in its application to cases falling within clause (*a*) of sub-section (1), clause (*b*) of sub section (1) cannot be applied to the circumstances of the present case. In our opinion, the contention is not well founded. The Legislature did not extend the application of sub-section (2) to cases under clause (*b*) of sub-section (1) for the obvious reason that it was needless to do. Clause (*b*), as we read it, applied to a case in which a person has acquired land, not merely because it has been directly settled with him by the Government but also because he has obtained it from the original grantee by transfer, succession or otherwise. In our opinion, clause (*b*) may be read so as to include a case in which a person has, before the commencement of the Regulation, acquired the land by inheritance from a person with whom it has been settled by the Government under a lease for a term not less than ten years. The learned Vakil for the appellants does not dispute that the term "acquired" may be interpreted in the

(13) 3 M. I. A. 261; 6 W. R. 48 (P. C.).
(14) 4 M. I. A. 321.
(15) 17 C. 686.

HEDLOT KHASIA *v.* KA RAN KHASIANI.

wider sense just indicated. But he contends that a narrower construction may very well be put upon it. We are of opinion that the restricted interpretation suggested ought not to be adopted and we are fortified in this view by the circumstance that the Legislature has not thought fit to make the provisions of sub-section (2) applicable to cases covered by clause (*a*). The policy of the Legislature is obvious. In the case covered by clause (*a*) where title is acquired by continuous possession for ten years, the Legislature provides that the possession of the successor-in-interest may be added to the possession of the previous holder. In a case comprised within clause (*b*) it is not necessary to make a provision of this character, because the original grantee holds under a lease and the interest of the successor-in-interest may be taken to have been acquired for him, whether it has been acquired by succession, transfer or any other manner. The present case is thus completely covered by clause (*b*) of sub-section (1). It has been finally argued by the learned Vakil for the appellants that the sisters of the original grantee cannot be said to have acquired the land, because admittedly they never obtained possession. It has been argued in substance that the term "acquired" connotes entirely over the property; in other words, that a person cannot be said to have "acquired" land unless he has acquired physical possession thereof. We are not prepared to accept this contention as well founded; the ordinary meaning of the term "acquired" undoubtedly does not lend any support to this argument. The true position, therefore, is that upon the death of U. Timon and in spite of the hostile act of his brother his sisters became the owners of the interest originally vested in him, and as soon as the Regulation came into force on the 1st July 1886, the sisters became land-holders within the meaning of clause (*b*) of sub-section (1) of section 8 of the Regulation. Once the conclusion is firmly established, the case proves reasonably plain and free from difficulty. Section 9 provides that a land-holder shall have a permanent, heritable and transferable right of use and occupancy in his land, subject to the payment of revenue and the other items mentioned in clause (*a*) and subject also to other conditions needless to enumerate for our present purposes. Consequently, it cannot be maintained that upon the expiry of the term of ten years fixed in the lease of the 21st October 1884, the interest of the sisters completely terminated; they were completely entitled to claim settlement from the Government. True it is, that they have not done so. But it is plain from the other parts of the Regulation, to which we shall presently refer, that their rights have not been affected by the settlement made with their brother. Section 39 provides that no person shall, merely on the ground that a settlement has been made with him or with some person through whom he claims, be deemed to have acquired any right to or over any estate as against any other person claiming rights to or over that estate. The same doctrine is recognised in section 62, which provides that nothing contained in Chapter IV of the Regulation and nothing done in accordance therewith, shall be deemed to preclude any person from bringing a suit in the Civil Court for possession of a declaration of his right to any immoveable property to which he may deem himself entitled. Consequently, the inference is irresistible that in spite of the Settlement of 1898, the plaintiffs, as the sisters of the original grantee, are entitled to recover the property from the hands of the brother who has unlawfully seized it. The view we take is supported by the decision of this Court in the cases of *Madhub Nath Surma* v. *Myarani Medhi* (16) and *Patan Maria* v. *Bhabiram* (17). The third ground upon which the decree of the District Judge is assailed cannot consequently be supported.

In so far as the fourth ground is concerned, it raises a question of the customary rules of inheritance which govern the parties to the suit. It has been argued that the District Judge has overlooked the fact that the plaintiffs are not *Khasias* but *Syntings*, and has, therefore, erroneously applied to the plaintiffs a rule of succession which obtains only amongst *Khasias*. We are of opinion that there is no substance in this contention. It may be conceded that in the settlement proceedings it was alleged that the plaintiffs were not *Khasias* but *Syntings* and that the customs and usages of the *Khasias* and *Syntings* were radically

(16) 17 C. 819.
(17) 24 C. 239; 1 C. W. N. 94.

distinct. When the case came to be argued, however, before the Courts below, it does not appear to have been urged that the customary rules of inheritance were different in the two classes. In so far as we have been able to gather, the name *Synting* is applied properly to person residing in the *Jaintia* hills, but as they are the residents of the *Khasia* hills are popularly known as *Khasias*. The Sub-Judge found upon the evidence that amongst the *Syntings*, a sister inherits the property of her brother in preference to a brother. This conclusion is supported not merely by the oral evidence but also by the opinion of experts. [The *Khasias* by Major Gardon; Statistical Accounts of Assam by Sir William Hunter, Volume II, 203, 489; Diary of Mr. Heath; Report of Mr. Shadwell]. When the matter was taken on appeal before the District Judge, objection was taken to the judgment of the Sub-Judge, not on the ground that different rules govern the *Khasias* and the *Suntings* in this respect, but that he had misconceived the evidence as to the rules of succession amongst the *Khasias*. It was further urged that the rules of inheritance, so far as the *Khasias* are concerned, did not apply to the case. The District Judge has overruled all these objections, and, in our opinion, rightly done so. It is plain from the record that the distinction now sought to be raised was never suggested in the Courts below. We may further observe that this point might and ought to have been raised at an earlier stage of the case when upon the death of the original plaintiffs their daughters applied to be brought on the record as their representatives-in-interest. They were allowed, however, to be substituted without any question. The District Judge held upon the evidence that the rule of succession applicable to the case was that which prevailed amongst the *Khasias*, namely, that a sister succeeds to the estate of her brother in preference to a brother. This conclusion, in our opinion, cannot be successfully assailed, and the fourth ground of appeal, must be negatived.

The result is that all the objections taken by the appellants fail, and the appeal is accordingly dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 75 OF 1911.

January 3, 1912.

Present:—Mr. Justice Chamier.

MUTSADI LAL—APPLICANT

versus

MULE MAL—OPPOSITE PARTY.

Bengal North Western Provinces and Assam Civil Courts Act (XII of 1887), ss. 8, 21—District Judge—Power to assign cases to Additional Judge—Jurisdiction.

A District Judge has power to assign any case to an Additional Judge, who in entertaining an appeal in pursuance of such assignment, does not act beyond his jurisdiction.

Revision against the order of the Additional District Judge of Meerut, dated 1st May 1911.

Mr. *Ross Alston*, for the Appellant.

Dr. *Tej Bahadur Sopru*, for the Respondent.

JUDGMENT.—On November the 24th I called upon the Additional Judge to explain how he came to exercise jurisdiction in this case and to forward to this Court copies of any general or special orders bearing upon the question. The report now made by the Additional Judge and the copies of orders submitted by him show that in 1907 the District Judge of Meerut assigned to the Additional Judge all appeals, applications and miscellaneous cases coming from the Muzaffernagar district, and it is in pursuance of those orders that the present Additional Judge entertained the appeal in the present case. It is contended that the District Judge had no power to make over the work of the Muzaffernagar district to the Additional Judge and that the word 'assign' in section 21 sub-section (3) of the Civil Courts Act does not refer to action to be taken by the District Judge but to action to be taken by the Local Government. There is no section in the Act which empowers the Local Government to assign to an Additional Judge work which in the ordinary course would come before a District Judge but there is a provision in section 8 sub-section (2) to the effect that an Additional Judge shall discharge any of the functions of the District Judge which the District Judge may assign to him. It is quite clear to me that the District Judge had power to assign appeals and other cases coming from the Muzaffernagar district to the Additional Judge. Therefore, the Additional Judge had jurisdiction to hear the appeal in the present case. The application for revision fails and is dismissed with costs.

Application disallowed.

NGA PYAN *v.* EMPEROR.

(s. c. 4 Bur. L. T. 267.)

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 172 OF 1910.

March 21, 1911.

Present:—Mr. Shaw, J. C.

NGA PYAN—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), *ss.* 84, 307, 471—*Unsoundness of mind—Proof—Evidence.*

The accused was convicted for an offence, under section 307 of the Penal Code. It was found from the evidence for the prosecution that he was known as "Mad Nga Pyan"; that immediately before he committed the offence he was noticed by persons to be in one of his mad fits, that he was under a delusion that the Phongyi whom he attacked was keeping his sisters and daughters in the monastery, that he confessed to the investigating Officer and the headman, that he discontinued the attack when he was asked to do so and that the act was utterly unprovoked and motiveless:

Held, that under these circumstances the accused was at the time of committing the offence incapable, by reason of unsoundness of mind, of knowing the nature of the act or that it was wrong or contrary to law.

Appeal against the finding and sentence of the Sessions Judge, Magwe, in Sessions Trial No. 32 of 1910, whereby appellant was convicted under section 307 of the Indian Penal Code, and sentenced to 10 years' transportation. Mr. *H. M. Lutter*, Public Prosecutor, for the Respondent.

JUDGMENT.—Appellant Nga Pyan, 43, has been convicted under section 307, Indian Penal Code, and sentenced to 10 years' transportation for having on the 18th September 1910 at Aingtha attempted to murder a Pongyi U. Ahsinna by cutting him with a *da*.

The facts are not open to doubt. There were several eye-witnesses and the appellant does not seriously attempt to deny what he did. The Pongyi was lying on a bedstead under his monastery when appellant, without any sort of provocation, attacked him with a *dama* that had been lying on the bedstead. The Pongyi succeeded after the first cut in getting away, but when he tripped and fell, appellant who had pursued him renewed his attack. There was no sort of motive for ill-will on the appellant's part towards the Pongyi. There were eight wounds on the Pongyi, four of which were declared by the Medical Officer as grievous and at least two were in dangerous situations. Having regard to the number and character of the wounds, an intention to cause death must be inferred.

The appellant in his defence pleaded insanity. But the Sessions Judge after studying Mayne's Commentary came to the conclusion that appellant was not incapable of knowing the nature of his act or that it was wrong or contrary to law.

The evidence as to appellant's state of mind was all given by the witnesses for prosecution. The appellant called no witnesses. There is, however, practical unanimity. Appellant was known as "the Mad Nga Pyan." He was sometimes mad and sometimes sane. When mad he was restless and could not eat and went about shouting, crying out that he was surrounded and attacked and praying for help and trying to hide. It is to be remarked that here we have evidence indicating an unmistakable delusion characteristic of insanity. On the 18th, immediately before his attack on the Pongyi, appellant was noticed by more than one person to be in one of his mad fits. One observed that he was restless, another that he was silent and sullen. He himself explained to the Pongyi that his "mind was hot." The Pongyi advised him to continue telling his beads. This was only a short while before he attacked the Pongyi. As the Sessions Judge also observed, appellant immediately before the attack said that he wanted to see his children. The Pongyi himself gave one explanation to the trying Magistrate, *viz*, that appellant thought his children were dead. Another explanation would seem to be furnished by what appellant said to the Sub-Inspector when the latter arrived to begin his investigation on the day on which the occurrence in question took place. As a confession what he said to the Sub-Inspector could not, of course, be proved against appellant. But I see no reason why it should not be proved in appellant's favour in reference to his state of mind. It was to this effect, that he met the Pongyi because the Pongyi was keeping his sisters and daughters in the monastery. Appellant had, as far as the proceedings show, no sisters, and only one daughter, a girl of 12, who was in the village at the time of his attack on the Pongyi. It seems to be quite clear that the Pongyi was not keeping any women folk in the monastery. As the Sessions Judge perceived, a delusion seems to be involved here, whichever explanation we accept. To the headman, on the same day, appellant said that he had apologised to the Pongyi and

the Pongyi had accepted his apology. I cannot see in this statement evidence of sanity On the contrary, such a statement could hardly have been made by a man in his senses It does not, to me, appear to afford any indication that appellant knew (at the time of committing the act) that he was doing what was wrong or contrary to law. The failure to appreciate the gravity of his act, is so great as to be inconsistent with such knowledge even at the time of the statement nor can I see any evidence of sanity in the fact that after having very nearly killed U. Ahsinna appellant desisted from his attack when U. Lekkana ordered him to do so. Next day appellant was apparently quite sane and thenceforward he exhibited no symptoms of mental unsoundness. But this does not mean that he could not have been insane before, and there is no reason for doubting the truth of the evidence that he had been, which I have already summarised. The learned Sessions Judge believed it, for he held that the accused before his assault on the complainant had not been in a normal state of mind and was subject to delusions. I agree that it is unsafe to admit a plea of insanity upon arguments merely derived from the character of the crime—though cases are not unknown in which such a plea has been admitted on no other ground. But here we have other evidence, *viz.*, the evidence just referred to, and taken in connection with that evidence, the utterly unprovoked and motiveless character of the act in question indicates very strongly that appellant was of unsound mind and incapable within section 84, Indian Penal Code, at the time he committed it. Appellant's omission to escape or conceal himself is a fact tending in the same direction. My opinion is that appellant is entitled to be acquitted. I find that the accused Nga Pyan attempted to murder U. Ahsinna, an offence punishable under section 307, Indian Penal Code, but that at the time he did so he was incapable by reason of unsoundness of mind of knowing the nature of the act or that it was wrong or contrary to law and I direct that he be acquitted of the said offence.

The case is to be reported to the Local Government under section 471, Criminal Procedure Code, and meanwhile the accused is to be detained in safe custody as required by that section.

(S. C. 4 Bur L. T. 279.)

LOWER BURMA CHIEF COURT.

CRIMINAL APPEAL No. 342 OF 1911,
August 4, 1911.

Present:—Mr. Justice Ormond.

NGA PO YON—APPELLANT

versus

MESSRS. MOHR BROTHERS AND COMPANY LIMITED—RESPONDENTS.

Penal Code (Act XLV of 1860), s. 420—Cheating—Advance obtained on false representation—Promissory note executed—Admissibility of oral evidence to prove representation of intention—Prosecution bound to prove falsity of representation—Evidence Act (I of 1872), s. 92.

The accused obtained an advance from the complainants through a broker on the representation that he had two boat-loads of paddy in the creek and that he would bring them to the mill and would sell them to the complainants. The accused and the broker jointly executed a promissory-note for the advance in favour of the complainants. The promissory-note contained no statement of the representation made by the accused. Subsequently the accused absconded; and it appeared he had no boat-loads of paddy. The complainants thereupon preferred a charge of cheating against him:

Held, (1) that oral evidence was admissible to prove the representation of fraudulent intention and as the representation of intention was not inconsistent with the written agreement and would not have been embodied in it, there was nothing in the Evidence Act to preclude evidence being given of the representation of intention.

Reid v. *So Hlaing*, 5 L. B. R. 241; 3 Bur. L. T. 124; 8 Ind. Cas. 952; 11 Cr. L. J. 738, explained and distinguished.

(2) That it was not sufficient to prove that the accused promised to bring paddy to the mill at some time or other and failed to do so; the prosecution must show that the representation made by the accused was false, that is, at the time of making it he had no intention of carrying out the promise.

(3) That the facts warranted the inference that the accused's representation was false.

Mr. *Jordan*, for the Appellant.

Mr. *McDonell*, for the Respondents.

JUDGMENT.—On the 14 June 1907, the accused sold one boat-load of paddy to the complainants at their mill through their broker, Ko Hmya. Accused asked the broker for an advance of Rs. 1,500 saying that he had two more boat-loads of paddy in the Kanaungto Creek and that he would bring them to the mill and would sell the paddy to complainants. The broker took the accused to the Manager of the mill and repeated to him the accused's statement and obtained for the accused an advance of Rs, 1,500, for which he and the accused jointly executed a promissory-note in favour of the complainants. The promissory-note bears these

words: "For value received, this day in cash advance for the supply of grain." The accused absconded and the complainants preferred a charge of cheating against him. He has been convicted under section 420 of the Indian Penal Code and now appeals.

Mr. Jordan for the accused contends that the transaction was one between the accused and the broker, and not between the accused and the mill: and that upon the authority of the Full Bench case of *Reid* v. *So Hlaing* (1), no evidence of the arrangement between the parties besides the promissory-note is admissible. Mr. McDonnell, who appears for the prosecution, asks me to hold that under proviso 1 to section 92 of the Evidence Act such evidence is admissible, in accordance with the opinion of Mr. Justice Twomey expressed in *So Hlaing's case* (1), and also in accordance with the opinion of Mr. Justice Hartnoll expressed in the present case, when ordering further inquiry on the 16th September 1910.

I find it difficult to apply the first proviso of section 92 of the Evidence Act to the present case, because the promissory-note is not impugned in any way. But I think evidence of the false representation is clearly admissible. All that was decided in *So Hlaing's case* (1) was that where a party to a written contract institutes a criminal proceeding against another party to such contract, and the question arises what the real contract between the parties was, the provisions of section 92 of the Evidence Act apply, and the complainants must be deemed to be a "party" to the case within the meaning of that section.

In a case of cheating such as the present case, the question primarily is:—Did the accused fraudulently or dishonestly induce the complainants to part with the money mentioned in the promissory-note by an untrue representation of fact? The representation of fact in this case being that the accused had two boat-loads of paddy in the creek and that it was his intention to bring them to the mill and to sell the paddy to the complainants. The question of admissibility of evidence only arises in connection with the representation of intention if the intention is expressed in an oral promise and if the oral promise is inconsistent with a contemporaneous written agreement which is not impugned, or if the oral promise is such that (had it in fact been made) it would have been expressed in the written agreement; the rules of common sense, apart from the provisions of the Evidence Act, would exclude evidence attempting to prove such oral promise:— because any such evidence would not be sufficient to support a conviction in the face of the written agreement. But it would be open to the accused to show that the alleged representation was embodied in an oral promise which was inconsistent with the written agreement. Such evidence would be adduced not "for the purpose of contradicting, varying, adding to or subtracting from the terms of the written agreement," but for the purpose of showing either that the alleged representation could not have been made, or that it could not have operated as an inducement to the complainant to part with his property. On the other hand, if the alleged representation of intention is not inconsistent with the written agreement, and would not have been embodied in it, there is nothing in the Evidence Act to preclude evidence being adduced to prove the representation.

A promissory-note is essentially a self-contained and complete contract in itself; and a promise to deliver goods could not be a term of that contract. To admit, therefore, evidence to prove such a promise would not be to *add* to the terms of the promissory-note. And the only question that could arise as to the admissibility of evidence to prove the alleged representation of intention would be:—Is the alleged representation inconsistent with the contract embodied in the promissory-note? No presumption arises that, because there was a promissory-note, there were no other contemporaneous transactions or negotiations between the parties. Promissory-notes are frequently used as security in commercial dealings when advances are made; and I see nothing inconsistent in a mill giving as a loan re-payable on demand, money to a trader who has agreed to sell paddy delivery of which is to be given on a future date; even though it may be understood by both parties that in all probability the loan would not be called in before the date for delivery of the paddy, and that on delivery the price would be deducted from the loan. The loan is in fact independent of the contract of sale;

(1) 5 L.B. R. 241; 3 Bur. L. T. 124; 8 Ind. Cas. 952; Cr. L.J. 738.

although the contract of sale (or, more strictly speaking, the representation of the vendor that it was his intention to deliver the paddy in accordance with the contract of sale) operated as an inducement to the purchaser to make the loan. In the present case there was no contract of sale. The intention of the accused (if true) to bring and to offer for sale the paddy would be a fact independent of any contract and would not be inconsistent with a contract of loan, though it might have been induced by, and was an inducement for, the loan.

There can be no doubt that the alleged representation was made by the accused to the broker, in order that the broker might obtain the Rs. 1,500 from the complainants upon the faith of that representation, as a loan from the complainants to the accused; and that the complainants were induced by such representation of the accused to deliver the Rs. 1,500 to the accused. If then the representation has been proved to be false, the offence of cheating has been made out. It is not sufficient to prove that the accused promised to bring paddy to the mill at some time or other and failed to do so; the prosecution must show that the representation made by the accused was false, *i.e.*, that at the time of making it he had no intention of carrying out the promise. The accused's representation was that he had the two boat-loads of paddy then in the creek and that his intenion was to bring that paddy to the mill the next day. After receiving the Rs. 1,500 the accused absconded; I think it is legitimate to draw the inference from those facts that the accused's representation was false; and his defence is that he does not remember the transaction. The accused has been sentenced to three years' rigorous imprisonment. I uphold the conviction, but I think that a sentence of one year's rigorous imprisonment is sufficient. I alter the sentence accordingly.

Sentence altered.

(s. c. 4 Bur. L. T. 259.)

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 160-B OF 1910.

July 5, 1910.

Present:—Mr Justice Twomey.

MADAR SAHIB—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Lower Burma Land and Revenue Act (11 of 1876), ss. 18, 19,—Rules 51, 52 68, 69—Failure to comply with notice of ejectment--Demarcated grazing land—Admission of receipt and disobedience of notice—Prosecution bound to prove illegal encroachment—Application of Rules—Criminal Procedure Code (Act V of 1898), ss. 190 (c), 191--Magistrate acting on his own knowledge of fact--Failure to inform accused of his right to be tried by another Court.

In a prosecution for failure to comply with a notice of ejectment from land said to form part of demarcated grazing ground, an admission by the accused of the receipt of notice and of his failure to comply with it does not amount to an admission that he has committed an offence, as it does not imply that the accused admits his liability to ejectment. The prosecution must prove not only that the accused was served with a notice and disobeyed it but that he was actually occupying the land in contravention of rules under the Land and Revenue Act.

Rules 51 and 52 only refer to land available for temporary occupation under section 19 of the Act, and do not apply to demarcated grazing grounds.

Rule 69 deals with persons who encroach on grazing grounds.

King-Emperor v. *Po Chon*, 2 L. B R. 311; 1 Cr. L. J. 1118, referred to.

Where a Magistrate acts on his own knowledge of facts under section 190 (c) of the Criminal Procedure Code, he is bound to proceed under section 191 and inform the accused that he is entitled to be tried by another Court. Failure to comply with this imperative rule of law in section 191, is a defect which invalidates the proceedings.

Application to revise the order of the First Class Township Magistrate of Insein, dated the 3rd day of May, 1910.

Mr. *R. N. Burjorji*, for the Petitioner.

JUDGMENT.—The appellant was fined Rs. 25 under rule 51 (should be rule 52) of the rules under the Lower Burma Land and Revenue Act for failing to comply with a notice of ejectment from land said to form part of a demarcated grazing ground.

The Sessions Judge declined to interfere in revision remarking that the accused admitted the offence and that there was no reason to think the conviction was wrong. The accused only admitted that he had received the notice of ejectment. The Magistrate further noted, it is true, that "the accused pleads guilty," but the plea clearly meant no more than that he admitted receipt of the notice and failure to comply with it. There is

nothing to show that he admitted liability to ejectment. On the contrary, the village headman states that the accused gave as his reason for disobeying the notice that he was working on the land with the Deputy Commissioner's permission for some years and in a later petition to the Magistrate (in his capacity as Township Officer) the accused contends that the land occupied by him is not within the grazing ground and that he has possessed it and paid revenue on it for twenty years. If the latter statement is true the accused would have acquired landholder's rights. But in any case it is clear that the accused by no means admitted the commission of any offence and that evidence should have been recorded for the purpose of establishing his guilt before punishing him under rule 52. The Magistrate should have required proof not only that he had been served with a notice and disobeyed it but that he was actually occupying the land in contravention of rule 51.

It may also be remarked that rule 51 and rule 52 are of doubtful applicability to cases of encroachment on grazing grounds. Grazing grounds can hardly be called available lands. They are lands definitely allotted under section 20 of the Act from the land (waste and available) referred to in section 18. Rules 51 and 52 seem to refer only to lands available for temporary occupation under section 19. Demarcated grazing grounds are not such lands.

Moreover, the rules make a separate provision (rule 69) for dealing with persons who encroach on grazing grounds and this Court has indicated clearly in *King Emperor* v. *Po Chon* (1) how cases under that rule should be inquired into. There was no reason, apparently, why the accused in this case should not be prosecuted under rule 68. It can hardly be doubted that he was seriously prejudiced by the Magistrate's summary action under rules 51 and 52.

But the most serious defect of the Magistrate's proceedings remains to be noticed, namely, that though he took cognizance ostensibly under section 190 (*a*) he was really acting under section 190 (*c*) and was therefore, bound to proceed under section 191 and inform the accused that he was entitled to be tried by another Court.

(1) 2 L. B. R. 311; 1 Cr. L. J. 1118.

The Village headman was ordered by the Magistrate (in his capacity as Township Officer) on the 29th March to tell the accused that he must remove his huts and fence at once. The Township Officer added:—"If not, report on the 4th April 1910. I shall prosecute him." On the 16th April, the headman was ordered " to come to Court and make his complaint on oath." On the 19th, the headman reported "in accordance with the order to report whether Madar Sahib has cleared out or not", that Madar Sahib was still occupying the land. This report was treated as a complaint and was made the starting point of the prosecution. But it is clear from the revenue records which have been sent with the case that the Magistrate was really acting on his own knowledge of the facts as Township Officer, and that the headman's report was merely used as a device for getting over the obstacle presented by section 191. Failure to comply with the imperative rule of law in section 191 is a defect which invalidates the proceedings. The conviction and sentence are set aside and it is ordered that the fine paid by the applicant shall be refunded to him.

Conviction set aside.

(s. c. 4 Bur. L. T. 268.)

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 718 OF 1910.

March 9, 1911.

Present:—Mr. Shaw, J. C.

MI HLA SO AND ANOTHER—APPELLANTS

versus

NGA THAN AND ANOTHER—RESPONDENTS.

Penal Code (Act XLV of 1860), ss. 97, 101, 354—Outraging woman's modesty—Lover pulling woman by hair and hand—Private defence—Right of third person to prevent assault—Acquittal—Interference—High Court—Erroneous interpretation of law.

The fact that *A.* is in love with *B.* and is jealous of *C.* does not authorise him to pull *B.*'s hair and hand. An assault of this kind made in the presence of several persons is calculated to outrage the woman's modesty and is punishable under section 354 of the Penal Code.

A person, who sees a woman being assaulted in the manner described in sections 97 and 101 of the Penal Code, is justified in going to her assistance and even in cutting another person with a *da* if the latter interferes to prevent him.

An erroneous interpretation of law to the effect that a man claiming to be the lover of a woman is entitled to pull her by the hair and hand is alone

NGA PO CHEIN v. EMPEROR.

sufficient to justify interference with an order of acquittal.

Po Han v. *Thaleni*, U. B. R. 1897-1901, I, 104, relied upon.

Revision of the finding and order of the Sub-Divisional Magistrate, Meiktila, in Criminal Case No. 146 of 1910, convicting the accused under sections 354 and 324.

Mr. *A. C. Mukerjee*, for the Appellants.

Mr. *S. Mukerjee*, for the Respondents.

ORDER.—If accused Nga Than was in love with Mi Hla So and was jealous of Lu Gyi, that did not authorise him to pull Mi Hla So's hair and hand. An assault of the kind in the presence of several persons suggests to Burmese on-lockers that the man and woman are on conjugal terms. It is, therefore, undoubtedly calculated to outrage the woman's modesty and the applicability of section 354, Indian Penal Code, is indisputable. Again, if Lu Gyi saw Mi Hla So, assaulted in the manner described, sections 97 and 101, Indian Penal Code, justified him in going to her assistance and even in cutting Ngwe Byaing with a *da* if Ngwe Byaing interfered to prevent him. The Magistrate seems to have entirely overlooked the foregoing considerations. He also seems to have overlooked the support which the evidence for the prosecution derived from at least three of the witnesses for the defence. The erroneous interpretation of the law which he impliedly adopted in holding that accused Nga Than was entitled to pull Mi Hla So by the hair and hand, because he claimed to be her lover, is alone sufficient, on the principles explained in *Po Han* v. *Thaleni* (1), to justify me in interfering with the Magistrate's order of acquittal. The accused have had an opportunity of showing cause and they have been heard by an Advocate. The order acquitting accused Nga Than and Ngwe Byaing of offences under sections 354 and 324 respectively is set aside and it is directed that they be re-tried by another Magistrate.

(1) U. B. R. 1897-1901, I, 91.

(s. c. 4 Bur. L. T. 261.)

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 32 OF 1911.

June 10, 1911.

Present:—Mr. Eales, Offg. J. C.

NGA PO CHEIN—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860),ss. 224, 226—Prisoner under sentence of transportation—Confinement in jail before actual transportation—Escape from jail—"Return from transportation"—Interpretation of statutes Penal enactments.

Criminal statutes are to be construed strictly. It is not merely unsound but unjust to read words and infer meanings that are not found in the text.

A prisoner under a sentence of transportation, who escapes from a jail where he is confined before he is actually transported beyond the seas, cannot be convicted under section 226 of the Penal Code. His escape is not a "return from transportation."

Ramasami v. *Queen Empress*, 4 M. H. C. R. 152, followed.

Appeal against the sentence of the Sessions Judge, Meiktila, in Sessions Case No. 3 of 1911, convicting the appellant under section 226, Indian Penal Code, and sentencing him to transportation for life.

Mr. *Lutter*, Government Prosecutor, for the Respondent.

JUDGMENT.—The appellant who was not represented before me pleaded guilty before the Sessions Judge and only appealed against the severity of the sentence.

As the charge framed against the accused appeared to be illegal, I asked the Government Prosecutor to appear to support the conviction.

The facts in the case are quite simple.

On the 26th September 1905, the appellant was sentenced to 7 years' transportation by the District Magistrate of Pakokku and he was sent to the jail at Myingyan to serve out his sentence. As a matter of fact, he was not transported.

On the night of the 8th November 1907, the accused in company with three other prisoners escaped from the jail. He was subsequently re-captured and committed for trial. The charge framed against the accused to which he pleaded guilty is that on or about the night of 8th November 1907, at Myingyan, he escaped from Myingyan Jail where he was then serving his term of 7 years' transportation and which escape, therefore, is deemed to be the return from

transportation and thereby committed an offence under section 226, Indian Penal Code. Now it will be seen that the words "and which escape, therefore, is deemed to be the return from transportation" is not any part of section 226 and I cannot find any justification for the insertion of these words.

It is a well-known maxim of law that criminal statutes are to be construed strictly and that it is not merely unsound but unjust to read in words and infer meanings that are not found in the text.

The wording of the section is simple and clear. "Whoever having been lawfully transported returns from such transportation" can only mean that the offender must have been actually transported or he could not have returned therefrom.

Court has mixed up serving a term of transportation with transportation itself as if the mere passing of the sentence meant the ratification of it.

But, as a matter of fact, between the passing of the sentence and the actual transportation some time must elapse and it has been held by the High Court of Madras that a prisoner who escaped while being actually transported and before he left Madras had not been yet actually transported and hence his escape was not a return from transportation. *Ramasami* v. *Queen Empress* (1).

But in Burma, it is by no means an uncommon thing for a prisoner sentenced to transportation to serve the whole of his sentence in Burma.

The question then is, what is meant by transportation.

It is quite clear that the framers of the Indian Penal Code, by transportation meant, "transportation beyond the sea" for the words used are not, "escape from transportation" but "return from transportation" which shows that the section was framed on the Georgian Statute, IV George, Chap. 84, section 22.

To translate the plain meaning of these words into an escape from a jail in Burma, is, I think, an unwarrantable extension of the plain meaning of the section.

Moreover, the sentence that is awardable should, I think, have warned the learned Judge, for, the sentence is transportation for life and nothing short of it is a legal sentence under the section.

For a man who has been transported to the Andamans and who breaks jail and returns to India, transportation for life may be a suitable punishment, such a return is nowhere a fortuitous escape but to punish a man sentenced to 7 years' transportation when that sentence is not carried out is a sentence, which is on the face of it unduly and even grotesquely excessive in its severity. I think that the accused should have been charged and convicted under section 224, Indian Penal Code. I amend the finding and conviction accordingly and I reduce the sentence to one of 2 years' rigorous imprisonment, to take effect at the expiration of the period of the former sentence of transportation.

(1) 4 M. H. C. R. 152.

(s. c. 4 Bur. L. T. 269.)

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 723 OF 1910.

March 16, 1911.

Present:—Mr. Shaw, J. C.

J. P. DRAGON—APPLICANT

versus

EMELIE MIATAIK DRAGON—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 488—Maintenance—Wife living effectively—Absence of habitual cruelty—Amount how to be fixed—Offer to maintain, when valid.

The present Code does not restrict payment of maintenance, where the wife is living separately, to cases in which she has been treated with habitual cruelty.

Ma The v. *Tha* E. U. B. R. 1897-01, 1,104, distinguished.

In fixing the amount of maintenance, no luxury should be allowed and necessaries of life should be considered according to the station in life of the applicant and the means of the respondent.

An offer to maintain, in order to be a valid defence must be a *bona fide* offer and not made with the object of escaping the obligation to maintain.

Revision of the order of the Western Sub-Divisional Magistrate, Mandalay, in Criminal Miscellaneous No 220 of 1910, ordering the applicant under section 488, Criminal Procedure Code, to pay Rs 50 monthly as maintenance to respondent.

FACTS.—The applicant and the respondent were married in August 1909 in Mandalay and lived together as man and wife till

NGA LU PE v. EMPEROR.

July 1910 when a quarrel broke out over a gramaphone, which the applicant had taken to his sister's house, and also over a diamond-ring of the respondent which the applicant had lent to one of his sisters. The applicant left his wife and went and lived with his two sisters and a brother. The respondent wrote three letters to the applicant asking him to come back to her. The respondent was asked by applicant to go and live with him in his sister's house which the respondent refused. After the marriage, they were living in the house of respondent's mother free of rent. On the application of the respondent, the Western Sub-Divisional Magistrate held that she was justified in her refusal to go and live in the applicant's sister's house and ordered the applicant to pay Rs. 50 per month to the respondent as maintenance.

The following is the order of the Magistrate regarding the allowance.

"The Advocate for respondent (the husband) in his argument says that the amount required for actual necessaries of life should be fixed in maintenance cases; the Advocate for applicant (the wife) says that the necessaries of life of a common coolie woman and those of a respectable lady cannot be the same and he urges that it is necessary to consider the station of life. In determining the amount of allowance, I quite agree that no luxury should be allowed, but necessaries for life should be considered according to the station of life of the applicant and the means of the respondent. In the present case the respondent is drawing Rs. 145 a month and according to his admission, he used to pay the applicant at the rate of Rs. 70 per month for four months though he did not mess with her. This shows that the household monthly expenditure of applicant amounted to Rs. 70. There may be probably luxuries in this expenditure of Rs. 70, but I do not think the luxuries would amount to Rs. 20. I consider full amount Rs. 50 per month allowed by law should be granted in this case.

Mr. *J. C. Chatterjee*, for the Applicant.

Mr. *H. M. Lutter*, for the Respondent.

ORDER.—After perusing the proceedings, I am of opinion that I should not interfere. The case of *Ma Thi* v. *Tha E* (1) was decided under the previous Code. The present Code does not restrict payment of maintenance where the wife is living separately to cases in which she has been treated with habitual cruelty. Having regard to the circumstances under which applicant left the house and the evidence as to the relations between respondent and applicant's sisters, the finding of the Magistrate that applicant's offer to maintain respondent if she went and lived with him in the same house with the sisters was not a *bona fide* offer and was made with the object of escaping his obligation to maintain his wife was reasonable and I cannot find sufficient ground for interfering with it.

As to the amount of maintenance the Magistrate seems to have had a perfectly correct view of the law and I am not prepared to say that he was wrong in fixing upon Rs. 50 as the amount which applicant should pay.

The application is dismissed.

Application dismissed.

(1) U. B. R. 1897-1901, I, 104.

(s. c. 4 Bur. L. T. 262.)

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 370 OF 1910.

June 29, 1911.

Present:—Mr. Eales, Offg. J. C.

NGA LU PE—APPLICANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 182, 193—Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute—Perjury—False charge by witness made voluntarily and irrelevantly.

A witness is bound to speak the truth though he may have to make statements on oath which he would hesitate to utter in private life. A *bona fide* truth-speaking witness must, therefore, be protected even when he utters things that cannot be proved against others in the witness-box. The Court must use its discretion to refuse sanction when necessary.

Where a charge against another person is made by a witness not in the course of his evidence or in answer to a question but quite voluntarily and irrelevantly, sanction can be properly granted to prosecute the witness under section 182 of the Penal Code.

Although it would be dangerous to hold that the mere fact of a witness having made contradictory statements would justify a Court in granting sanction to prosecute him for perjury, the propriety or impropriety of such a grant of sanction must rest on the circumstances.

Emperor v. *Tripura Sankar Sircar*, 37 C. 618; 14 C. W. N. 767; 6 Ind. Cas. 476; 11 Cr. L. J. 360, referred to.

NGA LU PE v. EMPEROR.

Revision of the finding and sentence of the Sub-Divisional Magistrate of Myittha in Criminal Case No. 159 of 1910 convicting the applicant under section 182, Indian Penal Code, and sentencing him to one month's rigorous imprisonment.

Mr. *J N. Basu*, for the Applicant.

JUDGMENT.—Lu Pe was tried and convicted under section 182, Indian Penal Code, and there being no appeal he came up on revision on the 22nd November 1910. My learned predecessor admitted the case and let him out on bail. The case came up for hearing on 31st January and was adjourned from time to time as another charge under section 195, Indian Penal Code, was pending against him.

The case was adjourned till the result of the trial was known. Accused was convicted. He appealed to the Sessions Judge, Meiktila, who on the 20th May confirmed the conviction against Lu Pe under section 193.

I had already, on 30th May, heard the Advocates on the charge under section 182, before the result of the appeal was known and I adjourned the case as it was impossible, I found, to pass orders in this case without seeing the proceedings in the cases under section 193, Indian Penal Code.

The report came on for the 8th, I again called the case on the 6th. Mr. Basu presented the appeal under section 193, Indian Penal Code.

On the case being called, both Advocates said they had no more to say and left the case in my hands.

I have read the voluminous records in this case.

It is, I find, very difficult to find out, where the lying begins and ends. Lu Pe, Po Ye, Lu Gale, are all Zerbaddis, all Mahomedans, and I fear all liars. That Lu Pe committed perjury, there can be no possible doubt, but I am bound to say I have considerable doubt whether his charge of receiving bribes that he brought against Lu Gale is not really true. I don't go so far as to say I believe it. Human credibility has its limits. Still I dont't feel sure there is not some truth in it.

The learned Advccate Mr. Basu urged that Lu Pe was being punished twice over for the same offence, once under section 182, and once under section 193.

The learned Sessions Judge has considered this point. I concur in his finding and it is quite unnecessary to go into this matter except to say Lu Pe is not being punished twice over for the same offence.

The learned Counsel then quoted the case *Emperor* v. *Tripura Sankar Sircar* (1). But while I agree in saying that it would be dangerous to hold that the mere fact of a witness having made contradictory statements would justify a Court in granting sanction to prosecute him for giving false evidence, I would hold that the propriety and impropriety of such a grant of sanction must rest on the circumstances. The present case is not at all on all fours with the Bombay case and I think that the accused was rightly prosecuted under both sections. This, however, really belongs to the consideration of the appeal under section 193, Indian Penal Code, and not here

As I said before, I rise from a perusal of the case with considerable doubt in my mind as to the applicant's guilt in this case. I think he ought to have been tried after he went out of his way to bring a charge against the Thugyi in the witness-box and this was a most interesting point on which, however, neither learned Counsel dwelt, how far a witness is protected from a charge under section 182 for statements made while giving evidence. It must be recollected that a witness is bound to speak the truth and he may have to make statements on oath which he would hesitate to utter in private life. A witness is liable, therefore, to have to incriminate others and *bona fide* truth speaking witnesses must be protected even when they utter things that cannot be proved against others in the witness-box. The Court must use its discretion to refuse sanction when necessary. Was that discretion used here? On the whole, I am inclined to believe that discretion was used. The charge against the Thugyi was not made really in the course of the witnesses' evidence or in answer to a question, but apparently quite voluntarily and irrelevantly.

After all this, however, is admitted, I am still doubtful whether in the light of the proceedings now before me if accused was rightly convicted under section 182, Indian Penal Code. I am bound to give him the benefit of the doubt.

(1) 37 C. 618 C. W. N. 767; 6 Ind. Cas. 476; 11 Cr. L. J. 360.

EMPEROR v. NGA SIT CHO.

I therefore, set aside the order of conviction and sentence of one month's rigorous imprisonment and I set aside the sentence or so much of it as remains unserved under section 182.

Conviction and sentence set aside.

(s. c. 4 Bur. L. T. 271.)

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No 344 OF 1911.

July 1, 1911.

Present:—Mr. Eales, Offg. J. C.

EMPEROR—APPLICANT.

versus

NGA SIT CHO—RESPONDENT.

Summary trial—Offence punishable with one year's rigorous imprisonment—Opium Act (I of 1878), s. 9—Subsequent regular trial without summary trial being quashed ultra vires—*Criminal Procedure Code (Act V of* 1898), *s.* 530.

The accused was prosecuted for an offence under section 9 of the Opium Act punishable with one year's rigorous imprisonment. The additional Township Magistrate tried the case in a summary manner and imposed a sentence of 4 months' rigorous imprisonment. The District Magistrate having declared the trial void, the Magistrate re-tried the case in the regular manner and imposed the same punishment:

Held, that both the trials were void *ab initio*.

The summary trial was *ultra vires*, as the offence being punishable with one year's rigorous imprisonment, the Magistrate had no jurisdiction to try the case summarily.

The regular trial was *ultra vires* as the former proceedings not having been quashed by the High Court, the accused could not be tried over again.

The whole proceedings were quashed and a re-trial ordered.

Proceedings submitted by the District Magistrate, Minbu, for orders in revision of the finding and sentence of the Additional Township Magistrate, Salin, in Criminal Case No. 93 of 1911, convicting the accused under section 9 (*c*) of the Opium Act and sentencing him to four months' rigorous imprisonment.

ORDER.—The learned District Magistrate in submitting the proceedings in the case, Criminal Regular No. 93 of 1911 in the Court of the Additional Township Magistrate reported as follows:—

"It will be seen that the Magistrate originally tried the case in a summary manner and imposed a sentence of 4 months' rigorous imprisonment. Recognising that this sentence was *ultra vires* he submitted his proceedings to me, and in my order in Revision Case No. 80 of 1911 I directed the proceedings to be submitted to the Judicial Commissioner. Owing to the carelessness of one of the clerks, the copy of this order was sent to the Magistrate, instead of the Registrar, and the Magistrate, thereupon, proceeded to try the case regularly and impose the same punishment. It seems clear that until the first order be quashed by competent authority, the Magistrate has no power to pass any further order even though he imposes a similar sentence."

The proceedings are before me. It is quite clear that the regular trial of the accused which ended in his being sentenced on the 25th May to four months' rigorous imprisonment is illegal as being *ultra vires*, the former proceeings not having been quashed he could not be tried over again.

I notice, moreover, that the accused has been further prejudiced in that the date of this later order is 25th May, whereas the first sentence of four months' rigorous imprisonment is dated 15th May, the net result, so far, being that the accused's sentence was enhanced by ten days' additional rigorous imprisonment.

The question is, what is to be done? The later proceedings must be quashed of course. Next, the offence under section 9 of the Opium Act is punishable with one year's rigorous imprisonment and hence the Magistrate had no jurisdiction to try the case summarily.

Under section 530 of the Criminal Procedure Code, his proceedings are, therefore, void *ab initio* and I have no choice but to set aside these proceedings also.

I accordingly quash these proceedings also.

I have read the files and I think I must order a re-trial. The District Magistrate, Minbu, will be asked to send the accused for trial to some Magistrate having jurisdiction other than the additional Township Magistrate of Salin. If the accused be again found guilty, the Court in awarding sentence should take into consideration the time already undergone in imprisonment.

The proceedings being void and the offence bailable, the accused must be at once admitted to bail on such security as the District Magistrate may deem fit.

NGA PO SHAT v. EMPEROR.

(s. c. 4 Bur. L. T. 263).

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEALS NOS. 19 AND 20 OF 1911.

June 6, 1911.

Present—Mr. Eales, Offg. J. C.

NGA PO SHAT AND ANOTHER—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), *s.* 236—*Charges—Misjoinder of charges and persons—Theft and receiving stolen property—Penal Code (Act XLV of* 1860), *ss.* 380, 411, 414.

Four accused were tried together, the first under section 380, the second under sections 380 and 411, the third and the fourth under sections 411 and 414, Indian Penal Code.

All the stolen property for receiving or disposing of which the four accused were charged was traced to possession of the first accused:

Held, that the disposal of the property was one and the same transaction and that there was no misjoinder of the charges or of the persons in the case.

Nga Nyo Gyi v. *Emperor*, U. B. R. 1907-09, Cr. P. C, p. 5; 14 Bur. L. R. 38; 6 Cr. L. J. 28, followed.

Subramania Ayyar v. *Emperor*, 25 M. 61; 28 I. A. 257; *King Emperor* v. *Datto Hanmant Shahapurkar*, 30 B. 49; 7 Bom. L. R. 633; 2 Cr. L. J. 578; *Emperor* v. *Jethalal Harlochand* 29 B. 449; 7 Bom. L. R. 527; 2 Cr. L. J. 480, distinguished.

Appeal against the sentence of the District Magistrate, Pakokku, in Civil Regular No. 22 of 1910, convicting the appellants under sections 411/75 and 414 of the Indian Penal Code and sentencing them to undergo 5 years' rigorous imprisonment with 3 months' solitary confinement.

Mr. *Mg Tha Gywe*, for the Appellants.

JUDGMENT.—The two accused who are nephew and aunt were tried at the same time with two other persons Nga Paw Thaing and Nga Kyaw Aung who were acquitted by the learned District Magistrate, Pakokku, who tried the case. The 1st accused Po Shat was sent up by the Police under section 380, the second accused Mi San Me under sections 380, 411 and the two accused who were acquitted were sent up under sections 411, 414. The learned Magistrate convicted Nga Po Shat under sections 411/75 Indian Penal Code, and Mi San Me under section 414 and sentenced the former to 5 years' rigorous imprisonment including 3 months' solitary confinement and Mi San Me, 18 months' rigorous imprisonment.

The facts of the case were fully set out in the judgment of the lower Court and need be only briefly recapitulated here. On the 10th October, a theft took place in the house of one Maung Ya Baw at Nyaunghla village and certain gold articles and other jewellery were stolen to the value of about Rs. 600. Towards the end of October, the date is not quite certain, the 4th accused Kyaw Aung says that the 1st accused Po Shat came to him and offered to sell him some gold, and next day Mi San Me brought to him certain articles of jewellery which he melted down to the form of bar gold, which he produced in Court. Meanwhile, Ya Baw had informed the Police; it is not very clear from the record of the lower Court how the Police came to take action. But on the 20th November, the house of Po E (8th witness for prosecution) was searched. Po E made no attempted act of concealment and gave up the gold he received from the 2nd accused, Mi San Me. On the 25th November, the house of Kyaw Aung was searched; and Kyaw Aung on 29th made a confession to the 1st Class Magistrate, Pakakku. His confession was duly recorded and I will deal with it hereafter. The other accused were arrested, their houses were searched and they were all sent up for trial together as detailed above. I think the accused Paw Thaing is rightly acquitted by the District Magistrate. As regards the accused Kyaw Aung, I think the Magistrate did right in giving him the benefit of the doubt. His purchase of the gold from Mi San Me at the low price of Rs. 74-2-0 is a very doubtful transaction, and I consider, it does tell against him and his statement is really a confession and not a mere lying exoneration of himself.

Nevertheless, I think the learned District Magistrate exercised a wise discretion in giving him the benefit of the doubt and acquitting him. The two remaining accused, Po Shat and Mi San Me, were convicted and have appealed.

The first ground of appeal is on the point of law. The learned Advocate Mr. Maung Tha Gywe quoted *Subramania Ayyar* v. *King Emperor* (1) to prove the misjoinder of charges and of persons as a material irregularity and sufficient ground for quashing the conviction. He also wishes the Court to dissent from the ruling of my learned predecessor in the case of *Nga Nyo Gyi* v. *King*-

(1) 25 M. 61; 28 I. A. 257.

Emperor (2) and also from the ruling in the case of *Nga Ta Pu* v. *King-Emperor* (3). He also tried to distinguish the facts to prove in *Nga Nyo Gyi's* case (2). The learned Counsel also drew attention to the case of *King-Emperor* v. *Datto Hanmant Shahapurkar* (4). He pointed out that the Judges had in this case insisted that there must be one object for all the accused, otherwise their acts could not be held to form parts of the same transaction. I have carefully examined these rulings and I cannot find any grounds established that there has been any misjoinder in the present case. The last ruling quoted by the learned Counsel is that of *Emperor* v. *Jethalal Harlochand* (5), but it is quite clear the accused in that case performed acts which had no connection with each other except that the property which had been sold in each case turned out to have been some of the property which had been stolen some months before, and no connection was established between each of the acts. It is quite clear that there was misjoinder of charges in this last Bombay case but the facts set forth by the Police in the present appeal are not on all fours with the Bombay case. On the contrary, all the stolen property for receiving or disposing of which the four accused were charged, was traced to the possession of the 1st accused.

First accused was said to be found in possession of certain property not long after the theft took place and the disposal of it by the agency of Mi San Me to the other men who were charged, Pa Thaing and Kyaw Aung, was rightly held by the learned District Magistrate to be one and the same transaction. I see no reasons whatsoever to disagree with the opinion of my learned predecessor in *Nga Nyo Gyi's* case (2) and the present case can be easily distinguished and does not fall within the findings in the case of *Emperor* v. *Jethalal* (5). I, therefore, hold that there was no misjoinder of charges in this case.

The learned Advocate for the appellant then argued the case on the facts. The first point he urged was that the lower Court had placed too much weight on the confession of Kyaw Aung. He urged this was no confession, but a mere exoneration of Kyaw Aung. He urged that the confession to be of any value should implicate the man who made it at least as much as the co-accused. It is quite true that Kyaw Aung's so-called confession is chiefly an exoneration of himself, but, if it were true, it is a truthful exoneration. On the other hand, I do consider that the statement by Kyaw Aung thus partook of the nature of a true confession. Kyaw Aung admitted that he bought a quantity of gold ornaments under very suspicious circumstances at a price which was very suspiciously low and the result was he was sent up for trial and narrowly escaped being convicted on his own confession. I think, therefore, in the circumstances, the learned Magistrate did quite right in taking this confession into consideration. It is urged that the evidence of the prosecution apart from this confession, is insufficient to support the conviction; that the identification is doubtful and the evidence regarding the disposal of property is tainted. I have carefully considered the evidence. I think that the identification of several of the exhibits is quite reliable and I do not think that the witnesses who were called to prove the disposal of the property by the accused are unworthy of credit. I think, even if the confession of Kyaw Aung is left out of consideration, there is still enough evidence in the record, to justify the conviction of the accused on the charge against them.

The next point raised by the Advocate for the accused is that the accused Po Shat was wrongfully prejudiced by the action of the Magistrate in calling upon him to plead to the previous conviction. I do not think he was prejudiced.

The last point is, the sentences are too severe. I do not think so. Po Shat has been convicted of dacoity and Mi Shan Me belongs to a very dangerous class of persons, namely, those who assist in disposal of stolen property, and this facilitated the action of the thieves themselves. I, therefore, uphold the conviction and sentences, and dismiss the appeal.

Appeal dismissed.

(2) U. B. R. 1907-09 Cr. P C., p. 5; 14 Bur. L. R. 38; Cr. L. J. 28.
(3) 2 L. B. R. 19.
(4) 30 B. 49; 7 Bom. L. R. 633; 2 Cr. L. J 578.
(5) 29 B. 449; 7 Bom L. R. 527; 2 Cr. L. J. 480.

In re RUDRA PROSAD.

(s. c. 14 C. L. J. 606.)

CALCUTTA HIGH COURT.

CIVIL RULE No. 3956 OF 1911.

August 24, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

In re Munshi RUDRA PROSAD, MUKTEAR—PETITIONER.

Legal Practitioners Act (XVIII of 1879), *s.* 13—*Attesting Will after testator's death—Misconduct—Extenuating circumstances—Lenient punishment.*

Immediately after the death of a person, a *muktear* was pressed by persons interested in establishing a Will, to sign it as an attesting witness. He took time to consider the matter. Subsequently in a moment of weakness he signed as an attesting witness; Will bore what purported to be the signature of the deceased and which was like his genuine signature with which the *muktear* was familiar as his officer, and which signature was subsequently found to be genuine by the Court. The *muktear* was examined by the Probate Court, but he made no attempt to perjure himself and freely disclosed what he had done. He had been a member of the profession for over 25 years and had borne a good character and was sincerely repentant:

Held, that although his conduct was wholly unworthy of the profession, yet under the circumstances he should be dealt with mercifully.

Rule under the Legal Practitioners Act.

Babus *Mohendra Nath Roy* and *Biraj Mohan Mojumdar*, for the Petitioner.

JUDGMENT.—This is a Rule issued by this Court under section 13 of the Legal Practitioners Act, calling upon one Rudra Prosad, a *muktear* practising at Muzafferpore, to show cause why he should not be suspended or dismissed. Rudra Prosad was examined as a witness at the instance of the Court in a Probate case. In the course of his deposition he stated that he had attested the Will of which Probate was sought, four days after the death of the testator. According to him the testator died on the 5th December 1910, and immediately afterwards he was pressed by persons interested in establishing the Will, to put his name down as an attesting witness. He admits that he was not present at the time of the execution of the Will nor had he obtained from the testator an acknowledgment of his signature. In the affidavit which has been placed before us in this Court he admits that when it was first suggested to him that he should put his name down as that of an attesting witness he took time to consider the matter. This plainly indicates that he was aware that what he was pressed to do was not right. In spite of this, he yielded to pressure and as he puts it, in a moment of weakness ultimately consented to put his name down as an attesting witness. It has not been disputed before us, indeed it cannot be disputed that the conduct of the *muktear* has been wholly unworthy of the profession to which he belongs and the learned Vakil who has appeared on his behalf has made no attempt to justify his act. He has submitted, however, that there are circumstances which might well be taken into account by the Court with a view to determine the mode in which the *muktear* should be dealt with under section 13 of the Legal Practitioners Act. It has been urged that he has been a member of the profession for over 25 years, that as evidenced by the certificates produced, he has hitherto borne a good character and that he is sincerely repentant for his misconduct. There is also the circumstance that he proceeded on the assumption that the document was genuine because what purported to be the signature of the testator was like his genuine signature (with which he was familiar) as his officer and has subsequently been found to be genuine by the Court below. There are, no doubt, relevant circumstances and, but for them, we would have been prepared to dismiss him, because an act of this character on the part of a professional gentleman is reprehensible in the highest degree. In view of these circumstances, and also of the fact that in the Court below the *muktear* made no attempt to perjure himself but freely disclosed what he had done, we have decided to deal with him very mercifully. The order of the Court is that he be suspended for three months from this date.

(s. c. 4. Bur. L. T. 270.)

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 298 OF 1911.

May 4, 1911.

Present:—Mr. Shaw, J. C.

EMPEROR—APPLICANT

versus

NGA PO SIN—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 110, 120, 123—Security—Detention of accused in jail subsequent to expiry of period of security—Date of expiry to be mentioned in bond—Making each surety liable for whole penalty.

A Magistrate has no power to keep a man in jail beyond the period for which security was ordered.

It is a serious mistake in the bond to make each of the sureties liable for the full penalty of the bond.

King-Emperor v. *Shwe Daung*, U. B. R. 1897-1901, I, 119, relied upon.

When a bond is not executed till after the date on which the period for which security is required commences, it should state plainly the date on which the period expires.

Proceedings submitted by the District Magistrate, Lower Chindwin, for order in revision of the finding and sentence of the Sub-Divisional Magistrate, Yinmabin, in Civil Miscellaneous Case No. 105 of 1910 whereby accused was convicted under section 110 of the Criminal Procedure Code and sentenced to execute a bond on Rs. 100 with two sureties in the like amount for one year or one year's rigorous imprisonment.

ORDER.—The District Magistrate is clearly right. Section 120, Criminal Procedure Code, declares that the period for which security is required where the accused is not undergoing a sentence of imprisonment shall commence on the date of the order. Section 123 declares, that except where the period of security exceeds one year, in which case the orders of the Sessions Judge have to be taken, the person who fails to give security on or before the date on which the period for which security is to be given commences, shall be imprisoned until such period expires or until, within such period, he gives the security. Section 126 declares that if security has been given and a surety applies for cancellation of the bond, the Magistrate shall cancel the bond and order the accused

to give fresh security for the unexpired portion of the term of the bond.

These provisions are perfectly plain and it is not intelligible how a Magistrate of the 1st Class could have supposed in face of them that he had power to keep a man in jail after the date on which the period for which security was ordered had expired.

The Magistrate is directed to recall his warrant and issue a correct one showing clearly the time for which security is required and in default accused may be detained in prison till that period expires. The original warrant was wrongly dated 27th October instead of 27th September 1910 a very serious mistake—which the Magistrate ought to have detected before he signed the warrant.

The warrant also re-produced another serious mistake made in the bond by which the sureties were made liable for Rs. 100 each, or double the penalty of the bond, which was absurd as explained in *King Emperor* v. *Shwe Daung* (1). The Magistrate must take care that these errors are not repeated. When a bond is not executed till after the date on which the period for which the security is required commences, it should state plainly the date on which the period expires.

(1) U. B. R. 1897-1901, I, 119

(s. c. 14 C. L. J. 652.)

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 490 OF 1911.

August 2, 1911.

Present:—Mr. Justice Holmwood and Mr. Justice N. Chatterjea.

JANG BAHADUR LAL—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 193, 467, 471—Charges to be separate for every act of perjury or forgery—Independent evidence of user in each case—Asking of forgiveness—Incriminating statement—Confession

JANG BAHADUR LAL *v.* EMPEROR.

There must be a separate count for every alleged item of perjury or forgery, and this means that there must be independent evidence of user in the case of each document.

The expression "Sir, kindly forgive the fault. Such thing shall not take place again," is not an incriminating statement; and when used with reference to alleged forged receipts, is not an admission of forgery or of using a forged document.

The conduct of a tenant is not evidence upon which the question as to the rate of rent can be decided.

Appeal against the conviction and sentence passed by the Sessions Judge of Shahabad, dated May 30th, 1911.

Babu *Dasarathi Sanyal*, for the Appellant.
Mr. *Sultan Ahmad*, for the Crown.

JUDGMENT.—This is an appeal from the judgment and sentence of the learned Sessions Judge of Shahabad who, agreeing with both the assessors, found the accused Jang Bahadur Lal guilty of the offence of using as genuine a false document, to wit, two rent receipts, and sentenced him to three years' rigorous imprisonment under section 471, read with section 467, Indian Penal Code.

We have had the evidence put before us and the judgment of the learned Judge and we are of opinion that, apart from the questions of law which arise in the case, it would altogether be too dangerous to support this conviction on the evidence.

The case starts with a serious initial error in respect of the charge and that error seems to have been carried into the learned Judge's reasonings with regard to the user. Two documents are said to have been used which the accused knew to be forged. Now it might very well be that the decision of the Court would be that one of these documents was genuine and the other forged. In which case the charge as framed would entirely break down. The law is clear that there must be a separate count for every alleged item of perjury, or forgery, and this means that there must be independent evidence of user in the case of each document. Now what is the evidence in this case. The Assistant Settlement Officer says, that these two receipts were filed in support of the accused's claim, that his rent was Rs. 3 and not Rs 3-12, and he says it does not appear whether the other receipts and papers in the bundle were filed for that purpose or not, but he is convinced that they were not used. Now the *patwari* on whose evidence this case principally depends deposed that the accused "took the papers out of his pocket in a bundle and threw them on the table in front of the Deputy. The Deputy was doing work in attestation camp surrounded by bamboos. The parties were outside the bamboos. The Deputy Saheb took up all the receipts and saw them and asked me if I had granted them. I said I could say that if I saw them. I saw them and saw that the signatures on them were different and that they did not bear my signature or my father's signature or the *malik's* signature. Also the rent was less. They purported to be signed by Sheo Barat Singh and my father and two of them purported to be signed by me. None of the signatures were genuine. All the receipts filed by him at that time were forged." He does not say under what circumstances the accused person was taxed with forgery and made what is held by the Judge to be unincriminating statement. But it is perfectly clear from his evidence that these documents were not tendered by the accused independently and that the Settlement Officer himself selected these two receipts for inquiry and discarded all others. It now turns out, according to the *patwari's* own evidence, that two of these documents at least are genuine, and it is clear from the Settlement Officer's evidence that the *patwari* did not aver before him that any of the documents were forged except Exhibits Nos. 1 and 2. We then have it from the Settlement Officer's evidence that he examined the *patwari* and the *malik's* son and that he then taxed this accused with forgery and he asked him to write the *patwari's* name and the name of Sheo Barat. The accused did so, and then the recollection of the Settlement Officer is not quite clear as to whether he asked the accused to sign his own name or not. But, however that may be, the accused fell at his feet and asked the following words: —"*Hazur kasur map kiya jai, ab aisa kubhi nahin hoga.*" Now this is not in itself an incriminating statement and the Settlement Officer does not say that he at the time was of opinion that the man had admitted these papers to be forgeries. He says that he is influenced by the man's conduct in thinking that the *malik's* statement as to the amount of rent is true: and that the *raiyat's* statement is false. But the words in themselves

are not an admission of forgery or of using forged document. It is easy to understand that a man in the *mofusil* being suddenly asked to sign his name and the names of the people whose names he is alleged to have forged would ask to be excused. The statement in itself is certainly not a confessional statement.

Then we have looked at the handwriting, and it is difficult to say that this receipt Exhibit No. 1 or Exhibit No. 2 was not, as a matter of fact, signed by the former *patwari* the father of Ram Pergash. There is one Exhibit No. 15 which his son cannot deny is not in his handwriting; which would rather lead to the conclusion that they were signed by Brijnandun, the father of Ram Pergash. They certainly were not signed by the accused; and the evidence of Sheo Barat who declared that a number of genuine documents were false and not in his handwriting, although his *patwari* proved that they rendered his evidence entirely worthless. We have, therefore, to rely entirely on the evidence of this *patwari* who contradicts the Settlement Officer on every point as regards the user of these documents.

Then there is the objection which the learned Judge feels to be a very grave one that from 1300 to 1315 this *malik* Sheo Barat says that no printed receipts were granted by him, but a still graver objection has not been noticed by the learned Judge that under the law he was compelled to keep counterfoil receipts whether printed or not, and he is unable to produce any counterfoil for that period. His statement, therefore, in regard to his own receipts is of very little value.

Then, again, as regards the question what the rent is, there is absolutely no evidence worth the name to show that it is Rs. 3-12 0 and not Rs. 3. The *sehas* are completely useless for that purpose. They contain no entry of Rs. 3-12-0 paid at any time by the accused; whereas they do contain an entry of Rs. 3 and another Rs. 1-14 0 having been paid by him on dates other than those of the receipts. The only way in which they can be used is that they omitted any reference to these two receipts. But it is not contended that the *sehas* contain item by item every receipt that was granted. Now, in support of the fact that the rent is Rs. 3-12-0 the only papers produced are the *jamabandi* and those *jamabandis* are said to have been prepared from the *sehas* and a written account-book. As we have seen, the *sehas* throw no light on the matter and the written account-book is not produced, and its non-production is in no way explained. The learned Settlement Officer candidly admits that his opinion as regards the rate of rent was based almost entirely on the accused's conduct. That we need hardly say is not evidence upon which the question as to the rate of rent can be decided in a Civil Court, and we think it is quite open still to the parties to say that the rate of rent is not decided. The accused is young man of 20 years of age and was acting for his father. The fact that he threw all these documents in a bundle on the table raises a great doubt as to whether he was minutely acquainted with the contents of each of those documents. No doubt he is a young man of education and has general knowledge of his father's affairs; but his very conduct shows that he was startled and taken aback when he was charged with forgery in respect of these two documents. Had he gone there with the deliberate intention of using these papers he would have been prepared for this accusation and would have strenuously denied that they were forgeries and put the *patwari* to the proof, and if he had done so, it would have been exceedingly difficult for the *patwari* to prove that they were forgeries.

We, therefore, think for all these reasons that it would not be safe to uphold this conviction and we, therefore, set aside the conviction and sentence and direct that the accused be acquitted and released.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 340 OF 1910.

December 19, 1911.

Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.

NATH MAL DAS—PLAINTIFF—APPELLANT

versus

DALIP SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Mortgage by father—Son's liability—Interest—Mortgagee to prove necessity of borrowing money at exorbitant rate of interest—Burden of proof.

In a suit brought by a mortgagee on foot of a mortgage, executed by a Hindu father, the mortgagee should prove not only that there was necessity for borrowing the money but that there was necessity for borrowing it at the exorbitant rate of interest stipulated in the bond.

Chandra Deo Singh v. *Mata Prasad*, 31 A. 176; 1 Ind. Cas. 479; 6 A. L. J. 263; *Nand Ram* v. *Bhupal Singh*, 8 A. L. J. 1294; 13 Ind. Cas. 5, referred to.

First appeal from the decision of the Subordinate Judge of Moradabad, dated 23rd June 1910.

Mr. *Howard* (with him Mr. *Shafiuzaman*), for the Appellant.

Mr. *Choudhri* (with him Mr. *Nihal Chand*), for the Respondents.

JUDGMENT.—This was a suit by the appellant upon a bond dated March the 12th, 1889, executed by the respondent Khub Singh and by Khiali Singh and Dalip Singh who are represented by respondents Nos. 2 and 3. The bond states that the executants have borrowed Rs. 20 from the appellant and that they have agreed to pay that sum on demand with interest at Rs. 3·2 per cent. per mensem *i. e.* $37\frac{1}{2}$ per cent. per annum, and in case of default of payment of interest to pay compound interest at the same rate calculated with half yearly rests. According to the terms of the bond there was due to the appellant when this suit was instituted no less than Rs. 23,047. The appellant abandoned Rs. 17, 547 feeling, no doubt, that no Court would award him that sum and has claimed Rs. 5,500. The Court below has given the appellant a decree for the principal sums Rs. 20 with interest at the rate of Rs. 30 per cent. per annum. The appellant contends that he is entitled to the whole sum claimed. He points out that the Court below has held that out of the principal sum Rs. 7 is an antecedent debt, and the remainder Rs. 13 was borrowed for legal necessity and also that it is not suggested that the executants were over-reached in any way or were compelled

to execute the bond by undue influence. It seems to us that if the law is as laid down by the majority of the Court in the case of *Chandradeo Singh* v. *Mata Prasad* (1), this appeal must be dismissed on the ground that there was no necessity to undertake the payment of interest at such a high rate as $37\frac{1}{2}$ per cent. per annum. In the case of *Nand Ram* v. *Bhupal Singh* (2), it was held, following the decision of the majority of the Court in the case reported as *Chandradeo Singh* v. *Mata Prasad* (1) that it lies on the lender to prove that there was necessity not only for borrowing money but for borrowing it at an exorbitant rate of interest. Even if the law is as laid down by the minority of the Judges in the case reported as *Chandradeo Singh* v. *Mata Prasad* (1), the result will be the same for, according to the finding of the Court below, the security given by the executants of the bond was ample, and there was no justification whatever for the executant's promise to pay the exorbitant rate of interest stated in the bond. It is impossible to hold that sons in a Hindu family are bound to pay any fancy rate of interest which their father may choose to promise to pay in a transaction of this kind. We think that the Court below is right. We dismiss this appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

(1) 31 A. 176; 1 Ind. Cas. 479; 6 A. L. J. 263.
(2) 8 A. L. J. 1294; 13 Ind. Cas. 5.

PUNJAB CHIEF COURT.

CIVIL REFERENCE No 26 OF 1911.

December 21, 1911.

Present:—Mr. Justice Chevis.

Musammat RUKMAN DEVI AND OTHERS—PLAINTIFFS

versus

SAIN DAS—DEFENDANT.

Jurisdiction of Civil or Revenue Court—Revenue payable by defendant—Government recovering from plaintiff—Suit to recover money from defendant—Registration of Civil Court's decree as that of Revenue Court—Practice—Court finding no jurisdiction—Disposal on merits—Punjab Tenancy Act (XVI of 1887), ss. 77 (3) (l), 100—Punjab Land Revenue Act (XVII of 1887), s. 158 (2) (XIV).

A suit for the recovery from defendant of a sum of money recovered from the plaintiff as land revenue by Government, when it was in fact payable by the defendant, is excluded from the cognizance of a Civil

RUKMAN DEVI *v.* SAIN DAS.

Court by section 158 (2) (XIV) of the Punjab Land Revenue Act and is exclusively cognizable by a Revenue Court.

Where a Revenue suit has been tried by a Civil Court not having any powers on the Revenue side and the defendant has all along objected to the Civil Court's jurisdiction, decree of the Civil Court should not be ordered to be registered as that of a Revenue Court. In such a case, all the proceedings should be set aside and the plaint returned for presentation to the Revenue Court.

Where a Court is of opinion that it has no jurisdiction, it should at once decline to exercise jurisdiction and should not proceed to dispose of the suit on the merits.

Case referred by the Divisional Judge, Gujranwala Division, with his No. 155, dated 1st March 1911, under section 100, Punjab Tenancy Act, for the orders of the Chief Court.

ORDER.—The plaintiffs and the defendants are both proprietors in certain villages. The plaintiffs have sued the defendants for certain sums of money which they assert to have been recovered by Government from them as land revenue whereas, as a matter of fact, these sums were payable not by them but by the defendants. The suit was heard and decided by a Munsif, who gave the plaintiffs a decree. Both parties appealed to the Divisional Judge, who decided the appeals on the merits but then referred the case to this Court under section 100, Tenancy Act, as he thought the claim was cognizable only by the Revenue Courts by reason of section 77 (3) (*l*) of the Tenancy Act and section 158 (XIV) of the Land Revenue Act.

Section 77 (3) (*l*) of the Tenancy Act relates to suits for the recovery of over-payments of Revenue, but I do not think the present is such a suit, for the plaintiffs are not suing to recover an over-payment from the person to whom they have paid it. If the plaintiffs where suing Government for return of money collected from them as revenue, then section 77 (3) (*l*) might be held to apply, but what the plaintiffs say is not that too much money has been paid, but that part of it has been collected from the wrong person, *i. e.*, from plaintiffs instead of from the defendants, the plaintiffs do not sue to get back the money, but they claim to recoup themselves from the proper payees. But section 158 (2) (XIV) of the Land Revenue Act certainly seems to apply, for it seems to me clear that the present claim is one arising out of the collection by the Government of land revenue. Probably, the claim would have been cognizable by the Civil Courts prior to the passing of the present Punjab Land Revenue Act, XVII of 1887 (see rulings cited on pages 246 and 247 of Madan Gopal's Punjab Land Revenue Act, 2nd edition), but it is now useless to consider cases decided with reference to the former Land Revenue Act as the law has since been altered. As the law now stands, I think there can be no doubt that the suit is cognizable only by the Revenue Courts.

The learned Divisional Judge himself thought the suit was cognizable only by a Revenue Court so I think he erred in deciding the appeals on the merits: when a Court is of opinion that it has no jurisdiction, it should at once decline to exercise jurisdiction. I cannot, therefore, see my way to ordering the decree passed by the learned Divisional Judge to be registered as the decree of an Appellate Revenue Court.

The suit was decided by a Munsif who has no powers on the Revenue side. The defendants had in both Courts objected to the Civil Courts exercising jurisdiction and I think they were perfectly right. Such matters are often threshed out much more thoroughly in a Court which, by reason of practical experience in revenue matters, is better qualified to deal with them. Where the case has been decided by an Officer who has both Civil and Revenue powers, the case is different and this Court may well exercise the powers conferred on it by section 100 of the Tenancy Act. I think the defendants in the present case have a right to ask that their suit should be heard and decided in a Court presided over by an Officer exercising Revenue powers. I set aside all the proceedings in the suit and direct the Divisional Judge to direct the Munsif to return the plaint for re-presentation in a Revenue Court.

Costs in the Civil Courts to follow the result in the Revenue Courts or, if plaintiffs do not present their plaint in the Revenue Court within six months of return of the plaint, to be paid by the plaintiffs.

GANGADHAR DAS *v.* BHIKARI CHARAN DAS.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 924 OF 1909.

December 14, 1911.

Present:—Mr. Justice Coxe and Mr. Justice N. Chatterjea.

GANGADHAR DAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BHIKARI CHARAN DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Revenue sale—Omission to post proclamation in time—Irregularity or illegality—Sale merely irregular—Not to be set aside without proof of injury—Inadequacy of price—No presumption as matter of law that inadequacy of price is due to irregularity—Revenue Sale Law (Act XI of 1859), s. 6—Bengal Act (VII of 1868), s. 8

The omission to post the proclamation of a revenue sale in the Collectorate one month before the date of sale, does not amount to more than an irregularity, and does not make the whole sale entirely null and void.

Tasadduk Rasul Khan v. *Ahmad Husain*, 21 C. 66; 20 I. A. 176 (P. C.) and *Gobind Lal Roy v. Ramjanam Misser*, 21 C. 70 (P.C.); 20 I. A. 165, followed.

Lala Mobarak Lal v. Secretary of State, 11 C. 200, not followed.

Jahnnovi Chowdhurani v. Secretary of State, 7 C. W. N. 377, *Sheikh Muhammad Aga* v. *Jadunandan Jha*, 10 C. W. N. 137; 2 C. L. J. 325 and *Sheo Ruttan Singh* v. *Net Lall Sahu*, 30 C. 1, distinguished.

Therefore, a person whose property has been sold cannot ask to have the sale set aside simply and solely on the ground that the sale was illegal by reason of the fact that the notice had not been served in time without proof of injury.

The Court is not bound, as a matter of law, to conclude that inadequacy of price was due to the irregularity.

Appeal from the decree of the Sub-Judge of Cuttack, dated February 3rd, 1909, affirming that of the Munsif of Cuttack, dated August 5th, 1907.

Babus *Provash Chandra Mitra* and *Susti Madhab Mallik*, for the Appellants.

Babu *Troylokya Nath Ghose*, for the Respondents.

JUDGMENT.

COXE, J.—This was a suit to set aside a revenue sale. The sale took place on the 9th April 1906, and the date on which the proclamation is said to have been affixed in the Collectorate was recorded as the 6th April. The Munsif considered that this was a clerical mistake; but the lower Appellate Court took a different view, and found that the defendant had failed to prove that the notice was affixed in the Collectorate one month before the date of the sale. He held that this was an irregularity, and he also held that the price realised at the sale was inadequate. But he was unable to find that there was any evidence to connect the inadequacy of the price with the irregularity and accordingly dismissed the suit.

The plaintiff appeals to this Court.

The first point taken on behalf of the plaintiff is, that the omission to post the proclamation of sale in the Collectorate one month before the date of sale (a point on which we are concluded by the decision of the lower Appellate Court) amounts to more than an irregularity, and makes the whole sale entirely null and void whether the plaintiff was injured or not. This is an argument that has very frequently been used in dealing with these revenue sales, and finds expression in the Full Bench decision in the case of *Lala Mobarak Lal* v. *Secretary of State* (1). In that case the learned Judges held, that failure to comply with the provisions of section 6 of Act XI of 1859 amounted to more than an irregularity and to an entire illegality, and that, consequently, the provisions of the Act imposing restrictions upon the rights of persons whose property was sold to relief in the Civil Courts, had no application; inasmuch as in such a case there was really no sale at all. The learned Chief Justice thought that in that case the sale in question could not properly be said to be a sale for arrears of revenue within the meaning of the Act; and Mitter, J., held that it was null and void as not being a sale under the provisions of Act XI of 1859. They held, therefore, that the sale in such a case was not a sale at all under the Act, and that the provisions of the Act which imposed restrictions on the right of the defaulter to have the sale set aside, had no application.

It appears to me that the whole reasoning on which this decision was based is entirely swept away by decisions in *Tasadduk Rasul Khan* v. *Ahamad Husain* (2) and *Gobind Lal Roy* v. *Ramjanam Misser* (3). In the first case it was held, that an irregularity under section 290, Civil Procedure Code, which greatly resembles the irregularity complained of in this case, did not make the sale a nullity and in the second case their Lordships used these significant and emphatic words: "In the opinion of their Lordships a sale is a sale made under the Act XI of 1859 within the

(1) 11 C. 200.
(2) 21 C. 66: 20 I. A. 176 (P. C.).
(3) 21 C. 70; 20 I. A. 165.

SARVOI BEGAM v. HAIDER SHAH.

meaning of that Act, when it is a sale for arrears of Government revenue held by the Collector or other Officer authorized to hold a sale under the Act, although it may be contrary to the provisions of the Act either by reason of some irregularity in publishing or conducting the sale or in consequence of some express provision for exemption having been directly contravened." It is clear, therefore, that in the opinion of the Privy Council a sale that was marred by an irregularity of this nature was none the less a sale under the Act, and that view appears to me to take away the whole foundation of the reasoning on which the decision in *Lala Moborak Lal* v. *The Secretary of State* (1) was based. It is true that the decision in *Lala Mobarak Lal* v. *The Secretary of State* (1) has been followed in subsequent cases namely in *Jahnnovi Chowdhurani* v. *The Secretary of State* (4); *Sheikh Mohomed Aga* v. *Jadunandan Jha* (5) and *Sheo Rutlan Singh* v. *Net Loll Sahu* (6). But in those cases the learned Judges were acting only with the question whether section 8 of Bengal Act VII of 1868 applied to a case in which notice, under section 6 of Act XI of 1859, had been served, but had not been served 30 days before the date of the sale; and they held, that although the certificate of title given to the purchaser was conclusive evidence that notice had been served, it was not necessarily conclusive evidence that the notice had been served in time.

I am myself inclined to think that the question whether the notice is served in time is part of the larger question whether it has been duly served, and that notice cannot be said to have been duly served if it has not been served in time. It is not, however, necessary in the present case to come to any decision on this point: for, even if the respondent is not entitled to the benefit of section 8, still the appellant will not be entitled to succeed unless he can show that he has been injured. The learned Judges who decided the cases to which I have referred, certainly cited the Full Bench decision as being still in effect, that the only point they were dealing with was whether section 8 applied and their decisions cannot, in my opinion, be taken as authority for holding that, in their opinion, that decision justified a person whose property had been sold, in asking to have the sale set aside simply and solely on the ground that the sale was illegal by reason of the fact that the notice had not been served in time, without proof of injury. Secondly, it has been urged that the learned Subordinate Judge ought to have concluded, as a matter of law, that the inadequacy of the auction price was the consequence of the irregularity to which we have referred. I cannot see, however, that any question of law really arises in this connection. The learned Munsif deals with this matter at great length, and explains more fully why the irregularity could not have caused the deficiency in the selling price. The learned Sub-Judge's judgment is one of affirmance. It is not for us to say whether the evidence is or is not sufficient to justify the conclusion arrived at by the Subordinate Judge but I certainly cannot possibly say that he was bound, as a matter of law, to conclude that the inadequacy of price was due to the alleged irregularity. I hold, therefore, that it is not sufficient for the appellant to show that the notice was published less than thirty days before the sale, and that he is not entitled to have the sale set aside on that ground alone. As regards the question whether he has suffered by this irregularity we are, in my opinion, concluded by the findings of fact.

The appeal will accordingly be dismissed with costs.

N. CHATTERJEA, J.—I agree.

Appeal dismissed.

(4) 7 C. W. N. 377.
(5) 10 C. W. N. 137; 2 C. L. J. 325.
(6) 30 C. 1.

(S. C. 9 A. L. J. 12.)

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL No 156 OF 1911.

November 18, 1911.

Present:—Mr. Justice Chamier.

SARVOI BEGAM—DECREE HOLDER—APPELLANT

versus

HAIDER SHAH AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Auction sale—Application to set aside sale—Application verbal or written—Person interested may apply.

An application under Order XXI, rule 89, to set aside an auction sale need not be in writing, but the application, whether made orally or in writing, must be in time.

SAWAN SINGH *v.* JAFAR KHAN

A deposit of money alone is not sufficient.

Tender by a person who is neither a general or special attorney, nor a Vakil or Mukhtar, for the owner of the property sold, is not sufficient tender within the rule.

Execution First Appeal from a decree of the Subordinate Judge of Meerut.

Mr. *Peary Lal Banerji*, for the Appellant.

JUDGMENT.—In this case, in execution of a decree held by the appellant against the respondents, certain property of the respondent, *Musammat* Ikram-un-nissa, was sold by auction to the appellant. Within thirty days of the sale the respondent, Sultan Muhammad, appeared before the Subordinate Judge with a tender of the required amount in the usual form, duly filled up and bearing on it an office report, and he orally requested the Subordinate Judge to set aside the sale. The Subordinate Judge signed the tender, returned it to him, and told him to go and pay the money into the treasury; and the money was paid in by Sultan Muhammad on the same day. The tender was made on behalf of Ikram-un-nissa. On a later date, the case was called on before the Subordinate Judge and he confirmed the sale forgetting that an oral application to have the sale set aside had been made to him by Sultan Muhammad Khan. The three respondents then applied to him for a review of his order, and thereupon he set it aside, and also set aside the sale. The auction-purchaser has appealed. When this case came before me in July last, I returned the record to the Court below in order that the Subordinate Judge might find definitely whether an oral application was made to him and whether the application was brought to his notice when he confirmed the sale. He has found, as already stated, that there was such application, but that it was not brought to his notice when he confirmed the sale. I am prepared to assume that sufficient ground has been established for a review of the Subordinate Judge's order confirming the sale, for it is clear that all the facts were not before him. But this is not an appeal against the order granting the application for review, but is an appeal against the final order passed by the Subordinate Judge, setting aside the sale. The question is, whether the sale should be set aside. Sultan Muhammad Khan has himself stated that he was not, on the date on which the money was tendered, either the general or special attorney of his wife, Ikram-un-nissa. Nor is he a Vakil or a Mukhtiar, therefore, he was not entitled to make an application to the Court on behalf of his wife under Order III, rule 1, of the Civil Procedure Code. It has been held that such an application need not be in writing; but the application, whether oral or in writing, must be in time Deposit of the money alone is not sufficient. The deposit in the present case was not made by a person who owned the property sold or had any interest in it. I feel bound to hold that the provisions of Order XXI, rule 89, have not been complied with. *Musammat* Ikram un-nissa was, under the circumstances, the only person who could have applied to set aside the sale. She did not apply within time, nor did any person duly authorised by her, make any application on her behalf. I, therefore, allow this appeal, and set aside the order of the Court below, setting aside the sale. The respondents must pay the applicant's costs in both Courts.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 19 OF 1909.

January 5, 1912.

Present:—Mr. Justice Robertson and Mr. Justice Shah Din.

SAWAN SINGH—DEFENDANT—APPELLANT

versus

JAFAR KHAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Village abadi—Alienation—Malik qabza—*Powers over houses and site occupied—Nature of* Malik qabza's *tenure.*

A *malik qabza* is, as regards the lands held by him, usually in the same position as a full proprietor in a village, with the exception that he sometimes has to pay *malikana* to such proprietors in the village and has no share in the *shamilat* land of the village.

A *malik qabza* is not a non-proprietor in respect of the houses and sites in the village *abadi* held by him He has the same powers of alienation and disposition over these houses and sites as the original proprietors have over their buildings and sites in the *abadi.*

Kirpal Singh v. *Kesree*, 67 P. R. 1869, relied upon.

The entire village *abadi* can very seldom be looked upon as *undivided shamilat* of the original proprietors.

Second appeal from the order of the Divisional Judge, Jhelum Division, dated

SAWAN SINGH *v.* JAFAR KHAN.

the 4th April 1908, affirming that of the Subordinate Judge, Jhelum, dated 20th November 1907, decreeing the plaintiffs' claim.

Mr. *Nanak Chand* and Rai Bahadur Lala *Sukh Dial*, for the Appellant.

Dr. *Muhammad Iqbal*, for the Respondents.

JUDGMENT.—In this case one Khuda Bakhsh, a *malik qabza* in the village of Pinnanwal, has sold his house to one Sawan Singh. The sole question which we have to decide is whether Khuda Bakhsh was a proprietor of such a nature that he could alienate his house to a third party. The suit is brought by the full proprietor of the village claiming the right to an entry upon Khuda Bakhsh's house upon his surrender of it by sale.

We must note, to begin with, that both the lower Courts seem to have been under some misapprehension as to the nature of the status of the *malik qabza*. As regards the land held by a *malik qabza*, he is usually in the same position as full proprietor in a village with the exception that he sometimes has to pay *malikana* to such proprietors and that he has no share in the *shamilat* land in the village. At page 63 of the Jhelum Settlement Report by Mr. Talbot, a description of the tenure of *malik qabza* will be found. The assumption, therefore, that because non-proprietors may be presumed to have no rights to alienate more than the materials of their houses, therefore, it must be presumed that *malik qabza* has no such power, is not sustainable. The question is, the status of a *malik qabza* being clearly inferior to that of a full proprietor and equally clearly superior to that of a tenant or a non-proprietor, has he in this instance the power to alienate his house in the *abadi*? The plaintiffs rely largely upon an entry in the *Wajib-ul-arz* of 1880. That entry provides that non-proprietors shall have no power to dispose of the sites upon which their houses stand but only of the *malba* under certain conditions. The *qabza maliks* not being non-proprietors do not, in our opinion, come within the purview of this clause in the *Wajib-ul-arz*. Some reliance was also placed upon an entry in the *khasra abadi* of 1860, but it is clear from a *robkar* attached to that document, the preparation of which has been declared to have been unauthorized, that no weight can be attached to it.

For the defendants a statement made by the father of Fazal Dad, plaintiff, by name Mahla Khan, is brought to our notice. In this statement Mahla Khan himself clearly differentiates between the rights, or rather absence of rights, of a *qabza malik* to sell his house and site, and those, of a tenant or non-proprietor. Moreover, in the signatures at the end of the *Wajib-ul-arz* itself the *qabza maliks* are shown amongst the *maliks* or proprietors, and not amongst the tenants or non-proprietors. There is an absence of actual judicial authority on the point. In *Kirpal Singh* v. *Kesree* (1) it seems to have been assumed as a matter of course that the rights of a *qabza malik* over his house in the *abadi* would be the same as his rights over the cultivated land in his *milkiyat*. This was not an actual point for decision in that case. Neither side could quote to us any decision of this Court, in which the actual point now before us was brought under discussion. It appears to us, however, natural to presume that a *malik qabza* having full proprietary rights over the cultivated lands in his possession as *malik* will have the same rights, in the absence of any proof to the contrary, over his house in the *abadi*. It is in fact now very seldom that we find the entire village site "*abadi*" to be held in common as *shamilat deh*. The various proprietors very frequently own their own houses even where parts of the *abadi* are still held in common, and in this case it has not been suggested that the whole of the village *abadi* is still undivided *shamilat deh* of the original proprietors. This being so, we see no reason to differentiate between the powers of the original proprietors over their buildings and sites in the *abadi* and the powers of the *qabza maliks*, over such houses and sites as they possess. The materials for coming to a decision are not very plentiful. Such as they are they lead us to the conclusion which we have expressed above.

We accordingly accept the appeal and dismiss the claim with costs throughout.

Appeal accepted.

(1) 67 P. R. 1869.

KOILASH CHANDRA *v.* GAJENDRA NATH.

(s. c. 15 C. L. J. 1.)

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 46 OF 1910.

August 29, 1911.

Present :—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice D. Chatterjee.

KOILASH CHANDRA SANTRA AND OTHERS—DEFENDANTS—APPELLANTS

versus

GAJENDRA NATH MISRA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence of title—Decree in possessory suit.

A decree based upon a possessory title is *prima facie* evidence of title to the land as against a stranger.

Appeal from the decree of the Hon'ble Mr. Justice Doss, dated the 31st March 1910, in Second Appeal No. 1502 of 1908, which was as follows:—

Doss, J.—This appeal arises out of an action by the plaintiffs as reversionary heirs of one Muchiram Misser to recover possession of a plot of land. The defendant No. 1 pleaded that he was in possession of the land under a settlement from the landlord ; the defendants Nos. 2, 3 and 4 are the sons of the defendant No. 1 and they pleaded that they had no right to it.

Both the Courts below have found that the land belonged to Muchiram, that the plaintiffs are the sons of Muchiram's daughter Bhaba Mohini, and that the defendants have failed to prove that they obtained any settlement from the landlord. Both the Courts below have overruled the plea of limitation.

The defendant No. 1 died after the decree of the Court below. The defendants Nos. 2, 3 and 4, in their capacity of legal representatives of the defendant No. 1, have preferred this appeal. The first contention raised on behalf of the appellants is that the finding of the lower Appellate Court as to title is based merely on a possessory decree, dated the 9th July, 1863 obtained by Kadambini, the second wife of Muchiram, against the defendant No. 1 and other persons ; that this decree is not sufficient to support the finding that Muchiram is entitled to the land.

The Munsif based his finding upon the question of title on the evidence of the plaintiffs' witnesses and also upon this decree. The lower Appellate Court confirmed the finding of the first Court.

In my opinion this decree is a piece of evidence showing that Muchiram had title to the land. Although the decree is based upon a possessory title it is *prima facie* evidence of title to the land as against a stranger.

The next contention raised by the learned Vakil for the appellant is that the plaintiffs failed to show that on the 1st April 1873, when Act IX of 1871 came into operation, Kadambini had a subsisting title to the land and that if she had no subsisting title on that date the plaintiffs' suit must be held to be barred by limitation, though after Act XV of 1877 had come into operation, adverse possession by the defendants as against Kadambini might have been of no avail against these plaintiffs. I think the decree of the year 1863 furnishes a conclusive answer to this contention, even supposing that after the decree was passed, the defendant No. 1 continued in possession adversely to Kadambini. I may point out in passing that the first Court found that the defendant No. 1 was in possession under some arrangement with Kadambini after the decree ; such adverse possession could only have commenced to run as against Kadambini from the date of the decree and that was within 12 years prior to the 1st of April 1873, I am of opinion that the second contention must also fail.

Babus *Ram Chandra Majumdar* and *Chandra Sekhar Banerjee*, for the Appellants.

Babu *Joy Gopal Ghosha*, for the Respondents.

JUDGMENT.

JENKINS, C. J.—The case has been placed before us very clearly by Mr. Majumdar, but I am unable to see that we are entitled to interfere in second appeal. It cannot be said, and is not said, that the decree is no evidence of title. It proved possession, and possession is evidence of title. The value to be attributed to it is a matter to be determined by the lower Appellate Court which is the final Court of fact. I think the matter has been correctly formulated by Mr. Justice Doss, and that we must dismiss the appeal with costs.

CHATTERJEE, J.—I agree.

Appeal dismissed.

KHAIR AHMAD v. MIR AHMAD ULLAH.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 355 OF 1910.

January 9, 1912.

Present:—Mr. Justice Chevis.

KHAIR AHMAD AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MIR AHMAD ULLAH AND ANOTHER PLAINTIFFS—RESPONDENTS.

Punjab Courts Act (XVIII of 1884), s. 40 (1)(a)(i)—Further appeal—Suit for declaration and injunction in respect of house—Value of house exceeding Rs. 1,000—Valuation of suit—Jurisdiction—Value—Court-fee—Court Fees Act (VII of 1870), s. 7 (IV) (c) and (d)—Suits Valuation Act (VII of 1887), s, 8—Chief Court Rules under s. 9, rule 4.

In a suit for declaration where consequential relief in the nature of an injunction is prayed for, the value for purposes of Court-fee and jurisdiction is the amount at which the plaintiff values the relief between Rs. 100 and Rs. 500.

Nanak v. *Gurditta* 63 P. R. 1902, followed.

Sardar Singji v. *Ganpat Singji*, 17 B. 56; relied upon.

Chingachamvital Sankarannair v. *Chingachamvital Gopalamenon*, 30 M. 18; 1 M. L. T. 412, distinguished.

A further appeal lies from an appellate decree declaring a house to be *waqf* if the market value of the house exceeds Rs. 1,000.

Second appeal from the order of the Divisional Judge, Amritsar Division dated the 7th February 1910, modifying that of the District Judge, Amritsar, dated the 24th July 1909, dismissing plaintiff's suit.

Mr. *Beechey*, for the Appellants.

Mr. *Fazal i-Husain*, for the Respondents.

ORDER.—The plaintiffs have brought this suit, asking

(1) for a declaration that the house in question is *waqf* and attached to the shrine, and

(2) for an injunction restraining the defendants from interfering with the plaintiffs' rights as *mutwalis*.

The first Court dismissed the suit, but on appeal the learned Divisional Judge has given the plaintiffs a decree declaring the house to be *waqf*.

The defendant has lodged this appeal and for the plaintiffs a preliminary objection is taken that no further appeal lies. For the defendants it is contended that a further appeal lies under section 40 (1) (*a*) (*i*) of the Punjab Courts Act. This is correct, only if it can be said either that the value of the suit is one thousand rupees or upwards, or that the decree passed on appeal by the Divisional Judge involves directly some claim to or question respecting property of like value.

First, as to the value of the suit. The suit, being for a declaration and also for an injunction, seems to me to fall under section 7, clause 4, sub-clauses (*c*) and (*d*) of the Court Fees Act, and the fee payable is according to the amount at which plaintiff values the relief sought. See *Sardar Singji* v. *Ganpat Singji* (1). But Mr. Beechey for the appellant quotes *Nanak* v. *Gurditta* (2), and urges that the plaintiffs cannot put forward an arbitrary valuation. This ruling, while upholding the view that the Court-fee and the jurisdictional value are the same in such suits, lays down that, with reference to section 8 of the Suits Valuation Act, the plaintiff must fix a value falling within the limits laid down by the Chief Court in rule 4 of the rules made by the Chief Court under section 9 of the same Act. I do not see how this helps Mr. Beechey, as the limits laid down in rule 4 are Rs. 100 to Rs. 500 and the plaintiffs in the present case have kept within those limits by valuing their relief at Rs. 130. Mr. Beechey also refers me to *Chingachamvital Sankarannair* v. *Chingachamvital Gopalamenon* (3), but that was a declaratory suit in which no consequential relief or injunction was prayed, and so it did not fall under section 7 para. 4 clause (*c*) of the Court Fees Act I hold that the value of the present suit both for purposes of Court-fee and for jurisdiction is Rs 1'30 that being the value at which plaintiffs have themselves valued the reliefs sought.

The next question is, whether the Divisional Judge's decree involves directly some claim to or question respecting property of value exceeding Rs. 1,000. The Divisional Judge has given a decree declaring the house to be *waqf* Now, in the common class of cases in which a reversioner sues for a declaration that an alienation of land shall not affect his reversionary rights the value of the land is taken at 30 times the revenue, and this is held to be the value of the suit. See *Hari Singh* v. *Nika Singh* (4) and *Jalla* v. *Gehna* (5). In *Bakhu* v. *Jhanda* (6)

(1) 17 B. 56.
(2) 63 P. R. 1902.
(3) 30 M. 18; 1 M. L. T. 412.
(4) 42 P. R. 1907.
(5) 60 P. R. 1907; 76 P. W. R. 1907.
(6) 145 P. R. 1892.

RAJA *v.* JANNAT BIBI.

a ruling which was affirmed by the Full Bench in *Jalla* v. *Gehna* (5), it was held that it could not be said in such a case, that the decree involved directly some claim to, or question respecting property of the value of Rs. 1,000, or upwards, because the only property respecting which any claim or question was directly involved was the land, the value of which, whatever the market-value might be, being reckoned at 30 time *jama*, was under Rs. 1,000. In the present case the defendant claims the house as his private property but the Divisional Judge's decree denies that claim by declaring the house to be *waqf*. I am of opinion, therefore, that this decree involves directly a claim to or question respecting the house. Now, when a house is concerned, the only value which can be put to it seems to be the market-value. There can be no question here of any artificial value such as thirty times the *jama*. I hold, therefore, that the decree involves directly a claim to or question respecting the house and that the market-value must be regarded as the value of the house. Therefore, if the market-value of the house be Rs. 1,000 or upwards a further appeal will lie.

No inquiry as to market-value has yet been made. Mr. Beechey asserts this value to be Rs. 1,500. Mr. Fazal-i-Husain is not prepared to make a statement on this point. I direct the Divisional Judge to make inquiry through the first Court as to the market-value of the house, (site not included). Return to be made within three months.

Note.—At time of announcing this order, Mr. Fazal Husain admits that the house including site is worth over Rs. 1,000, says he will make a statement as to value of house excluding site in four days. I will wait till 9th instant before sending the case back.

ORDER.—Counsel on both sides present. Mr. Fazal Husain says he is instructed to say that the house is not worth Rs. 1,000 even including the site.

The order of 4th January 1912 will now go down to the Divisional Judge for compliance. The Divisional Judge should note that I am inquiring only as to the market-value of the house, not including the site. The decree does not mention the site, so the site is not directly affected.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 433 OF 1909.

January 6, 1912.

Present—Mr. Justice Johnstone and Mr. Justice Rattigan.

RAJA—PLAINTIFF—APPELLANT.

versus

Musammat JANNAT BIBI AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Gift—Daughter—Khanadamad—*Right to property gifted to daughter*—Gujars *of Gujrat District—Completion of gift—No formal delivery of possession or mutation of names—Construction of deed—Will or gift.*

A., a *Gujar* of *mauza* Bawli Kalan *tahsil* Kharian in the Gujrat District, executed and registered a deed in favour of his only child a minor daughter, *B.* By this deed, *A.* declared *B.* his sole heiress in respect of his house and landed property and he also pointed out in the deed that *B.'s* husband *C.* was his *khanadamad* and that *B.* and *C.* were living with him.

A.'s collaterals forthwith instituted a suit against *A.* and *B.* for whom *A.* acted as guardian *ad litem*, for a declaration that the gift would not affect their reversionary rights. The parties in this suit arrived at a compromise by which the gift in respect of all the houses and ⅓rd of the land was to remain valid in favour of *B.*, while in respect of the remaining ⅔rds of the land the gift stood cancelled.

Soon after *B.* died without issue. No formal delivery of possession was made to *B.*, nor did any mutation of names take place in her favour. But *C.* cultivated all the land of *A.* and lived in the same house. Subsequently, *A.* and *C.* fell out and then *C.* sued *A.* for possession of the houses and one-third of the land gifted to *B.*

Held, (1) that there was an immediate and irrevocable gift to *B.* and that the transaction in favour of *B.* was not a testamentary disposition.

(2) That the gift was complete as the donor had done everything that could reasonably be expected in the circumstances to give effect to the gift. In such circumstances formal delivery of possession was not essential to the completion of the gift.

Gul Ahmed v. *Sahibzada* 45 P. R. 1881; *Ghulam Muhammad* v. *Muhammad Amin*, 86 P. R. 1882; *Faujdar* v. *Bhamma*, 91 P. R. 1883; *Ahmad Khan* v. *Ghulam Bibi*, 36 P. R, 1891; *Sohna* v. *Mosam*, 23 P. R. 1895; *Samman* v. *Allah Bakhsh*, 106 P. R. 1901, referred to.

(3) That the gift to *B* enured after her death for the benefit of *C.* during his life-time.

A gift of this kind among the *Gujars* was intended as much for the benefit of the son-in-law as for the benefit of the daughter.

Mahla v. *Shah Muhammad*, 134 P. R. 1894; followed.

Sita Ram v. *Raja Ram*, 12 P. R. 1892 (F.B.) *Ghulam Bhikh* v. *Massania*, 22 P. R. 1893; *Bhatu* v. *Lehru*, 54 P. R. 1897, distinguished.

Second appeal from the order of the Divisional Judge, Jhelum Division, dated the 13th March 1909, reversing that of the Munsif, 1st class, Gujrat, dated the 26th November 1908, decreeing plaintiff's claim.

RAJA *v.* JANNAT BIBI.

The Hon'ble Mr. *Muhammad Shafi*, for the Appellant.

The Hon'ble Mr. *Shadi Lal*, for the Respondent.

JUDGMENT.—The parties are *Gujars* of *Mauza* Bawli Kalan, *tahsil* Kharian in the Gujrat District, and on the 15th February 1907 Khuda Bakhsh executed and registered a deed, described as *hibanama*, in favour of his daughter, *Musammat* Fateh Bibi, a young girl, aged about 12, who was married to the present plaintiff Raja. In this deed Khuda Bakhsh declared that as he had no son and had no hopes of ever having a son, he had made his daughter his sole heiress in respect of his house and landed property and in explanation of his action, he pointed out in the same deed that his daughter and her husband were living with him and that her *doli* had never left his house.

This so called *hibanama* is, in terms, really a Will but it was apparently regarded at the time by all concerned as a gift *in presenti* of the whole of its author's immoveable property and as a result, the latter's collaterals forthwith instituted a suit against Khuda Bakhsh and his said daughter (for whom her father acted as guardian *ad litem*) and prayed for a declaration that the gift would not affect their reversionary rights. Khuda Bakhsh contested that claim and in his written statement pleaded that his daughter was married to Raja and that the latter was his *khanadamad*, and that the gift in her favour was, therefore, valid by custom. After issues were drawn, the parties arrived at a compromise, the terms of which were as follows:—

"The gift in respect of all the *houses* in suit in favour of *Musammat* Fateh Bibi shall stand, while the gift in her favour in respect of the *land* shall stand to the extent of $\frac{1}{3}$rd only and she shall be owner thereof. The gift in respect of the remaining $\frac{2}{3}$rds of the land shall stand cancelled and Khuda Bakhsh, donor, shall remain in possession of the said $\frac{2}{3}$rds during his life-time. After his death the said $\frac{2}{3}$rds shall descend to his son, if any, and in default, to his reversionary heirs."

Khuda Bakhsh was examined by the Court with regard to the terms of the said compromise and repeated the provisions of the written agreement. The suit was accordingly decided in accordance with the said terms. A few months later *Musammat* Fateh Bibi died without issue and, as occasionally happens in such cases, the father-in-law and son-in-law fell out, the result being that the latter instituted the present suit against the former and claimed possession of the houses and $\frac{1}{3}$rd of the land which had (as he alleged) been gifted to his wife. Plaintiff's contention is that the gift in favour of his wife was complete and that as he himself was the *khanadamad* of the donor, he was entitled to succeed on a life tenure to the property which had been given to her. Khuda Bakhsh, in reply to the present claim, pleaded (in direct opposition to his pleas in the previous suit) that plaintiff was not his *khanadamad*; that there had been no gift in favour of *Musammat* Fateh Bibi but merely a Will in her favour, to take effect after his death, and that his daughter had not obtained possession of the property now in suit.

Shortly after institution of the suit, Khuda Bakhsh died and his two widows were brought upon the record as his legal representatives. The Munsif, 1st class, framed four issues and upon them decided, (1) that Khuda Bakhsh had taken plaintiff into his house as *khanadamad*; (2) that as Khuda Bakhsh was now dead, it was immaterial whether the alienation made by him was a gift or a devise, as in either event plaintiff would be entitled to succeed; (3) that the *razinama* in the previous suit modified the terms of the *hibanama* of the 2nd July 1907 and gave *Musammat* Fateh Bibi possession of the houses and $\frac{1}{3}$rd of the land and that as the donee and her husband continued to live with the donor, it was not necessary for the completion of the gift that formal possession should be delivered to the donee; and (4) that plaintiff was clearly entitled [upon the authority of *Mahla* v. *Shah Muhammad* (1)] to possession of the property in suit. The suit was accordingly decreed with costs. Defendants appealed to the Divisional Judge, who in a somewhat brief judgment reversed the decree of the Munsif and dismissed plaintiff's suit. The learned Judge held that the *hibanama* of the 2nd July 1907 was not a gift *in præsenti* but a Will and that the *razinama* provided that after Khuda Bakhsh's death, $\frac{2}{3}$rds of the land

(1) 134 P. R. 1894.

was to go to the reversioners and $\frac{1}{3}$rd to the daughter. He accordingly was of opinion that "both arrangements were in the light of a Will" and that it was open to Khuda Bakhsh to "change" these arrangements at pleasure, especially as the arrangements were intended solely for the benefit of his daughter who had died. As Khuda Bakhsh had revoked the arrangements and as he had never divested himself of his vested interests in the property, the learned Judge held that plaintiff had no title or right to the property after his wife's death.

Plaintiff has preferred a further appeal to this Court and we have heard the case for appellants and for the respondents very ably set forth by their respective Counsel.

Briefly summarised, the arguments for the plaintiff and the respondents are as follows:

For plaintiff it is urged that whatever may have been the effect of the *hibanama* of the 2nd July 1907, the *razinama* filed in the previous suit and the solemn statement made in Court by Khuda Bakhsh in that case proved that a present gift of the houses and of $\frac{1}{3}$rd of the land had been made in favour of *Musammat* Fateh Bibi; that in view of the fact that the donee was a minor girl living with her father (who as head of the family would naturally act in all matters as her guardian and did in fact so act for her during the previous litigation), the mere fact that formal possession was not delivered to the girl is a matter of no consequence, especially as her husband was (according to Khuda Kakhsh's own admissions in that suit) cultivating the land for his father-in-law; that mutation was not effected owing to the death of the donee within a few months of the termination of former litigation; and that in view of the fact that a gift was actually made to *Musammat* Fateh Bibi and that her husband was at the time the *khanadamad* of the donor, the latter, on the death of his wife, became entitled to possession of the said gifted property for the period of his life-time.

On behalf of respondents, Mr. Shadi Lal joins issue upon all these points. He argues that the *hibanama* was a mere Will, to take effect in future upon the death of Khuda Baksh; that the *razinama* made no change in the nature of the transaction but merely limited the extent of the property which was to devolve upon the daughter; that viewed as an intended gift, the transaction was incomplete inasmuch as it had not been followed by mutation of names or by transfer or delivery of possession, and that, in any event, the transaction, whatever it was became infructuous in consequence of the death of the donee, without issue, in the life-time of the donor, [*Sita Ram* v. *Raja Ram* (2)].

The first question then before us is whether there was a gift to *Musammat* Fateh Bibi of the property in suit, and if so, whether the gift was complete: upon these points we have no hesitation in agreeing with Mr. Shafi. As construed by lawyers, or even by educated laymen, the so-called *hibanama* executed by Khuda Bakhsh can only be regarded as a testamentary disposition to take effect upon the death of the other. But it is clear from the conduct of all parties interested in this matter that it was regarded by them as an immediate gift and it was upon this assumption that the collaterals of Khuda Bakhsh brought their suit for a declaration of its invalidity as against their reversionary rights. But even if we concede that the *hibanama* was in reality a Will and as such operative only upon the death of Khuda Bakhsh and revocable during his life-time, we cannot agree that the *razinama*, complied with Khuda Bakhsh's express statements in Court, in no way, altered the nature of the transaction. According to the *razinama*, it was argued that *Musammat* Fateh Bibi should have possession of the houses and of $\frac{1}{3}$rd of the land and that this provision did not relate to events subsequent to the death of Khuda Bakhsh but to present facts is clear from the other provision that during his life-time Khuda Bakhsh was to remain in possession of the remaining $\frac{2}{3}$rds of the land. The obvious and only inference from the latter provision is that possession of the $\frac{1}{3}$rd of the land and of the houses was to pass at once to *Musammat* Fateh Bibi; for if the intention had been to make her *heiress* of the latter's property on the death of her father the latter would necessarily have continued in possession of the whole of his property as long as he lived. Khuda Bakhsh at that time was fighting strenuously on behalf of his daughter and he very

(2) 12 P. R. 1892 (F. B.)

RAJA v. JANNAT BIBI.

naturally wished to make her position as secure as possible. It is not surprising, therefore, that he decided to hand over part of the property to her during his life-time and the very fact that his collaterals accepted this condition tends to show that they recognized the very real and substantial rights which *Gujars* of Gujrat District concede to daughters when husbands are residents in the houses of their fathers in-law. We find, therefore, that there was an immediate gift of the property in suit to *Musammat* Fateh Bibi.

The next question is whether this gift was complete, it being admitted that formal delivery of possession and mutation of names did not take place. In our opinion, the donor did everything that could reasonably be expected in the circumstances to give effect to the gift. The donee was his minor daughter and he acted as her guardian; her husband was cultivating the donor's land and was living with him in his house and was at the time regarded in the light of a son. The donor had openly affirmed the gift in a Court of law and mutation of names would probably have been duly effected had not the donee died so soon after the termination of the previous litigation [See *Gul Ahmed* v. *Sahibzada* (3); *Gulam Muhammad* v. *Muhammad Amin* (4); *Faujdar* v. *Bhamma* (5); *Ahmad Khan* v. *Gulam Bibi* (6); *Sohna* v. *Mosam* (7); *Samman* v. *Ala Bakhsh* (8)]. There is ample authority for holding that, in such circumstances, formal delivery of possession is not essential to the completion of the gift and we decide accordingly that the gift was complete and irrevocable.

The final, and perhaps, most important question is whether upon the assumption that there was a valid and completed transaction of gift in favour of *Musammat* Fateh Bibi, the plaintiff is entitled to claim possession of the donated property for the period of his life; he being the husband of the donee and also the *khanadamad* of the donor.

Mr. Shadi Lal in support of his argument to the contrary relies upon the decision of the Full Bench in *Sita Ram* v. *Raja Ram* (2) and upon a number of rulings of this Court, to the effect that where the usage of *khanadamad* is recognized in giving rise to customary rights, the purpose is to benefit the daughter's sons and the daughter and her husband only incidentally benefit [*Ghulam Bhikh* v. *Massania* (9)]. We have considered these decisions, but we can find nothing in them antagonistic to the present claim.

The actual question before the Full Bench in the case above referred to, was whether by general custom prevalent among agricultural tribes in this Province, the collateral heirs, in his natural family, of a man who had been adopted under a customary adoption and had died without lineal heirs succeeded to property which he had acquired or inherited by virtue of such adoption; or whether the collateral heirs of the donor could claim such property. The Full Bench held that in such a case the property reverted to the donor and his collateral heirs; and the question now before us was not decided, nor did the learned Judge express any opinion thereon.

It may be conceded that in cases where the custom prevalent in a particular tribe recognizes the usage of *khana lamad* (and this usage certainly obtains among *Gujars* of the Gujrat District) the primary purpose is to benefit the issue of the daughter and her husband. But in all such cases it is recognized that the intention is also to benefit the daughter and her husband though only incidentally. And (as usual) there is good reason in support of this customary rule, where the usage of *khanadamad* obtains, we find that the son-in-law practically cuts himself off from his own family. He comes to his father-in-law's house, takes up his residence there, helps his father-in-law in the cultivation of his land and, to all intents and purposes, identifies himself with the family of his wife. It is only natural, therefore, that he should be recognized by the custom of the tribe as having certain rights in the latter family and we know of no cases, nor have we been referred to any, in which it has been held, that where the father in law has made a gift of land to his daughter whose husband was a *khanadamad* (in the sense that that expression is understood among *Gujars* of Gujrat

(3) 45 P. R. 1881.
(4) 86 P. R. 1882.
(5) 91 P. R. 1883.
(6) 36 P. R. 1891.
(7) 23 P. R. 1895.
(8) 106 P. R. 1901.

(9) 22 P. R. 1893.

District), the husband loses all rights in the said land upon the death, without issue, of his wife in the life-time of her father.

The cases cited by Mr. Shadi Lal in support of his contention do not help him.

In *Ghulam Bhikh* v. *Massinia* (9) the parties were *Laoni Rajputs* of Amballa District and it was found that among them daughter's sons were not favoured by custom and the case was decided with special reference to the custom obtaining in that tribe. The same remark applies to *Bhatu* v. *Lehru* (10) where it was held, that according to the custom of the *Girths* of Kangra District where the wife of a resident son-in-law dies during the life-time of her father and leaves no sons, her husband on her father's death, does not succeed to the latter's immoveable property. We cannot possibly accept the proposition that a particular rule of custom found to be observed by *Girths* of the Kangra District is to be applied to *Gujars* of Gujrat District.

On the other hand, the decision of this Court in *Mahla* v. *Shah Muhammad* (1) (where the parties were *Waraiches* of this very district) is directly in point and favours the contention of the plaintiff. In this case Benton, J., remarked: "It is in fact the residence of the appointed *khanadamad* that validates the gift, as ruled in *Jiwan* v. *Wazir* (11) and not *vice versa*. Once appointed, he will continue to hold until death, when he will be succeeded by his male children or it may be by another *khanadamad* duly appointed by the daughter. His tenure according to this view, is one for life, and I cannot accept the contention that it is to be cut short by the failure to beget male children, or by the decease of his wife during his life time . . . . . One of the cases dealt with is the case of the daughter's daughter dying without male issue before her husband. The husband is then to hold for life and to be succeeded by his father-in-law's collaterals. In accordance with this rule, in an unpublished Case No. 889 of 1891, a suit by the collaterals to obtain possession of the estate in the *khanadamad's* life-time, was dismissed as premature.

(10) 54 P. R. 1897.
(11) 39 P. R. 1887.

"So, in like manner, I would dismiss the present claim, holding, as I have said above, that the *khanadamad's* rights are the same, however he may have been appointed whether by gift to himself or by gift to his wife or by the expressed wishes of his father-in-law, that he should succeed, the condition of residence having in all cases to be fulfilled, and that he is entitled to hold for life."

The principle underlying these observations is, in our opinion, applicable to the facts of the case before us. Khuda Bakhsh appointed plaintiff his *khanadamad* and, according to his own statements in the previous case, he took plaintiff into his house and practically constituted him his son. He then made a gift of part of his land in favour of his daughter, plaintiff's wife, and plaintiff attended to the cultivation of the whole property of his father-in-law. The obvious intention of this gift was to benefit the daughter and her husband and any issue of theirs, and we think it would be doing grave injustice to plaintiff to hold that the gift *ipso facto* terminated upon the death of the daughter without issue, in her father's life-time. Not only would such a decision be unjust to plaintiff, but it would, in our opinion, be opposed to the spirit of the customary rule which among such tribes as the *Gujars* recognizes the strong claims which the *khanadamad* has upon his father-in-law in whose house he has taken up his residence and to whom he has been rendering, possibly for many years, most valuable service. A gift of this kind and among such tribes as that of the *Gujars* is obviously intended as much for the benefit of the son-in-law as for the benefit of the wife, and frequently it is made nominally in favour of the former, [see for example *Nawab Khan* v. *Kalu Khan* (12)]. No doubt, in all such cases the gift is not intended to have far-reaching consequences or to enure for the benefit of persons other than the daughter and her husband and their lineal descendants. The collateral heirs of the husband, for example, would have no right to claim such property after his death without issue. But we have no hesitation in holding that a gift when made by a *Gujar* of the Gujrat District to his daughter, whose husband is a resident son-in-law enures for the benefit of

(12) 39 P. R. 1905; 16 P. L. R. 1905.

the latter during his life-time and this, too, in cases where the gift is nominally in favour of a daughter who happens to pre-decease her father, and to leave no issue her surviving.

We accordingly accept this appeal and reversing the decree of the Divisional Judge, we grant plaintiff the relief claimed by him. Respondent must pay costs throughout.

Appeal accepted

(s. c. 15 C. L. J. 3.)

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2251 OF 1908.

May 3, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Teunon.

NARSING NARAIN—PLAINTIFF—APPELLANT

versus

Sheikh JAHI MISTRY—DEFENDANT—RESPONDENT.

Minor—Guardian—No one to be appointed guardian without his consent—Proposal of guardian—No consent to act—Whether competent to Court to appoint him guardian—Married woman, if could be appointed guardian ad litem—*Effect of appointment—Civil Procedure Code (Act XIV of* 1882), *s.* 457—*Civil Procedure Code (Act V of* 1908), *O. XXXII, r.* 4 (3).

No person can be appointed to act as guardian *ad litem* of an infant, without his consent.

Jadow v. *Chhagon*, 5 B. 306, relied upon.

Therefore, where the mother of a minor was proposed as guardian *ad litem* but she never consented to act as such, it is not competent to the Court to appoint her guardian *ad litem* of her minor son.

Where a married woman is appointed guardian *ad litem* for an infant defendant in contravention of the provisions of section 457 of the Code of 1882, he must be taken to have not been represented for the purposes of the suit: in fact, he is in the same position as if he was not made a party to the suit at all. The contravention of the statute is not merely an irregularity, but renders the proceedings a nullity in so far as the infant is concerned.

Khairajmal v. *Daim*, 1 C. L. J. 584; 32 C. 296, relied upon.

Appeal from the decree of the Subordinate Judge of Muzafferpore, dated the 30th June 1908, confirming that of the Munsif of that place, dated the 28th January 1908.

Babu *Shoroshi Charan Mitra*, for the Appellant.

Bubu *Joy Gopal Ghosha*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the plaintiff, who was an infant at the time of the commencement of this suit, for a declaration that an *ex parte* decree passed against him on the 18th March 1904 and the execution sale held on the basis thereof, have not in any manner affected his interest. It appears that on the 17th September 1903, the defendants-respondents sued the plaintiff, then an infant, and several other persons for contribution. The then plaintiffs applied that the mother of the infant might be appointed guardian *ad litem*. Notice was issued in due course upon the infant as also on his mother. The mother, however, did not enter appearance. Thereupon, the Court recorded the following order: "On the plaintiffs' petition supported by an affidavit *Musammat* Ojahar is appointed guardian *ad litem* on behalf of the minor defendant in this case." There was no appearance on behalf of the infant at the trial and the suit was decreed as against him *ex parte*. In execution of that decree his properties have been sold. The plaintiff now contends that the decree and the sale subsequent thereto are entirely inoperative in so far as he is concerned, on the following grounds; namely: *first*, because the mother was not properly appointed guardian as she never consented to act as such guardian; *secondly*, because she was appointed guardian in contravention of the provisions of section 443 of the Code of Civil Procedure of 1882, and *thirdly*, because she was appointed guardian in contravention of section 457 of the Code of 1882.

In so far as the first of these contentions is concerned, it is obviously well founded and must prevail. As already stated, notice was served upon the mother who had been proposed as guardian by the plaintiffs in the suit. She neither appeared nor intimated to the Court that she was willing to accept the office of guardian *ad litem* of her minor son. It is an elementary principle that no person can be appointed to act as guardian *ad litem* of an infant, without his consent [*Jadow* v. *Chhagon* (1), Daniell on Chancery Forms, pp. 54, 55; Annual Practice, 1911, Vol. II, p. 14, Form 8; and Civil Procedure Code, 1908, Order XXXII, rule 4 (3)]. In this case, the mother who was proposed as guardian *ad litem*, never consented to act as such, and it was not competent to the Court

(1) 5 B. 306.

to appoint her as guardian *ad litem* of her infant son.

In so far as the second contention is concerned, there is considerable force in it. Section 443 of the Code of 1882 provides that where an authority competent in this behalf has appointed or declared a guardian or guardians of the property or person or both, of the minor, the Court shall appoint him or one of them, as the case may be, to be the guardian for the suit under the section, unless it considers, for reasons to be recorded by it, that some other person ought to be so appointed. Now, it appears that in the present case, the father of the infant had been appointed guardian under Act VIII of 1890. He was, therefore, the proper, person to be appointed guardian *ad litem* of his infant son. The plaintiffs in the suit, however, did not bring it to the notice of the Court that there was a certificated guardian and applied that the mother might be appointed guardian. The Court, therefore, had no opportunity to consider whether some person other than the certificated guardian ought to be appointed guardian *ad litem* of the infant defendant. In view of this circumstance, the learned Vakil for the appellant has contended, on the authority of the decision in the case of *Hanuman Prasad* v. *Muhammad Ishaq* (2), that the mother was appointed guardian in contravention of the provisions of the statute and that consequently the infant must be taken not to have been represented at all for the purposes of that suit. On behalf of the respondents, reliance has been placed upon the cases of *Jogeshwar Narain* v. *Lala Mooralidhar* (3) and *The Midnapore Zemindari Co.* v. *Gobinda Mahto* (4), in which a Division Bench of this Court followed the decision in *Dammar Singh* v. *Pirbhu Singh* (5) and laid down that if a guardian has been appointed in contravention of the provisions of section 443 of the Code of 1882, the act of the Court amounts merely to an irregularity and does not vitiate the proceedings so far as the infant is concerned. It is not necessary for the purposes of the present case to consider whether the view taken by the learned Judges of the Allahabad High Court in the case of *Hanuman Prasad* v. *Muhammad Ishaq* (2), or the view taken by this Court in the cases of *Jogeshwar Narain* v. *Lala Mooralidhar* (3) and *The Midnapore Zemindari Co.* v. *Gobinda Mahto* (4) gives effect to the true intention of the Legislature. But it is worthy of note that the decision in *Hanuman Prasad* v. *Muhammad Ishaq* (2) was not brought to the notice of the learned Judges of this Court who decided the two cases to which reference has been made. It is further worthy of note that the case of *Dammar Singh* v. *Pirbhu Singh* (5) was decided by the same two Judges as had taken the opposite view in *Hanuman Prasad* v. *Muhammad Ishaq* (2). We further find that the case last mentioned, though cited on two occasions, namely in the cases of *Ganga Ram* v. *Mihin Lal* (6) and *Krishna Pershad Singh* v. *Gosta Behari Kundu* (7), was not disapproved. In view of this conflict of authorities, we reserve our opinion upon the question raised, which when it arises will require very careful scrutiny.

In so far as the third ground on which the validity of the proceedings in the original suit is challenged is concerned, it is clear that the appellant must succeed. It is pointed out that the mother who was appointed guardian *ad litem* was a married woman and under section 457 of the Code of 1882 she could not have been appointed to act as guardian *ad litem* of the minor. In support of this view, reference has been made to the cases of *Kali Shankar Sahai* v. *Maharaja Pratab Udai Nath* (8) and *Rashid-un-nisa* v. *Muhammad Ismail Khan* (9). The decision of the Judicial Committee, which is conclusive upon this matter, shows that when a married woman has been appointed guardian *ad litem* for an infant defendant, he must be taken not to have been represented for the purposes of the suit. In fact, the Judicial Committee laid down that in such cases he is in the same position as if he was not made a party to the suit at all. It is also clear from the decision of the Judicial Committee in the case of *Khairajmal* v. *Daim* (10), that this contravention of the statute is not merely an irregularity but renders

(2) 28 A. 137; 2 A. L. J. 615; A. W. N. (1905) 229.
(3) 7 C. L. J. 270.
(4) 8 C. L. J. 31.
(5) 29 A. 290; 4 A. L. J. 155; A. W. N. (1907), 70.
(6) 28 A. 416; 3 A. L. J. 187; A. W. N. (1906) 73.
(7) 5 C. L. J. 434.
(8) 6 C. L. J. 36.
(9) 10 C. L. J. 318; 13 C. W. N. 1182; 3 Ind. Cas. 864; 6 A. L. J. 822; 11 Bom. L. R. 1225; 6 M. L. T. 279; 31 A. 572.
(10) 1 C. L. J. 584; 32 C. 296.

the proceedings a nullity in so far as the infant is concerned.

The result is that the plaintiff must be deemed bound in no way by the decree and the execution sale which followed thereon. The appeal is, therefore, allowed, the decree of the Courts below set aside and the suit decreed with costs in all the Courts.

Appeal allowed; suit decreed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 282 OF 1910.

December 14, 1911.

Present:—Mr. Justice Karamat Husain and Mr Justice Chamier.

Musammat KASHMIRE—PLAINTIFF—APPELLANT

versus

RAMSARAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Lease by two lessors—Supersession of lease by one lessor.

R. executed an usufructuary mortgage in favour of one *F.* in 1903 in respect of certain property. In the same year *F.* executed a lease in favour of *R.* in respect of the same property. Subsequently *F.* died and was succeeded by *K.* and *S.*, *K.* being entitled to ¾ths and *S.* being entitled to ¼th of the mortgagee right of *F.* In 1907, *R.* executed another mortgage in favour of *K.* alone superseding the entire mortgage and the entire lease of 1903:

Held, that under the circumstances the mortgage of 1907 could not affect the lease of 1903.

First appeal from the decision of the Assistant Collector, 1st class, Meerut, dated the 25th July 1910.

Messrs. *M. L Agarwala Surendro Nath Sen*, for the Appellant.

Mr. M. Ishaq Khan, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the appellant for arrears of rent due upon a lease granted in November 1903 to respondents Nos. 3, 4 and 5 and the father of respondent No. 1, by one Fakir Chand whom the appellant claims to represent. The main question in the case is whether the lease is still in force as between the parties to this appeal.

On October 27th, 1903, respondents Nos. 3, 4 and 5 and Baldeo Sahai, father of respondent No. 1, made an usufructuary mortgage of their shares in two villages Sirsawa and Pipal Khera in favour of Fakir Chand who on November 12th in that year gave the mortgagors a lease of the property. Fakir Chand died in January 1905. He seems to have been only manager of the property on behalf of other persons and on his death a dispute arose as to who should be regarded as mortgagor of the property. The appellant claimed to be regarded as sole mortgagor but she was opposed by the sixth respondent Sri Kishen Lal who claimed a one-fourth share in the mortgage. Mutation of names was ultimately effected in favour of the appellant in respect of three-fourths of the property and in favour of Sri Kishen Lal in respect of the remaining one-fourth and Sri Kishen Lal succeeded in obtaining a decree against the mortgagors for one fourth of the rent payable under the lease. Meanwhile, on December 14th, 1907, the mortgagors who seem to have been willing to recognise the appellant as sole mortgagee in succession to Fakir Chand, made a fresh mortgage of the bulk of the property in favour of the appellant alone in avowed supersession of the mortgage and lease of 1903. They stated in the deed that they had placed the appellant in possession of the property and that she was already recorded as *lambardar* of one of the villages and they promised to get her appointed *lambardar* of the other village also. The present suit for rent is based upon the lease of 1903. The plaintiff-appellant in her plaint states that the mortgage of 1907 never took effect, and, in view of the fact that Sri Kishen Lal has succeeded in establishing his right to one-fourth of the rent reserved by the lease, the appellant has claimed three-fourths only of the rent for the years to which the suit relates. The defence is that the mortgage and lease of 1903 have been superseded by the mortgage of 1907. The Assistant Collector has accepted this defence and dismissed the suit, though he has found on the evidence that the mortgage of 1907 was not given effect to, in its entirety at all events, and that the respondents other than Sri Kishen Lal are still in possession of the property.

An examination of the mortgage-deed of 1907 shows clearly that it was intended to supersede entirely the mortgage and lease of 1903. But it could not be given effect to in its entirety because Sri Kishen Lal succeeded in establishing his right to be treated as lessor of the property to the extent of his one-fourth share. The result of the action taken

by him was that the mortgagors remained in possession of the whole of the mortgaged property as if the mortgage of 1907 had never been made. The oral evidence shows that the appellant was unable to recover any portion of the rents of the property from the cultivators and suits for rent brought by her against them were dismissed. As between Sri Kishen Lal and the other respondents the mortgage and lease of 1903 are still in force, it was never intended by any one that the mortgagors should hold possession of one-fourth as lessees under the lease of 1903 while the appellant hold collecting possession as mortgagee of the remaining three-fourths. Nor as the mortgage of 1907 superseded entirely the mortgage of 1903 for Sri Kishen Lal is still mortgagee. It was never intended that the mortgage of 1907 should supersede part only of the mortgage of 1903. The greatest confusion would ensure if it were held that both mortgages are partly in force and the loan of 1903 has been partially superseded.

It appears to us that the mortgage of 1907 failed to take effect at all that the lease of 1903 is still in full force and that the present suit is maintainable.

Under Order XLI, rule 25, we direct that the record be returned to the Court below for trial of the following issue:—

What amount is due to the appellant in accordance with the lease of 1903?

Further evidence may be admitted. On return of the finding ten days will be allowed for objections.

Case remanded.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 266 OF 1910.

January 6, 1912.

Present:—Sir Henry Richards, KT., K. C., Chief Justice, and Mr. Justice Banerji.

MRS. E. C. BLANCHETT—PLAINTIFF—APPELLANT

versus

SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

Master and servant—Neglect by servant in common employment—Liability of Master—Duty of Master to employ competent servant and use fit machinery.

In India a servant has no cause of action against his master for the neglect of another servant in the common employment of the same master and this notwithstanding the fact that the nature of the employment of the servant suffering the injury and the servant whose neglect causes the damage is very dissimilar. It is the duty of the master, however, to employ competent servants and to provide proper appliances for the carrying out of the work.

First appeal from the decision of the Subordinate Judge of Meerut, dated the 29th April 1909.

Mr. *Sawhny*, for the Appellant.

Mr. *Ryves*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff against the Secretary of State for India in Council as representing the Oudh and Rohilkhand Railway. It appears that on the 6th of May 1908, a collision took place between Dasna and Ghaziabad Railway stations, with the result that the plaintiff's husband, who was an Engine Driver in the employment of the Oudh and Rohilkhand Railway, was killed. He was a man aged 38½ years and his wages are stated to have averaged Rs. 280-4-0 a month, which evidently includes his remuneration for over-time work. Dasna is a station on the Oudh and Rohilkhand line which is a single line at that point. Ghaziabad is a station which is used both by the Oudh and Rohilkhand Railway and the East Indian Railway and other Railways, but the servants employed in Ghaziabad are not the direct servants of the Oudh and Rohilkhand Railway. Efforts had been made by inquiries and by prosecutions to arrive at some conclusion as to how the accident occurred. This much is common case, and beyond all question, namely that the immediate cause of the accident was the running of two trains in opposite directions between Ghaziabad and Dasna which unfortunately collided. There is no evidence to show whether the train from Ghaziabad started from that station before the train from Dasna started from Dasna or *vice versa*. The accident must have been caused by gross negligence on the part of an official at one station or the other at the time of the accident, the departures of trains from both Dasna and Ghaziabad stations were regulated by what is called Tyre's Patent Tablet Instrument. If this instrument is used and the rules are observed by the Railway servants it would appear to be impossible that a train should leave Dasna after a train had already started from Ghaziabad to Dasna, or *vice*

versa. The plaintiff in her plaint alleges that the defendant Railway appointed and maintained incompetent servants, namely, Mr. C. Collett White, Sunder Lal, and Jawahir Lal and further that they neglected to supply suitable and safe machinery and appliances for the working of the line. Mr. Collett White, Sunder Lal and Jawahir Lal are all admittedly servants of the Oudh and Rohilkhand Railway. It is to be noticed that the Oudh and Rohilkhand Railway alone are sought to be made liable in the present suit.

The defence was that the plaintiff had no cause of action against the Secretary of State for India, that the present suit was not maintainable under the provisions of section 1 of Act XIII of 1855, and that Article 745 of the Civil Service Regulations was a bar to the suit. It was also alleged that an offer was made to the plaintiff of Rs. 2, 160 being the equivalent of 12 months' substantive pay at Rs. 180 per mensem. The defence of Article 745 of the Civil Service Regulations has not been pressed in this Court.

It must be admitted that there was neglect somewhere as the cause of the accident which happened on the 6th of may 1905. There must have been neglect by the officials either at Dasna or at Ghaziabad, otherwise it is quite impossible that the two trains wonld have been allowed to proceed on the same line in opposite directions at the same time It is perfectly clear in this country where there is no Legislature analogous to the Employers Liability Act that a servant has no cause of action against his master for the neglect of another servant in the common employment of the same master and this notwithstanding the fact that the nature of the employment of the servant suffering the injury and the servant whose neglect causes the damage is very dissimilar. It was evidently for this reason that an allegation is made in the plaint that the defendant is liable on the ground that the Oudh and Rohilkhand Railway employed incompetent servants and neglected to supply suitable appliances for the carrying out of the work of the line. The evidence as to the incompetence of the servants Mr. Collett White, Sunder Lal and Jawahir Lal, is very unconvincing. We have no reason whatever for holding that Mr. Collett White was not a perfectly competent official of the Railway. Furthermore, there is nothing in the evidence to connect Mr. Collett White with the accident. Some evidence was given as to the incompetence of Sunder Lal, who is supposed to have used the Tablet Instrument on the day in question. Mr. Collett White was examined on behalf of the plaintiff so also was a gentleman of the name of Mr. Plunkett and another gentleman of the name of M. Cole. Mr. Plunkett stated that he found sometime before the accident that Sunder Lal had not learnt the "beats" of the Tablet Instrument by heart. It would appear that beats are transmitted by the instrument for the information of the official of the particular train which is awaiting to start or has been allowed to start from a station and the official is thereby enabled to know the number and description of the train. It was further stated that Sunder Lal had been suspended as the result of a report that he did not work the Tablet Instrument properly. With regard to this suspension it appears from the evidence of Mr. Collett White in cross-examination that an inquiry was made after Sunder Lal's suspension and that it was found that he was not to blame in respect of the matters reported on and that, on the contrary, the blame for failure to work the instrument properly must be attributed to the officials at Ghaziabad. It is also proved in cross-examination (to which no exception was taken) that before the accident Sunder Lal was examined and found capable of working the instrument. There was also evidence that since the accident the Oudh and Rohilkhand Railway have discontinued the use of the Tyre's Patent Tablet Instrument. Dasna is not a junction : it is a station on a single line, and it is, therefore, probable that the working of the Tablet Instrument at that station is as simple as it can be at any station probably far more simple that the working of the same Instrument at Ghaziabad which is a junction used by a number of lines and into which a number of trains come. The failure to have learnt the beats by heart has been in no way connected by evidence with the accident; and according to the evidence of the plaintiff's own witness in cross-examination we find that Sunder Lal had been examined and found capable of working the Instrument before the accident occurred. The Instrument itself according to the evidence is an

instrument which is largely used in India and in England. It is true that Mr. Cole in his evidence says that it is capable of being tampered with, and that it is possible to get the Tablets, which enable trains to start, out of the drawer simultaneously at two different stations. The Oudh and Rohilkhand Railway according to the evidence had not adopted the Tyre's Patent Tablet Instrument throughout their line, and not much significance can be given to the fact that they have discontinued its use at the two stations where they had adopted it. It may well have been that they considered that the Instrument was not so perfect as to make it expedient for them to introduce it throughout their system. It is not shown at all that there was any defect in the Instrument, far less that the accident was due to any such defect. According to the evidence the Instruments were regularly tested after the accident and found quite perfect. Mr. Cole says "It is not known even now that the accident was due to any defect in the instrument." He says further: "So far as I know, there was no safer Tablet Instrument in existence than those in use on the Dasna-Ghaziabad section. Before the accident they were believed to be perfectly safe." This witness was produced on behalf of the plaintiff though, no doubt, he was in the employment of the defendant Railway. There is no doubt that while a master is not liable for the neglect of a servant which causes injury to another servant in the same employment it is his duty to employ competent servants and to provide proper appliances for the carrying out of the work. But we find it quite impossible in the present case and on the evidence before us, to find that the Oudh and Rohilkhand Railway neglected their duty by appointing Sunder Lal or by making use of the Tyre's Patent Tablet Instruments. Apart from this accident, Sunder Lal appears to have nothing against him. The result of the inquiry as to the complaint of failure to work the Tablet Instrument before the accident resulted in his favour, and, as we have stated, the instrument used at Dasna was in perfect working order and is an instrument generally recognized as being safe and efficient.

Even if we were to assume for a moment that the accident was due to the neglect of Sunder Lal rather than the neglect of one of the officials at Ghaziabad, the neglect would be the neglect of a servant in common employment with the plaintiff and the defendant would not be liable.

It is next argued that there must have been neglect either at Ghaziabad or at Dasna and that in any event the defendant is liable. As against this argument, it must be mentioned that there is, *first* of all, no allegation of neglect at Ghaziabad, and *secondly*, that there is no evidence that the officials who worked the instruments at Ghaziabad are the servants of the Oudh and Rohilkhand Railway. The mere fact that work is done at Ghaziabad Station in which the defendant Railway is interested as well as the East Indian Railway is not sufficient and this is shown by the case of *Swainson* v. *North East Railway Company* (1). If we assume that the accident was due to the neglect of the officials at Ghaziabad the East Indian Railway Company and not the Oudh Railway would be liable in damages for the result. It is argued that the officials at Ghaziabad must be deemed to be the servants of the Oudh and Rohilkhand Railway because they are the servants of the East Indian Railway Company who must be considered the Agents of the Oudh Railway and that, therefore, the Oudh and Rohilkhand Railway are liable. It seems to us that if this argument were sound the Oudh and Rohilkhand Railway would not be liable because the husband of the plaintiff and the servants guilty of negligence would be in common employment.

Furthermore, there is again no evidence that there was any neglect of duty by the East Indian Railway Company as representing the Oudh and Rohilkhand Railway to employ competent servants and to supply proper appliances.

In our opinion the decree of the lower Court must be upheld. We would strongly recommend the plaintiff to the consideration of the Railway Board. There is not the least doubt that through the neglect of some one the deceased met with his death and the plaintiff has been left with six destitute children to support. The case appears to

(1) 3 Ex. Dn. 341; 47 L. J. Ex. 372; 38 L. T. 201; 26 W. R. 4.

ns to be an extremely sad one and to well merit the kind consideration of the Railway Board. We dismiss the appeal and direct that each party do pay his own costs. We also direct that a copy of this judgment be sent to the Railway Board.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 351 OF 1910.

December 21, 1911.

Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.

HARDEY NARAIN AND ANOTHER—OPPOSITE PARTY—APPELLANTS

versus

MRS. POWELL AND OTHERS—OBJECTORS—RESPONDENTS

Land Acquisition Act (I of 1894), s. 30—Apportionment of compensation between zemindar *and occupancy-tenant*

Where an occupancy-holding is acquired under the Land Acquisition Act and a certain sum is awarded as compensation therefor, the compensation should be apportioned between the landlord and the occupancy-tenant in accordance with the values of their respective interests in the holding, and if possible something should be awarded to the landholder on account of the possibility that he may have rent of his occupancy-tenant enhanced.

First appeal from the decision of the District Judge of Saharanpur, dated the 14th July 1910.

Dr. *Tej Bahadur Sapru*, for the Appellants.

Mr. *Ryves* with him Mr. *Nihalchand*, for the Respondents.

JUDGMENT.—This is an appeal against an order or decree of the District Judge of Saharanpur awarding to the appellants 22/40 and to the respondent Mrs. Powell 28/40 of the sum of Rs. 7,768-8 awarded by the Superintendent of Dehra Dun as compensation for certain land taken up under the Land Acquisition Act for public purposes. It is not now disputed that Rs. 7,768 8 represent the fair value of the property taken up, and the only question for decision now is how this sum should be divided between the appellants and the respondent Mrs. Powell. The Superintendent proposed to award to the appellants the whole of the above sum except Rs. 144 which he considered to be the value of Mrs. Powell's interests in the land. She objected to this and the Superintendent referred the matter to the District Judge. Mrs. Powell's case was that she was virtually the *zemindar* of the land and that the appellants were only nominally *zemindars* and were entitled at best to compensation calculated on the amount of rent paid by her to them. That rent was Rs. 12 per annum, and her suggestion was that the *zemindars* should be awarded Rs. 144 only. The reference by the Superintendent was made to the District Judge early in 1910. A date was fixed for the hearing of the case in June 1910 and it was decided that the case should be taken up at Dehra Dun. On some day in June, the exact date is not clear, it seems to have occurred to some one that the appellants were interested in the case as, of course, they were, and on June the 13th notice was issued to the appellant Hirdey Narain that the case would be taken up on the following day. Notice was served upon Hirdey Narain on the 13th of June at 9 P. M. He appeared before the Court on the following day and as the Judge observes, very reasonably asked for time. On that day two witnesses only were examined for Mrs. Powell, and the case was adjourned to June the 22nd to be heard at Mussoorie. It was taken up on June the 25th. Witnesses were examined on that day and on the 26th, one witness only being produced by Hirdey Narain. Here we may mention that although Maharaj Narain seems to have a share in the property no notice was issued to him. But this is not made a ground of complaint here and for present purposes Maharaj Narain may be disregarded. The object of Mrs. Powell seems to have been to prove that occupancy-tenants like herself were entitled to build upon their land and also to transfer it to whomsoever they pleased. An extract from the *Wajib ul arz* of the village was put in and several witnesses were called and questioned as to the rights of occupancy-tenants in the village in question and in the adjoining villages. It is unnecessary for us to examine this evidence in detail. The *wajib-ul-arz* does not lay down that occupancy tenants can transfer their rights. It says only that certain *kashtakars* can build houses without the permission of the landlord. The oral evidence on the point is quite worthless. The District Judge has arrived at the conclusion, as we understand his judg-

ment that occupancy-tenants in the suburbs of the town of Dehra Dun which include the village in question are practically sub-proprietors who are entitled to transfer their rights and need only pay a quit-rent to the *zemindars*. In arriving at this conclusion he made use of some remarks made by Mr. Dampier in a Rent Rate Report for the Dehra suburb circle. It is not contended here that these remarks are admissible in evidence. They ought to have been excluded, and even if they are admitted, we consider that they are not sufficient to show that Mrs. Powell is entitled to transfer her rights in the land. She is recorded, or rather the person through whom she claims is recorded, as occupancy-tenant of the land.

According to the present law, she is not entitled to transfer her rights. No issues were fixed in the case. The point which the District Judge had to decide was how the sum awarded by the Collector as compensation for the land was to be divided between the claimants, and a definite issue should have been struck on this question. The sum awarded by the Collector should be apportioned between the appellants and Mrs. Powell in proportion to their interests in the land. On the one hand, we have the *zemindars* entitled to receive Rs. 12 per annum as rent; on the other hand, we have Mrs. Powell an occupancy-tenant of the land, receiving according to the evidence Rs. 40 from her sub-tenants, so that at first sight it would appear that the values of the interests of the *zemindars* and Mrs. Powell are in the proportion of 12 to 28, and it is in this proportion that the sum awarded by the Collector has been divided between them by the District Judge. The appellants take objection to this on the ground that the learned Judge has not taken into consideration the fact that whereas the rents received by Mrs. Powell were fixed quite recently the rent payable by Mrs. Powell to the appellants was fixed as long ago as 1890. They point out that a landholder may sue an occupancy-tenant for enhancement of the rent on the grounds stated in section of the Tenancy Act and they contend that inquiry should be made as to whether Mrs. Powell was not at the date of the acquisition of the land paying rent at a rate below the prevailing rate paid by occupancy-tenants for lands similar in quality and with similar advantages, and also that there has been a rise in the average local prices of staple food crops during the currency of the present rent. Owing to the fact that no issue was struck in this case the necessity for making a proper inquiry into the respective values of the interests of the parties has been overlooked. It has been held in more than one case in the Calcutta High Court that where a sum is to be apportioned between a landholder and a subordinate tenure holder, the respective values of the interest of the two should be ascertained, and, if possible, something should be awarded to the landholder on account of the possibility that he may be able to have the rent of the subordinate tenure-holder enhanced *mutatis mutandis*, what was said in these cases applies to the present case. If it can be shown that the landholder was, at the time of the acquisition of the land, entitled to have the rent enhanced, there would be no difficulty in ascertaining to what extent the rent might have been enhanced had the land not been acquired by the Government. There is some evidence that the landholder took steps to have the rent enhanced but abandoned them. Considering that notice of the case was given at the last moment to the appellant, and considering that no attempt has been made to ascertain the respective values of the interests of the parties in the land, we think that a further inquiry should be held: under Order XLI, rule 25, we remit to the Court of the District Judge the following issue:—What are the respective values of the interest of the appellants and Mrs. Powell in the land in question? Further evidence may be admitted on both sides. On return of the finding ten days will be allowed for filing objections.

Cause remanded.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 32 OF 1910.

January 17, 1912.

Present:—Mr. Justice Robertson and Mr. Justice Rattigan.

DASAUNDHI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

CHANDA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS

Custom—Adoption—Succession—Appointment of heir

DASAUNDHI *v.* CHANDA SINGH.

—*Right of appointed heir to succeed to natural father in the presence of collaterals.*

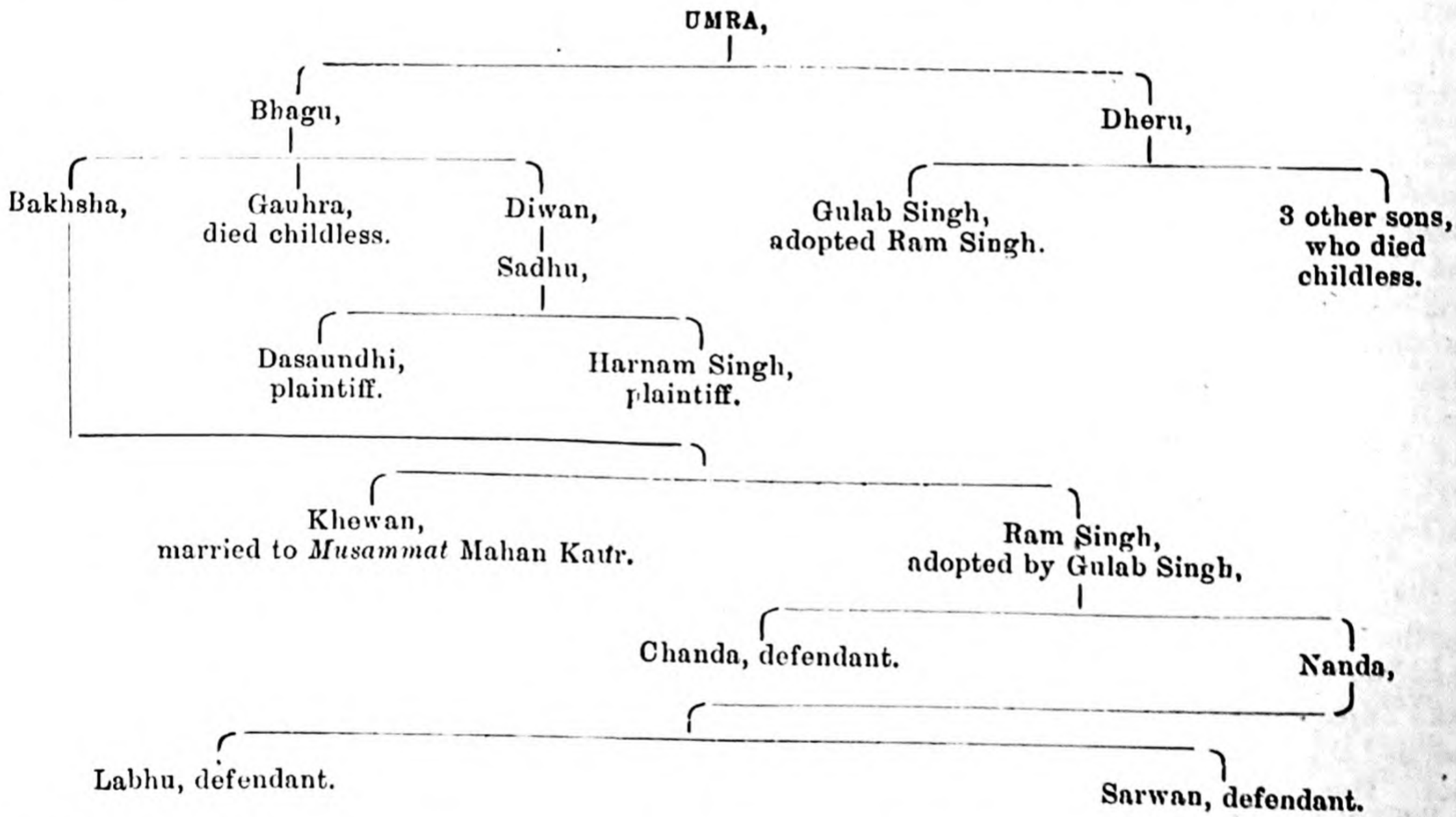
The right of an appointed heir and his lineal descendants to succeed to the property of his natural father is preferential to the right of the latter's collaterals.

Second appeal from the decree of the Divisional Judge, Ludhiana Division, at Ferozepore, dated the 19th of November 1909, reversing that of the Additional District Judge Ludhiana District, of the 19th June 1909, decreeing plaintiff's claim.

Lala *Lajpat Rai*, for the Appellants.

Rai Bahadur Lala *Sukh Dial* and Lala *Durga Das*, for the Respondents.

JUDGMENT.—The parties are Hindu *Jats*, of the *Man gôt*, of *Mauza* Nangal, *Tahsil* and District Ludhiana, and the following pedigree table (which is admittedly correct) explains rather more satisfactorily the facts than that given in the judgment of the Additional District Judge: —



It is admitted that Ram Singh, who was adopted by Gulab Singh, (1) succeeded to the estate of his adoptive father, Gulab Singh, and (2) did not inherit any part of the estate of his natural father, Bakhsha when the latter died. On the occasion of Baksha's death, the whole of his estate descended to Ram Singh's natural brother, Khewan, and upon the death of Khewan (who left no lineal descendants), the said estate was enjoyed for her life by his widow *Musammat* Mohan Kaur. She has now died, and mutation of names in respect of Khewan's estate was effected by the Revenue authorities in favour of the descendants of Ram Singh, plaintiffs who are the descendants of Diwan Singh, the brother of Bakhsha, claim to be entitled to the property on the ground that as Ram Singh was adopted by Gulab Singh and succeeded to the latter's property, his descendants have no right to any property which originally descended from his natural father. The simple question, therefore, that arises in this case is (as stated by the Divisional Judge) "whether where a person has been adopted, and has in the presence of a real brother not inherited in his natural father's family, he or his heirs can succeed in the natural father's family in preference to collaterals not descended from the natural father."

It was admitted in the lower Courts that the so called adoption of Ram Singh, by Gulab Singh was in fact the ordinary customary appointment of an heir as recognized among agricultural tribes in this Province, and, though Mr. Lajpat Rai attempted to show that it was in reality something different, we see no reason to doubt that the admissions made in the Courts below were correct, and it is upon this assumption that we proceed to deal with the question before us.

ATUL CHANDRA DUTT v. ESON ALI.

In view of the authorities, we must take it as established that the general rule accepted by the agricultural tribes in the Punjab is that a person who is appointed as an heir to a third person does not thereby lose his right to succeed to the property of his natural father, (para. 48 of the Digest of Customary Law and the cases there cited). A corollary to this general rule is that among many tribes it is recognized that the appointed heir and his lineal descendants have no right to succeed to any share in the family of the natural father as against other sons (and their descendants) of the latter, [see *e.g.*, *Mukh Ram* v. *Not Ram* (1)].

But, speaking generally, we have no hesitation in saying that the agricultural tribes of this Province recognize a preferential right on the part of the appointed heir to succeed to the property of his natural father when the only other claimant is the collateral heir of the latter.

The evidence in the present case, so far as it goes, supports the above conclusions. There is, no doubt, *per contra* the very general statement in the Customary Law of the Ludhiana District (page 70), but the rule therein laid down is opposed to the rule as generally observed in the province and not a single instance is given in support of it. That this general rule is not correct for the whole of the Ludhiana district is apparent from the fact that according to the *Riwaj-i-am* of the Pakhowal *pargana*, an adopted son succeeds to his natural father's estate in the absence of brothers and their descendants.

Plaintiffs have produced evidence to show that in certain instances an adopted son has not succeeded, in this or neighbouring villages, to a share in his natural father's estate, but in every such instance the persons who have succeeded to the latter's property have been either the natural brothers of the adopted person, or their lineal heirs. On the other hand, defendants have adduced instances to show that in certain cases the adopted person has succeeded to a share in his natural father's property, even in the presence of natural brothers.

In our opinion, formed after careful consideration of the evidence and the arguments of Counsel, the judgment of the learned Divisional Judge is right. It may well be that the right of an adopted son to succeed in the family of his natural father is not universally conceded by custom among agricultural tribes in cases where the natural father has left lineal descendants though even in such cases it will be found that among many tribes the right of the adopted son is recognized. But be that as it may, we have no doubt that the ordinary rule prevailing among the tribes in the Punjab is that the right of the adopted son and his lineal descendants to succeed to the property of his natural father is preferential to the right of the latter's collaterals. In the present case we can find nothing on the record to justify us in departing from this general rule and we, therefore, dismiss this appeal with costs.

Appeal dismissed.

(1) 100 P. R. 1906.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 952 OF 1909.

January 4, 1912.

Present:—Mr. Justice Caspersz and Mr Justice D. Chatterjee.

ATUL CHANDRA DUTT—PLAINTIFF—APPELLANT

versus

ESON ALI—DEFENDANT—RESPONDENT.

Landlord and Tenant—Kabuliat—*Construction*—*Condition to pay peddy rent, in default to pay certain sum*—*Whether the sum or market value of paddy payable.*

A tenant by a *kabuliat* agreed to pay a certain sum and 50 *aris* of paddy as rent, and in default, "to pay the price thereof, Rs. 19-4":

Held, that, in the event of the paddy not being delivered, the landlord could not get more than what was fixed in the *kabuliat*, that is, he could not recover the actual market value of the paddy.

Afar Morale v. *Surja Komar Ghose*, 7 Ind. Cas. 842: 12 C. L. J. 649; 15 C. W N. 249, relied upon.

Appeal from the decree of the Sub-Judge of Chittagong, dated January 20th, 1909, modifying that of the Munsif of Patiya, dated May 30th, 1908.

Babu *Dhirendra Lal Kastagir*, for the Appellant.

Babu *Khitish Chandra Sen*, for the Respondent.

JUDGMENT.—The lower Courts have differed as to the construction of the *kabuliat* on the basis of which the plaintiff appellant brought his suit to recover rent. In second appeal it is urged that the construction adopted by the first Court was correct.

KUTUBULLAH SARKAR *v.* DURGA CHARAN.

The *kabuliat* provides:—"That I shall annually pay Rs. 30 and annas 10 in cash and 50 *aris* of paddy as rent in instalments as mentioned below and receive *dakhilas* therefor. If I do not pay the aforesaid paddy rent each year by the months of *paus* then I shall pay the price thereof Rs. 19-4-0 with the aforesaid rent. If I do not pay the aforesaid rent then I shall not raise any objection to your realising the arrear rent along with damages and interest by means of any law existing at present or that may be passed in future.

Reliance is placed on the case of *Baneswar Mukerjee* v. *Umesh Chandra Chakraverty* (1) which was explained in *Afar Morole* v. *Surja Komar Ghose* (2). We have to ascertain the meaning of the *kabuliat*, and the intention of the parties is to be gathered from the plain sense of the language used by them in the lease.

The question is, whether the words "the price thereof Rs. 19-4-0" mean that the parties substituted for all time, in the event of the paddy not being delivered, that money equivalent of the 50 *aris*, or whether the plaintiff can recover the actual market-value of the paddy as awarded by the Munsif. In the absence of any finding or evidence that the sum of Rs. 19-4-0 represented a value adopted for registration and stamp duty, or that it was merely intended to represent the then value of the paddy, we are of opinion that the plaintiff cannot get more than what was fixed in the *kabuliat*. The language of the lease now under consideration resembles the wording of the instrument in the case of *Afar Morole* v. *Surja Komar Ghose* (2).

The view accepted by the Subordinate Judge is correct. The appeal is dismissed with costs.

Appeal dismissed.

(1) 37 C. 626; 7 Ind Cas. 875.
(2) 12 C. L. J. 649; 15 C. W. N. 249: 7 Ind. Cas. 842.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 76 OF 1911.
January 4, 1912.

Present:—Mr. Justice Caspersz and Mr. Justice D. Chatterjee.

KUTBULLAH SARKAR—PETITIONER—APPELLANT

versus

DURGA CHARAN RUDRA—OPPOSITE PARTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI r. 2—Payment or adjustment out of Court, not certified, —Effect of—Limitation for certifying to Court—Limitation Act (XV of 1877), Sch. II, Art. 173A—Judgment-debtor's remedy—Suit.

The Court cannot recognise a payment or adjustment, which has not been certified for any purpose whatsoever, as for example, to prolong the period of limitation for applying for execution.

The judgment-debtor is at liberty to inform the Court and so to protect himself from any fraud of the decree-holder. But he cannot be permitted to evade the provisions of Article 173A of the Limitation Act, and to obtain a decision in a matter which does not strictly come within the scope of section 47, because it is a matter which has been specifically provided for in Order XXI, rule 2. The judgment-debtor may have his remedy by suit on a plaint properly framed.

Manmohan Karmakar v. *Dwarka Nath Karmakar*, 7 Ind. Cas. 55: 12 C. L. J. 312, at p. 317, relied upon.

Appeal from the order of the District Judge of Rajshaye, dated November 15th, 1910, affirming that of the Munsif of Natore, dated March 8th, 1910.

Moulvi *Wahid Husain*, for the Appellant.

Babu *Krishna Kumar Mitra*, for the Respondent.

JUDGMENT.—This is an appeal by the judgment-debtor, from an order of the District Judge permitting the decree-holder to execute his decree of the 14th August 1901. The first execution proceedings began on the 5th September 1904; the second on the 4th January 1908; while the third and present application was made by the decree-holder on the 11th August 1909. On these facts it is urged for the judgment-debtor that the first and second applications to execute the decree were clearly barred. This contention, however, cannot be considered in the absence of findings of fact, and the omission is due to the attitude of the judgment-debtor who refrained from pressing any such objection in the lower Courts. There must have been various proceedings on the successive applications, and certain action taken on the second application has been mentioned at the Bar. If that appli-

cation was in time, the case with which we are now concerned was properly instituted and can continue.

The next contention is that there was an adjustment of the decree sometime in the year 1901; that the decree-holder fraudulently omitted to certify the same to the Court, and that the question is one that should have been decided under section 47 of the Code of Civil Procedure, 1908.

Order XXI, rule 2 of the Code, as now amended, provides that a payment or adjustment, which has not been certified or recorded in the manner provided by the foregoing part of the section, shall not be recognised by any Court executing the decree. The omission of the words "as payment or adjustment of the decree" makes it clear that the Court cannot recognise a payment or adjustment, which has not been certified, for any purpose whatsoever, as, for example, to prolong the period of limitation for applying for execution. The judgment debtor has his remedy under the second clause of rule 2; he is at liberty to inform the Court, and so to protect himself from any fraud of the decree-holder. The appellant, however, seeks to obtain another remedy, and to have his objecting to execution tried out under section 47 of the Code. But he cannot be permitted to evade the provisions of Article 173A of the Limitation Act, and to obtain a decision in a matter which does not strictly come within the scope of section 47 because it is a matter which has been specifically provided for in Order XXI, rule 2. If the contrary view were adopted, it would be open to the judgment-debtor in any similar case to allege fraud on the part of the decree-holder and to have an inquiry made under the general section, for every omission to certify payment may involve either negligence or fraud which in such a case would be an aggravated form of negligence. In the same order the Legislature has enacted that applications to set aside sales on the ground of fraud come within the scope of rule 90, and so the operation of section 47 is excluded by necessary implication.

The view we take in this matter receives support from the decision of Mookerjee and Carnduff, JJ., in *Mon Mohan Karmakar* v. *Dwarka Nath Karmakar* (1). The judgment-debtor may have his remedy by suit on a plaint properly framed.

The appeal is dismissed with costs. We assess the hearing fee at two gold *mohurs*.

Appeal dismissed.

(1) 12 C. L. J. 312 at P. 317; 7 Ind Cas 55.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 534 OF 1909.

December 19, 1911.

Present:—Mr. Justice Coxe and Mr. Justice N. Chatterjea.

MADAN MOHAN JIU THAKUR, BY HIS *Shebait* BENODE BEHARY PATNAIK AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MANMATHA NATH BOSE—DEFENDANT—RESPONDENT.

Second Appeal—Question of law—Construction of document—Evidence—Document of title—Civil Procedure Code (Act V of 1908), s. 100—*Hindu Law—Endowment*—Shebait—*Suit by* Shebait *to recover property of idol as inalienable from transferee—No dedication—Burden of proof.*

The misconstruction of a document by a Court below cannot justify interference in second appeal, if the document is merely a piece of evidence and not a document of title.

Shebaits who have themselves sold property said to belong to an idol as their own, cannot, in a suit to recover the property as inalienable, content themselves with showing that the property was usually called the *debuttar* and throw on their opponent the almost impossible task of proving the negative, namely, that there had been no dedication. The plaintiffs, *shebaits*, must prove that the land was dedicated and inalienable.

Appeal from the decree of the Sub-Judge of Cuttack, dated December 22nd, 1908, reversing that of the Munsif of Bhadrak, dated January 21st, 1909.

Babu *Brojendra Nath Chatterjee*, for the Appellants.

Babu *Baidyo Nath Dutt*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the *shebaits* of Thakar Madan Mohan Jiu for recovery of possession of certain lands, which they allege to be the property of the idol. The suit was decreed by the Court of first instance but dismissed on appeal, and the plaintiffs appeal to this Court.

The learned Subordinate Judge in appeal held that the plaintiffs had failed to prove that the land in suit was absolutely dedicated to the idol, or that it was inalienable. He consequently held that the sales, by which

the property had been lost to the idol, could not be set aside, and that the suit for recovery of the land must, therefore, fail.

On behalf of the plaintiffs it is urged (*i*) that the conclusions of the Appellate Court are not warranted by the facts found, (*ii*) that the burden of proof has been wrongly placed on the plaintiffs, (*iii*) that even if the findings of the lower Appellate Court are correct still the property is not freely alienable, and (*iv*) that the finding with regard to limitation is wrong.

As to the first point it resolves itself really into a plea that the lower Appellate Court has not dealt rightly with the *rubakaries* which have been marked 3 and 4. The *sanads* by which the endowment is said to have been made are not forthcoming. Their validity, however, was inquired into in 1842 and these *rubakaries* are the decisions of the Revenue authorities on the point. In them the *sanads* are referred to and one of them is found to be valid. The proceeding is described as one between Government as plaintiff and the idol, by its *morfatdars*, as defendant. The lower Appellate Court holds that these documents do not establish that the land was absolutely dedicated to the Thakur. Assuming that the learned Subordinate Judge has misconstrued the effect of these documents the question arises whether this misconstruction can be rectified in second appeal. The authorities show that such misconstruction cannot justify interference in second appeal, if the document is merely a piece of evidence, and not a document of title. It is argued that these *rubakaries* are equivalent to decrees, establishing the dedication of the property to the idol and may, therefore, be regarded as documents of title. But, clearly, the right of the idol to the land was not in controversy in those proceedings. All that the plaintiff in those proceedings was interested in claiming was that the land, whether it belonged to the idol or not, was subject to the assessment of rent or revenue. In these circumstances, it seems to me that the decision cannot be regarded as a document of title. The case of *Maganlal* v. *Doshi Mulji* (1), which has been referred to, is quite distinguishable as that was a case of a grant, not by a third person, but by Government itself. The cases of *Nimaye Churn Puteetundee* v. *Jogendranath Banerjee* (2); *Gobinda Kumar Roy* v. *Debendra Kumar Roy Chowdhury* (3); *Madhob Chandra Bara* v. *Srimatee Rani Sarat Kumari Debi* (4), on the other hand, support the view that these documents are merely evidence, and, that being so, the fact that the learned Subordinate Judge has not given them their proper effect, if that is the case, will not justify interference in second appeal.

There is no substance, in my opinion, in the second point. The learned Subordinate Judge is quite right in saying that the plaintiffs were bound to prove that the property was dedicated to the idol and was inalienable. It is argued, however, that, as the defendants admit that the property was nominally *debuttar*, it was incumbent on them to prove that it was not really *debuttar*. This, however, is not, in my opinion, a correct view. It would lead to much injustice if it were held that *sebaits*, who have themselves sold property said to belong to an idol as their own, could in a suit to recover the property as inalienable content themselves with showing that the property was usually called *debuttar*, and throw on their opponents the almost impossible task of proving the negative, namely that there had been no dedication. The fact that property is called *debuttar* is doubtless evidence in the plaintiffs' favour, but it does not relieve them of the whole burden of proving that the land was dedicated and is inalienable. Moreover, this plea is not really a plea that the burden of proof has been misplaced, but a complaint that the lower Appellate Court is wrong in holding that it has not been discharged. And that is a point for that Court and not for us to decide.

The third point is based on certain remarks in the learned Subordinate Judge's judgment as to what the real nature of the alleged endowment may have been. It is argued that if these conjectures be correct, still the property would not be alienable This argument seems to me of very doubtful validity, but even if it were accepted it would not avail the present appellants, because it is quite clear that these are mere conjectures of the learned Subordinate Judge, and not findings on which the decision is based.

(1) 25 B. 631.

(2) 21 W. R. 365.
(3) 12 C. W. N. 98.
(4) 15 C. W. N. 126; 6 Ind. Cas. 26.

NABA v. PIARA MAL.

In the view that I take of the case it is unnecessary to decide the question of limitation.

In my opinion, therefore, all the points taken fail and the appeal must be dismissed with costs.

N. CHATTERJEA, J.—I agree.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No 713 OF 1909.

January 15, 1912.

Present:—Mr. Justice Robertson and Mr. Justice Shah Din.

NABA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

PIARA MAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (II of 1905), *s.* 13 (1) *fifthly —Common entrance from the street—Blind alley—"Street" meaning of—Punjab Municipal Act (XX of* 1891*), s.* 3 *(4).*

Four houses opened into a blind alley of irregular shape and small dimensions. The mouth of the alley gave access to the houses from the public street. There was no arch or door at the mouth of the alley. Each of the four houses opening into the alley had a separate door and the four houses were not shown to have at one time constituted one building with the opening passage of the alley as its entrance and to have been subsequently sub-divided into separate dwelling-houses. There was nothing to show that no one other than the owners of those houses had free access to or a right of way over the blind alley. It was not proved that the blind alley was the private property of the owners of the four houses:

Held, that the blind alley did not constitute a common entrance to the four houses from the street within the meaning of section 13(1), *fifthly*, of the Punjab Pre-emption Act.

The Legislature intended to use the word "street" in section 13, in much the same sense in which the word is used in the Punjab Municipal Act, as including an alley, whether a thoroughfare or not, over which the public have a right of way.

Second appeal from the order of the Divisional Judge, Multan Division, dated the 17th April 1909, reversing that of the District Judge Multan dated the 31st August 1908, decreeing plaintiffs' claim.

The Hon'ble Rai Bahadur *Shadi Lal*, for the Appellants.

Messrs *Oertel* and *Mukerji*, for the Respondents.

JUDGMENT.—This appeal has arisen out of a suit for pre-emption brought by Sobha Ram, father of the appellants, who has since died, against the defendants-respondents in respect of a house situate in *mahalla* Hamam in the city of Multan. The original plaintiff based his suit on the ground that he had a common entrance from the street with the vendor, Allah Basaya, and that, therefore, under section 13 (1), *fifthly*, of the Punjab Pre-emption Act, he had a superior right of pre-emption as against vendee, Piara Mal, whose house adjoined the house in dispute on the back and opened into another street. The District Judge held that the plaintiff had a common entrance from the street with the vendor as alleged by him and, therefore, decreed his claim; but on appeal the Divisional Judge came to the contrary conclusion and dismissed his suit. The plaintiff Sobha Ram, having died, his sons have been brought on the record as his legal representatives; and on their behalf it has been contended by Mr. Shadi Lal that their claim falls within the purview of section 13 (1), *fifthly*, of the Pre-emption Act, inasmuch as the house in dispute and the house of the appellants, by virtue of which they claim pre-emption, have a common entrance from the street, whereas the vendor has not such a common entrance. In the judgment of the District Judge is given a rough sketch of the locality showing the relative positions of the appellants' house, the house of the vendee, and the house in dispute. The vendee's house is at the back of both the appellants' house and the house in suit, and it opens into a blind alley to the north of the appellants' house. The house in dispute and the appellants' house both open into a blind alley (*kucha sarbasta*) of irregular shape and comparatively small dimensions, and into this same alley open two other houses, one of which belongs to a Hindu and the other to a Muhammadan. The appellants' contention is that this blind alley is the private property of the four houses to which it gives access; that it is not a "street" within the meaning of section 13 (1), *fifthly*, of the Pre-emption Act; and that it is a common entrance or passage from the public street to the east as regards all the four houses, including the appellants' house and the house in dispute which open into it. The District Judge inspected the spot and found that the alley was some 3 feet wide at the entrance, and that it constituted the sole passage to three out of the four houses above referred to, two of which belong to Muhammadans and two to Hindus. He

held that, to all intents and purposes, this alley belonged to the owners of those four houses; that it would not be considered a public street, and that its mouth was a common entrance from the Municipal street as regards all the four houses opening into it, including the pre emptors' house, and the house in dispute. The Divisional Judge has not agreed in this view, and after hearing Mr. Shadi Lal, we think that the decision of the Divisional Judge is correct.

The Punjab Pre-emption Act does not contain a definition of "street," but we may take it that the Legislature intended to use the word "street" in section 13 in very much the same sense in which it is used in the Punjab Municipal Act, which defines it as including "any way, road, lane, square, court, alley, passage or open space, whether a thoroughfare or not, over which the public have a right of way." The plaintiff produced only two witnesses, Hema and Pir Mal, and their evidence is clearly insufficient to prove that the blind alley in question is the private property of the owners of the four houses which open into it. There is no arch or door at the mouth of the alley where it opens into the public street to the east, and its irregular shape, as indicated in the plan on the record, rather shows that Jandu Ram's house, which is the first to open into it, has to some extent encroached on its original site. Each of the four houses which open into it has a separate door, and there is nothing to show that none except the owners of those houses have a free access to or a right of way over it. Further, the four houses in question are not shown to have at one time constituted one building with the opening passage of the alley as its entrance and to have been subsequently subdivided into separate dwelling houses with separate owners. The privacy of the four houses is not to any large extent ensured by the blind alley in question, as it ordinarily would be by the existence of a common entrance from the street; and it is certainly not proved that the owners of the four houses have ever exercised or can exercise any rights of joint property in respect of this alley.

The facts that its mouth is only some 3 feet wide, and that the number of houses approached through it is rather small are not of themselves sufficient to constitute it into "a common entrance from the street" within the meaning of section 13 (1), *fifthly*, of the Punjab Pre-emption Act as regards the appellants' house and the house in dispute.

For the above reasons we hold that the appellants have failed to prove that they have a superior right of pre-emption in respect of the house in question as against the vendee, and we accordingly maintain the decree of the lower Appellate Court and dismiss this appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1240 OF 1910.

January 15, 1912.

Present:—Mr. Justice Chevis.

LAL HUSSAIN—PLAINTIFF—APPELLANT

versus

HASSA KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Courts Act (XVIII of 1884), s. 70 (1) (b)—Further appeal Pre emption suit—Jurisdiction—Value during pendency of suit.

A defendant's action *pendente lite* cannot affect the value of the suit. For the purposes of jurisdictional value for an appeal in a pre-emption suit, the value of improvements effected during suit should not be included.

Second appeal from the order of the Divisional Judge, Rawalpindi Division, dated the 7th July 1910, confirming that of the Munsif, 1st class, Rawalpindi, dated the 16th April 1910, dismissing claim.

Bhagat *Gobind Das*, for the Appellant.

The Hon'ble Mr. *Shadi Lal*, for the Respondents.

JUDGMENT.—This is a pre-emption suit which has been dismissed by both the lower Courts, they holding that the property in question is a shop in a town. The property is within the boundaries of a village, but the adjoining town has spread by extension of buildings on to the village, and the Courts have followed *Muhammad Din* v. *Shah Din* (1). This petition of plaintiffs has been admitted as an appeal under section 70 (1) (*b*).

But the value of the suit as stated in all Courts is only Rs. 150, and plaintiff has only paid stamp on that amount and plaintiff, who is present in person, has stated before me to-day that the value of the property at time

(1) 90 P. R. 1907.

of suit was under Rs. 200. Counsel urges that the value of improvements effected during suit should be included, but plaintiff has never amended his plaint so as to include the improvements or expressed any willingness to pay for those improvements; on the contrary, the question of his liability to pay for improvements had to be put in issue. Counsel for plaintiff can quote no authority for the proposition that defendant's action *pendente lite* can affect the value of the suit. I hold that the value is under Rs. 200 and that no revision under section 70 (1) (*b*) lies.

Counsel then asks for interference under section 70 (1) (*a*), and refers to grounds 1, 5 and 7. As to 1, I see, on a more careful perusal of the judgments, that the lower Courts have not differed at all. As to 5 there is no irregularity; the facts are similar to those of *Muhammad Din* v. *Shah Din* (1), which the Courts have followed. As to ground 7 Counsel says further inquiry would have shown that the property was not a shop: the point was put in issue, and both Courts held that it was a shop, so I fail to see how plaintiff can now demand to re-open the inquiry.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(S. C. 38 C. 824.)

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT NO. 753 OF 1910.

June 15, 1911

Present:—Mr. Justice Harington.

MATIGARA COAL CO., LTD.—PLAINTIFFS

versus

SHRAGERS, LTD.—DEFENDANTS.

Mortgage—Equitable mortgage—Deposit of title-deeds of Calcutta and Mufussil *properties—One mortgagor having no interest in the Calcutta properties—Jurisdiction of High Court to hear suit—Letters Patent, cl.* 12—*Transfer of Property Act (IV of* 1882*), s,* 59.

More than one person deposited the title-deeds of certain Calcutta and *mofussil* properties by way of equitable mortgage. One of them had no interest in the Calcutta properties. A suit was brought in the Calcutta High Court to enforce the mortgage:

Held, that as the documents were pledged by the authority of all the mortgagors as security for the re-payment of a debt which they jointly incurred, and as part of the property was within the local limits of the jurisdiction of the High Court, it was not relevant to inquire what interest each mortgagor has in the properties; the fact that one of them has no interest in the Calcutta properties, would not affect the jurisdiction of the High Court on the mortgage.

Suit upon an equitable mortgage.

Messrs. *Pugh* and *Langford James*, instructed by Messrs. *Leslie* and *Hinds*, Attorneys, for the Plaintiffs.

Mr. *A. N. Chaudhari*, with Mr. *B. C. Mitter*, instructed by Mr. *Nripendra Nath Dutt*, Attorney, for the Defendant Prokash Chandra Dutt.

JUDGMENT.—This is an action brought on an equitable mortgage against Shragers, Limited,—Adel Shrager, Adolphe Shrager and Kirtinar; two other persons Prokash Chunder Dutt and Naresh Chunder Dey are made defendants as being interested in the mortgaged property. The money advanced on the mortgage was paid through Mr. F. M. Leslie, the Attorney, and the defendant other than the last two, subsequent to the advance and the deposit of deeds with Mr. Leslie, sent a memorandum placing on record the fact of the advance and that they deposited the title-deeds of the Nudkhurki and Isabell Collieries together with the lease of the premises Nos. 10 to 15/1, Canning Street, by way of collateral security. The same parties, I should say, had executed promissory-notes in respect of the advances. Some seven or eight months after the deposit of the deeds in question, the Canning Street lease was withdrawn and there was deposited in place thereof a lease of Nos. 14, 14/1 and 14/4, Old China Bazar Street. The Canning Street lease was in favour of Adolphe, Adel and Kirtikar. The Old China Bazar Street lease was in favour of Adolphe and Kritikar. The only defendant who has appeared is Prokash and the point which he takes is that this Court has no jurisdiction to make a mortgage-decree, because one of the defendants, namely, Adel Shrager, is not a party to the Old China Bazar Street lease. Her interest, he says, is only in the property outside the jurisdiction and, therefore, no decree can be made. I am unable to accede to the proposition. The defendants incurred a joint debt and that debt was secured by a mortgage on which they were jointly responsible. The memorandum which was given after the Old China Bazar Street lease was deposited, is signed for Adel Shrager by her duly constituted attorney. She,

therefore, was a party to and authorised the deposit of that lease. To my mind the question whether she was a party to the lease itself in no way affects the question of the jurisdiction of this Court. The documents are pledged by the authority of all the mortgagors as security for the re-payment of a debt which they jointly incurred. Part of the property so made a security for re-payment of the joint debt is within the local limits of the jurisdiction of this Court. I do not think it is relevant to inquire what interest each mortgagor has in the particular properties comprised in the securities, nor do I think, even if it be shown that Adel Shrager had no interest in the deed which she deposited jointly with others, that that affects the jurisdiction of this Court on the mortgage which all the defendants join in making in favour of the plaintiffs. The result is, there will be the usual mortgage-decree in favour of the plaintiffs and the plaintiffs are entitled to a declaration of their lien on the shares which belong to the defendants, and liberty is given to apply for the sale of the same, if necessary. Prokash will pay costs of the action on scale No. 2.

Judgment for plaintiffs.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 685 OF 1909.

January 13, 1912.

Present:—Mr. Justice Robertson and Mr. Justice Shah Din.

SHAHBAZ KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

FAZAL DIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Property sold subject to mortgage—Redemption of mortgage by vendee—Pre-emptor cannot claim to pre-empt equity of redemption only.

Where property subject to a mortgage has been sold and the vendee has redeemed the mortgage before the institution of a suit for pre-emption, the pre-emptor cannot claim to pre-empt only the equity of redemption.

He must pay the whole amount of the purchase-money including the mortgage-money paid by the vendee before he can be allowed to pre-empt the property.

Bogha Singh. v. *Gurmukh Singh*. 93 P. R. 1902, distinguished.

Second appeal from the order of the Divisional Judge, Rawalpindi Division, dated the 20th May 1909, confirming that of the District Judge, Attock, dated the 27th March 1908, decreeing the claim on payment of Rs. 3,500.

Mr. *Pestonjee Dada Bhai*, for the Appellants.

Lala *Dina Nath* for Gokal Chand and Balmokand, and Mr. *Fazal Ilahi*, for the Respondents.

JUDGMENT.—The facts of the case, so far as they are material to the decision of the question involved in this appeal, are these. One Fazal Din sold his *muqarraridari* rights in 8 *kanals* 12½ *marlas* of land to certain vendees by a registered deed dated the 3rd October 1906, for Rs. 3,500. The property sold was already under mortgage with third parties for Rs. 2,000 and the deed of sale recited that the mortgage-money was left with the vendees and that they were at liberty to redeem the mortgage on payment of Rs. 2,000 to the mortgagees. The mortgage was one with possession and had been made by Fazal Din by a registered deed, dated the 26th June 1898, and the period of mortgage as entered in the mortgage-deed was ten years. The language of the deed shows that this period was fixed primarily for the benefit of the mortgagor and that he was not debarred from redeeming the mortgage before the expiry of ten years.

It appears that soon after the sale of October 1906 the vendees from Fazal Din redeemed the mortgage in question by paying Rs 2,000 to the mortgagees and obtained possession of the land, the mortgagees raising no objection to the redemption taking place before the expiry of the period of 10 years above referred to. Two suits for pre-emption were brought in respect of the sale in question:

(1) by Shabbaz Khan on the 2nd October 1907, and (2) by Zian-ud-Din, brother of Fazal Din, on 22nd October 1907.

In the first suit Shabbaz Khan alleged, *inter alia*, that the price entered in the sale-deed had not been paid and fixed in good faith; that only Rs. 2,500 had been so paid; and that this sum represented the market-value of the land. Zian-ud-din, the rival pre-emptor, sued to pre-empt only the equity of redemption, alleging that besides the sum of

SHAHBAZ KHAN v. FAZAL DIN.

Rs. 2,000 due to the mortgagees, only Rs. 1,300 had been paid to the vendor and that the remaining Rs. 200 was a fictitious item He asked for a decree for equity of redemption on payment of Rs. 1,300 or in the alternative for a decree for possession of the whole land on payment of Rs. 3,300 or such other sum as the Court might fix. Each rival pre-emptor having been made a defendant in the suit brought by the other, the parties went to trial on various issues raised on the pleading;and as a result of the findings recorded by him on those issues, the District Judge gave Zian-ud din, whose right of pre-emption was held to be superior to that of Shahbaz Khan, a decree for possession of the land on payment of Rs. 3,500 on or before the 5th May 1908. In the event of Zian-ud-Din not depositing the money within the prescribed period, Shahbaz Khan was to obtain possession of the land on payment of the same amount on or about the 25th May 1908.

From the decree of the District Judge both Zian-ud Din and Shahbaz Khan preferred separate appeals to the Divisional Court the former urging, *inter alia*, that he should have been allowed to pre-empt only the equity of redemption and to obtain a decree on payment of Rs. 1,300 or such other sum as had been paid by the vendees to Fazal Din, subject to the mortgage for Rs. 2,000, in other words, that he should not have been directed to pay the mortgage-money Rs. 2,000 to the vendees, who had redeemed the mortgage on payment of that amount to the mortgagees, in addition to the amount paid by the vendees to the vendor. The Divisional Judge held that the sale was for Rs. 3,500 and not for Rs. 1,500, that as before the institution of Zian-ud-din's suit the vendees had paid Rs. 2,000 to the mortgagees and redeemed the mortgage, Zian-ud-Din was bound to pay the full amount, Rs. 3,500, to the vendees provided that the price mentioned in the sale deed had been paid and fixed in good faith. The learned Judge found that the price was so paid and fixed, and he, therefore, dismissed Zian-ud-din's appeal except that he allowed his sons (Zian-ud-din having meanwhile died) till the 20th June 1909 to deposit the sum of Rs. 3,500 in Court, failing which the suit was to stand dismissed.

From the decree of the Divisional Judge Zian-ud-din's sons have appealed to this Court; and the sole question for decision in the appeal is whether the lower Appellate Court has erred in law in declining to grant to the appellants a decree for equity of redemption on payment of Rs. 1,500 subject to the mortgage for Rs. 2,000 in the hands of the vendees, who have already redeemed the mortgage and obtained possession of the land from the mortgagees. After hearing Mr. Pestonjee Dadabhai for the appellants, we have no hesitation in holding that the view taken by the lower Appellate Court is correct. Admittedly, the mortgage in question was redeemed by vendees long before Zian ud-din brought his suit; and, in our opinion, on the proper construction of the mortgage-deed, dated the 26th June 1893, the vendees, as representatives-in-interest of the mortgagor, Fazal Din, were not debarred from redeeming the mortgage before the expiry of the period of 10 years specified in the mortgage-deed. That period was, it seems to us, fixed for the benefit of the mortgagor, and the mortgagees, by having accepted the mortgage-money from the vendees of Fazal Din before the term of ten years had expired, unmistakably showed that the real intention of the parties to the mortgage-deed was that the mortgagor had a right to redeem whenever he pleased. That being so, the vendees were well within their rights in redeeming the mortgage soon after the sale took place in their favour, and they effected redemption of the mortgage in pursuance of the power given to them by the sale-deed of 3rd October 1906. Further, it is clear that the consideration for the sale was Rs. 3,500 and not Rs. 1,500 ; the stamp-paper on which the sale-deed was inscribed is of the value of Rs. 35, thus showing that what was sold was not merely the equity of redemption valued at Rs. 1,500 but the whole property in dispute subject to the mortgagee's lien amounting to Rs. 2,000, which the vendees were empowered to pay off as soon as they pleased, after the date of sale. They exercised that power in pursuance of the contract of sale before Zian-ud din's suit was instituted; the mortgage for Rs. 2,000 ceased to exist as soon as it was redeemed by them; and they became entitled to receive from the pre-emptor the whole amount of the purchase-money, Rs. 3,500, entered in the sale-deed, provided, of course, that it was

SHAHBAZ KHAN v. FAZAL DIN.

proved to have been paid and fixed in good faith. On a suit for pre-emption being successful as against a vendee with a defeasible title, the pre-emptor takes over the entire bargain and the vendee drops out of it altogether, the *status quo ante* being completely restored, so that the vendee's connection with the land is wholly severed. If, in pursuance of a stipulation in the contract of sale, the vendee has exercised the power of redemption in respect of a pre existing mortgage by paying the mortgage-debt to the mortgagee, he must be held to have exercised that power on behalf and for the benefit of the pre-emptor who subsequently brings a suit for pre-emption; and the latter cannot be allowed to claim only the equity of redemption, which *ex hypothesi* is no longer in existence, on paying to the vendee the value thereof and to force him to keep up his connection with the land as mortgagee of the property in place of the prior mortgagee, whom he has paid off. Such a situation would be both anomalous and inequitable; and in the majority of cases it would entail undue hardship on the vendee who is entitled to demand that if a decree for pre-emption is passed against him he should cease to have anything to do with the land.

In support of his contention that Zian ud-din had a right to pre empt only the equity of redemption on payment of Rs. 1,000, the appellant's Counsel relies on *Bagha Singh* v. *Gurmukh Singh* (1). That decision, however, in no way helps the learned Counsel, as all that was held therein was that where a pre-emptor successfully asserts his right of pre-emption in respect of a sale as against a vendee with a defeasible title, he is not bound by an incumbrance created by the latter on the property sold between the date of sale and the date of the suit brought by the pre-emptor. In the present case, the vendees did not create any incumbrance on the property sold between the date of sale and the date of Zian-ud-din's suit; and they have, in no way, by any act of their own, dealt with the property to the prejudice of the pre-emptor. The incumbrance on the property had been created by the vendor, Fazal Din, himself long before date of sale, and one of the terms of the contract of the sale between Fazal Din and the vendees was that they were at liberty to clear off the incumbrance by paying Rs. 2,000 to the mortgagees. In paying the said sum to the mortgagees and thus redeeming the mortgage, the vendees, therefore, acted simply in pursuance of the contract of sale and when Zian-ud-din asserted his right of pre-emption successfully and obtained a decree from the Court, he was bound to recognize the redemption of the mortgage as a valid act of the vendees under the said contract and to restore them to the position they occupied before the sale was made in their favour. While, on the one hand, they could not as against Zian-ud-din in any way benefit by the sale, on the other hand they could not be prejudiced in their relation to the land by reason of anything done by them in terms of the contract of sale before the suit for pre-emption was brought against them. If, of course, the vendees had not paid the mortgage money to the mortgagees and redeemed the mortgage before Zian-ud-din's suit was instituted, the latter would have been entitled to get a decree for pre-emption on payment of Rs. 1.500 only. That, however, is not the case here and we are quite clear that appellants, as heirs of Zian-ud-din, were rightly directed by the lower Appellate Court to pay Rs. 3,500 to the vendees as a condition precedent to their obtaining possession of the land. This they failed to do within the prescribed period and their suit stands dismissed.

As a last resort, their Counsel has asked us to allow them an extension of time for payment of Rs. 3,500 into Court, but we can see no reason whatever for acceding to this request. No such prayer is made in the grounds of appeal; and even if it had been made, we should not have granted it, as the Divisional Judge showed them great indulgence in extending the time for payment of the amount into Court up to 20th June 1909, and yet they failed to comply with the decree. We cannot now, after the lapse of over two years-and-a-half from that date, grant them another extension of time, and we decline to accede to the request preferred by their Counsel.

The appeal fails and is dismissed with costs throughout.

Appeal dismissed.

(1) 93 P. R. 1902.

SHARKEY *v.* JERRY ALLARD.

PUNJAB CHIEF COURT.
FIRST CIVIL APPEAL No. 938 OF 1911.
January 11, 1912.
Present:—Mr. Justice Chevis.
MRS. R. SHARKEY AND OTHERS—DEFENDANTS—APPELLANTS
versus
MRS. JERRY ALLARD—PLAINTIFF—RESPONDENT.

Probate and Administration Act (V of 1881). s. 69 —"Interest", meaning of—Reversioner's right—Sister's right to object in the presence of widow and daughters —Letters of administration, application for — Enquiry as to extent of estate.

A Christian died leaving a widow and two daughters. The widow applied for grant of letters of administration to herself in respect of the deceased's estate. The sisters of the deceased objected:

Held, that the sisters had no right to object in the presence of the widow and daughters of the deceased.

The word "interest" in section 69 of the Probate and Administration Act cannot cover the case of a mere reversioner. An interest that has not arisen is properly not an interest, nor a right; it is nothing more than a bare expectation of a future right.

Khettramoni Dasi v. *Shyama Churn*, 21 C. 539; *Brindabun Chandra* v. *Sureswar Shaha*, 10 C. L J. 263; 3 Ind. Cas. 178, distinguished.

In an application for letters of administration, it is quite outside the scope of inquiry to determine the limits of the estate.

First appeal from the order of the District Judge, Lahore, dated the 8th July 1911, refusing to hear the objections of appellants to grant of letters of administration to respondent.

Lala *Sangam Lal* and Lala *Hukam Chand*, for the Appellants.

Mr. *Parker* and Mr. *M. Obedulla*, for the Respondent.

JUDGMENT.—Mr. Jerry Allard having died leaving a widow and two daughters, application has been made by the widow for grant to her of letters of administration. The sisters of Mr. Jerry Allard object. The District Judge having decided that they have no right to object in the presence of the widow and daughters who are the heirs, the sisters have appealed to this Court. The question is whether the sisters have any interest in the estate such as would entitle them to intervene.

For the appellants it is pointed out that Mr. Gomez Allard was given a grant of land, one of the conditions being that the proprietary rights were to remain in his family, and that he died leaving two sons, Joachim and Jerry, and three daughters, the present appellants, that mutation was then effected in the name of Joachim, and on his death in the name of Jerry, but it is pleaded that this was a family arrangement and that the daughters of Gomez are entitled to a share in the village. This may be, but I fail to see how it affects the case. What the widow seeks is letters of administration of the estate of Mr. Jerry Allard, she does not say she wants to administer the land granted by Government to Gomex Allard. In an application for letters of administration it seems quite outside the scope of inquiry to determine the limits of that estate, granting that as regards the land granted by Government daughters are entitled to a share, the appellants may have a share as daughters of Gomez Allard, but it is difficult to see how they can claim to inherit any of the share of Jerry Allard in the presence of his daughters, to say nothing of the widow.

Then it is said that appellants claim by survivorship; but assuming that appellants and Mr. Jerry Allard were joint owners of the land granted by Government, still the fact remains that all the widow is seeking is the administration of her husband's estate; she does not ask to encroach on any one else's share in any joint property.

Then, it is urged that the daughters may die and the appellants succeed, and that they thus have a reversionary interest which entitles them to intervene, and *Khettramoni Dasi* v. *Shyama Churn* (1) and *Brindabun Chandra* v. *Sureswar Shaha* (2) are quoted in support of this proposition. Both of these, however, are cases of a reversioner under Hindu law being allowed to intervene. In *Khettramoni Dasi* v. *Shyama Churn* (1), the daughter of the deceased was allowed to intervene as a reversioner; the point is discussed somewhat briefly on page 542, where it is said there is ground for supposing that the widow is colluding with the applicant for probate. This case went up to the Privy Council [see *Shama Charan* v. *Khettromoni Dasi* (3)], where the daughter's *locus standi* was apparently not questioned. In *Brindabun Chandra* v. *Sureswar Shaha* (2), the point is dealt with at some length. On page 268 several cases are quoted in which the distinction

(1) 21 C. 539.
(2) 10 C. L. J. 263; 3 Ind. Cas. 178.
(3) 27 C. 521; 27 I. A. 10.

between an interest that has arisen and is represented and an interest that has not arisen and never may arise is pointed out. The observations of Lord Westbury in one of these cases as to an interest that has not arisen being merely an expectation of a future interest or rather of a future event which may give an interest are noted, but it is then held that the interest which would justify intervention in probate proceedings need not be an interest which has already arisen. The judgment then goes on to point out the peculiar position of a reversioner under Hindu law, and the various things which a reversioner can do. Later on (page 272) the principle followed in England, as laid down in Williams on Executors, Volume 1, is quoted, "any interest, however slight, and even, it seems, the bare possibility of an interest is sufficient;" but here I find nothing which, in my opinion, can be held to cover the case of the possibility of a future interest. The case before the High Court was the peculiar case of a reversioner under Hindu Law, though no doubt there are several remarks in the judgment which may be regarded as applicable to probate proceedings generally. I do not wish to show any disrespect for any remarks of the learned Judges of the Calcutta High Court, even though they may be *obiter dicta*, but I note that the words in section 69 are "all persons claiming to have an *interest* in the estate" and I certainly think that the *onus* of proving that the words "an interest" cover the possibility of a future interest lies on the appellants in this case, and, putting aside the peculiar case of a reversioner under Hindu law, I am unable to see how it can be said that the distinction which has so often been drawn between an interest which has arisen and is represented and an interest which has not arisen and may never arise should be disregarded in cases of application for grant of probate or administration. The reversioner under Hindu law has certain peculiar rights while he is still a reversioner, and so his case seems to me peculiar. I do not wish to put too narrow an interpretation on the words which I have quoted from section 69, but I think I am bound to interpret the words as they stand, and not to give them a wider meaning than they bear on their face. In my opinion the word "interest" cannot cover the case of a mere reversioner. As pointed out by Lord Westbury, an interest that has not arisen is properly not an interest, nor a right; it is nothing more than a bare expectation of a future right.

I hold, therefore, that the fact that appellants claim to be reversioners does not give them a right to intervene.

How they can claim any present interest in the estate of the deceased in the presence of his wife and daughters I cannot imagine. As I have already pointed out, it is a case of claiming to administer the estate of the deceased and any question as to the extent of the share held by the deceased in the land granted by Government does not come into the case.

In conclusion, I note that it is contended for the respondents that no appeal lies in this case and this seems to me correct, but as I have decided the case on the merits, I need not stay further to consider whether an appeal lies, or whether, in the event of no appeal, I should entertain the case as an application for revision.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(S. C. 15. C. L. J. 14.)

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2664 OF 1909.

August 22, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

MAHOMED FARID—PLAINTIFF—APPELLANT

versus

MAHOMED ABDUL GAFUR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Gift—Validity—Delivery of one of two properties given—Effect of gift—Whether whole gift void.

If a gift is made of two distinct properties and is perfected with regard to one of them by delivery, and not with regard to the other, the gift is not void in its entirety, but takes effect as to the property which has been duly delivered.

Appeal from the decree of the Sub-Judge of Patna, dated the 16th August 1909, affirming that of the Munsif of Behar, dated the 31st March 1909.

Moulvi *Syed Shamsul Huda*, Babus *Buldeo Narain Singh* and *Jyotish Chandra Sircar*, for the Appellant.

MAHOMED FARID *v.* MAHOMED ABDUL GAFUR.

Moulvi *Muhammad Mustafa Khan*, for the Respondents.

JUDGMENT.

MOOKERJEE, J.—The subject-matter of the litigation which has culminated in this appeal is immoveable property originally owned by a Muhammadan lady named Rasulan, who died on the 21st March 1907. The plaintiff-appellant claimed the property by right of inheritance. The first defendant resisted the claim on the basis of a deed of gift alleged to have been executed by her on the 24th September 1904. He further asserted that the lady subsequently took from him a lease of the disputed property on the 2nd October 1904, to continue during her life-time. In the original Court, as also in the Court of Appeal below, the plaintiff challenged the deed of gift and the lease as fictitious instruments. That case, however, completely failed, with the result that the Courts below concurrently made a decree in favour of the defendant. On the present appeal, the plaintiff has challenged the decision on the ground that, even if the deed of gift be assumed to be genuine, it did not vest good title in the donee, because the deed of gift covered two properties, and as possession was delivered to the donee of one of the properties only, the gift was void in its entirety. With reference to this argument, it may be mentioned that the deed of gift comprised the share of the *zemindari* now in dispute, as also a dwelling-house and lands appurtenant thereto. The case for the plaintiff is that there was no delivery of the house, and that, consequently, the gift failed with respect to both the properties, though they were distinct. The point was not specifically raised in either of the Courts below, and the question whether there was delivery of the house sufficient to validate the gift thereof has not been determined by the Subordinate Judge. But it may be assumed for the purposes of the present argument that there was not such delivery of the house as is deemed essential by the Muhammadan law for the validity of a gift thereof. This assumption, however, cannot affect the title to the house which is not in controversy in this litigation.

The learned Vakil for the plaintiff-appellant has broadly contended that, if a gift is made of two properties, and delivery is given of one only, the gift fails in its entirety, even though the properties be distinct, but he has conceded that he has not been able to discover any authority for this singular proposition. On the other hand, there are passages in the writings of Muhammadan Jurists, which directly or indirectly militate against this proposition.

Thus, in the *Fatawa Alamgiri* it is stated as follows:

"If a man says to another, 'I make a gift to you of these two houses,' and one of them is occupied, the gift is not valid with respect to one of them. But if a man says, 'I make a gift of this house to you and of my share in this other house,' the gift (*i.e.*, gift of both the house and the share in the other house) is valid. Thus it is laid down in the *Khizanat-Al-Muftui.*" (*Fatawa Alamgiri*, Cal. Ed., Vol. IV, page 530).

Again, I find the following passages in the *Fatawa Qadi Khan.*

"(1) A man makes a gift of a house to another man and delivers it to him while it contains furniture belonging to the donor. The gift is not valid, because the thing given is occupied by something which is not included in the gift, and, therefore, the delivery is not valid."

"(2) A man makes a gift of a house containing furniture, and he makes a gift of the furniture as well, and allows the donee to take possession of them. Then, afterwards, the furniture is claimed by another; still the gift of the house remains valid. Similarly, if he makes a gift of a sack along with the goods it contains, and allows the donee to take possession of them, and afterwards the sack is claimed by another man, the gift of what it contains is still valid."

"(3) If a man makes a gift of a house to another, and the house contains furniture belonging to the donor, and he gives delivery of the house with what it contains, and afterwards makes a gift of the furniture, the gift of the furniture is valid, but not that of the house.....If he makes a gift of the furniture first, and gives possession of the house along with the furniture and then makes a gift of the house also, the gift of both of them is valid" (*Fatawa Qadi Khan* (1196 A. D, Lucknow Ed., Vol. II, pages 283 and 284).

A similar doctrine is recognised by the author of the *Durr-al-Mukhtar*:

RAM PRASAD *v.* BEDO.

"If a man makes a gift of a sack containing grains belonging to the donor, or house containing his furniture, or a horse which bears a saddle belonging to him, and he delivers them (to the donee) in that state, the gift is not valid. But in the converse case, the gift would be valid only with respect to the grains, the furniture, and the saddle" (*Darr-al-Mukhtar* by Al-Hiskafi, 1677 A. D. Constantinople Ed., Vol. IV, page 779).

That these principles are firmly established in Muhammadan Jurisprudence is clear from the fact that they were set out in a work of great authority composed at least half a century before the time of the author of the *Hidayah* and *Qadi Khan*:

"If a man makes a gift of a house to another containing furniture belonging to himself (literally, belonging to the donor), and afterwards makes a gift of the furniture itself, then if he does not give delivery of possession of the house till after making a gift of the furniture, and he gives delivery of possession of the house along with that of the furniture (literally, altogether), the gift is valid. But if he makes a gift of it and gives delivery of possession of it, and then makes a gift of the furniture, the gift (of the house) is not valid." (*Khulasat-al-Fatawa* by Tahir bin Ahmad-al-Bukhari, 1147 A. D.)

The question is also considered by Baillie in his Digest of Muhammadan Law, Second Edition, Part 1, page 527, and in his Muhammadan Law of Sale, page 259. In my opinion, it cannot be disputed, in view of the principles recognised in the texts already quoted, that if a gift is made of two distinct properties and is perfected with regard to one of them by delivery, and not with regard to the other, the gift is not void in its entirety but takes effect as to the property which has been duly delivered. The contention of the learned Vakil for the appellant to the contrary cannot be supported either upon the authorities or upon any rational ground that can be suggested.

The result, therefore, is that the decree made by the Subordinate Judge must be affirmed and this appeal dismissed with costs.

CARNDUFF, J.—I agree.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 278 OF 1910.

December 19, 1911.

Present:—Sir Henry Richards, Kt., K.C., Chief Justice, and Mr. Justice Banerji.

RAM PRASAD—DEFENDANT—APPELLANT.

versus

Musammat BEDO—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 54, 123—Sale or gift, how effected—Registration—Mutation—Estoppel - Statement by donor before mutation officer that the donee's name may be recorded, whether alone sufficient to affect transfer—Suit by donor for possession, whether maintainable.

The husband of the plaintiff *B*, a widow, and *R*. were both entitled to get possession of certain immoveable property. *R*. made an application for mutation of his name alone in the Revenue Court. *B*. made a statement before the mutation officer that she was the heir of her husband but she did not want her name entered in the *khewat* and agreed to *R*'s. name being entered in respect of the estate. Upon this *R*'s. name alone was recorded in the Revenue papers. Sometimes afterwards *B*. filed a suit for possession of her husband's share in the property against *R*:

Held, that the suit was maintainable. The statements of *B*. in the mutation proceedings could not be said to have complied with the provisions of sections 54 and 123 of the Transfer of Property Act which lay down the effectual mode of effecting transfer of interest in immoveable property by sale or gift.

First appeal from the decision of the Subordinate Judge of Meerut, dated 19th April 1910.

FACTS:—The material facts will appear from the following judgment of the Additional Judge of Meerut:

This claim arises out of a mortgage which was made by *Musammat* Begum in favour of Har Pershad in lieu of Rs. 500 in 1851. The mortgage was afterwards redeemed by *Musammat* Niazan, daughter of *Musammat* Begam, who was the owner of a 7/40th share in the mortgaged property by inheritance from her father, and the equity of redemption in the remaining property was purchased by Baldeo Sahai, husband of *Musammat* Bedo, plaintiff, and by Ram Pershad, defendant. Baldeo Sahai and Ram Pershad sued for redemption and got a decree in respect of a 33/40th share of the mortgaged property conditioned on the payment of a proportionate amount of the mortgage-debt to the heirs of *Musammat* Niazan. They did not, however, deposit that amount in Court

within the time fixed and that decree consequently became inoperative.

Subsequently, Ram Pershad filed another suit for redemption of the same property and got a decree on payment of Rs. 427-1-4 which was upheld on appeal. *Musammat* Bedo, widow of Baldeo Sahai, was impleaded as a defendant in the above suit under section 32 of the old Code of Civil Procedure. After that decree, Ram Pershad paid the amount of the mortgage-money and took possession of the mortgaged property and got his own name entered in the Revenue papers to the exclusion of the plaintiff. He then filed a suit for arrears of profits against the heirs of *Musammat* Niazan, in which the present plaintiff was also impleaded as a *pro forma* defendant.

The plaintiff states that she then came to know that the present defendant who used to act as her *sarbarahkar* or manager had wrongfully got his sole name entered in the Revenue papers although, as she states, the mortgage-money had been paid by her and the defendant jointly and she, therefore, sues for the recovery of possession over a half share out of the mortgaged property with mesne profits.

The defence is that the mortgage money was paid and the mortgage redeemed exclusively by the defendant; that after the death of Baldeo Sahai, the plaintiff voluntarily relinquished her rights and got mutation effected in favour of the defendant; that in the redemption suit prosecuted by the defendant, the present plaintiff expressly admitted that she had no title to the mortgaged property; that the defendant was not acting as a manager on behalf of the plaintiff at the time, and that in any case the plaintiff cannot succeed without paying half the mortgage money and costs.

The questions for disposal are whether the plaintiff relinquished her rights in the mortgaged property after Baldeo Sahai's death and got mutation effected in favour of the defendant, or did the defendant dishonestly get his own name entered to the exclusion of the plaintiff and is the plaintiff entitled to a half share therein; whether the defendant was acting as a *sarbarahkar* or manager of the plaintiff after Baldeo Sahai's death and filed a suit for redemption on behalf of himself and the plaintiff and redeemed the mortgaged property after taking a half share of the mortgage money from her, or did the defendant pay the whole amount of the mortgage-money himself, and is the plaintiff entitled to possession and if so on what payment; whether the plaintiff is entitled to the mesne profits claimed and to what extent, and whether the description of the disputed property given in the plaint is correct.

It appears from the evidence of Shib Charan Das, who was a Naib Registrar *Qanungo* at Hapur in 1902, and Din Dayal, who was then *Patwari* at Hapur, and the mutation record summoned, that after the death of Baldeo Sahai, which took place on the 3rd January 1902, a mutation case was started on the report of the *Patwari*, in course of which the present plaintiff was examined by the Naib Registrar *Qanungo* and she then stated from behind the *pardah* inside her house that she was the heir of her husband, Baldeo Sahai, but she did not want the entry of her name in the *khewat* and was willing that the name of Ram Pershad, the present defendant, may be entered in respect of the estate, of which *Musammat* Niazan was the mortgagee. She was identified at the time of making that statement by Ram Lal who was then her *karinda* and was also working for the defendant and by Din Dayal, *Patwari* of the village. Ram Lal died on 16th April 1906, and Din Dayal has been examined owing to his illness by commission. Ram Lal's signature has been identified by his son Harsarandas. The plaintiff denies that she made that statement but, in the face of the statement of the *Qanungo* and the evidence of Din Dayal, witness, and the signature of Ram Lal, who was her own *karinda*, I cannot believe her.

It seems to me probable that the defendant induced the plaintiff to assent to his name being recorded either by telling her that the previous claim for redemption had been unsuccessful, and that her right in the property was extinct, or by telling her that the matter may be left in his hands to fight out. In any case, assuming that *Musammat* Bedo merely gave her assent to the defendant's name being entered in the Revenue papers it does not follow that that assent amounted to a transfer of property or to a relinquishment of her proprietary rights. In the case

of *Mohammad Imamali Khan* v. *Husain Khan* (1) where a plaintiff on his brother's death admitted the existence of a custom of primogeniture and joined in a petition asking that the defendant's name should be entered *dakhil khari)* in the Revenue records, their Lordships of the Privy Council held that there can be a withdrawal or retraction of a gratuitous admission unless there was some obligation not to withdraw it, that no such obligation existed in that case, and that there was no proof of any title on which the admission could rest. A statement made in a deposition that the plaintiff wanted that the defendant's name should be entered in the Revenue papers and that she did not want her own name to be entered amounted neither to a contract nor to a transfer of property much less to a renunciation of title. Under sections 54 and 123 of the Transfer of Property Act a transfer of immoveable property, over Rs. 100 in value or where the transferor was not in possession, could be effected only by means of a registered instrument, and an assent merely to the entry of another's name in the Revenue papers cannot, therefore, amount to a renunciation of title. The plaintiff in her statement before the *Qanungo* nowhere said that she was giving up her ownership, and renouncing her title, or that she made Ram Pershad the owner of her property and, under the circumstances, if there was no transfer, no contract, nor a renunciation of property there was nothing to prevent the plaintiff withdrawing from her previous statement of assent to the entry of the defendant's name in the Revenue Records and claiming a title to a half share in the property by inheritance from her husband. It is admitted that the plaintiff's husband and Ram Pershad lived separately (*vide* paragraph 3 of the written statement) and as the defendant was acting as a manager on behalf of the plaintiff after the death of her husband (*vide* Sheo Charan Lal's and Din Dayal's evidence) and the plaintiff was a *pardanashin* woman, who had no opportunity for obtaining independent advice before making that statement, I hold that both in law as well as on the facts she is justified in withdrawing her assent and claiming a half share in the mortgaged property belonging to her husband. Mutation of names in the Revenue records confers no proprietary title [*Chokhey Singh* v. *Jote Singh* (2).] The learned Pleader for the defendants relies on the case of *Har Lal* v. *Sardar* (3) but in that case the plaintiff had stated in her evidence that Dullia was the proper owner of one moiety of the estate and that the two had agreed to share that which stood in the name of Ganesh Pershad (*Ibid.* page 405). In the present case the plaintiff beyond stating that she was the heir of her husband and assented to the entry of the defendant's name in the Revenue Records said nothing whatever about any acknowledgment or renunciation of ownership or title and, as observed by Lord Hobhouse in the later case of *Muhammad Imam Ali* v. *Husain Khan* (1), "it would be absurd to suppose that the plaintiff made any representation to the defendant, neither was the situation of the defendant altered in any way to his prejudice." "No consideration," observed his Lordship in the above case, "was given by the defendant nor is there anything in the transaction to create a trust. Possibly, it might have given the defendant a possession on which time could run but, if so, time has not run long enough to create a bar.....If then there is no transfer, no estoppel, no bar by time, no trust, why should not the plaintiff assert his legal rights, whatever he may in ignorance of the facts or in deference to his uncle or for any other cause not injurious to the defendant have admitted?" The plaintiff is, therefore, entitled to withdraw from her gratuitous assent to the entry of the defendant's name in the Revenue Records and to claim a half share in the mortgaged property, belonging to her husband.

The defendant also relies on a written statement said to have been filed by the present plaintiff in the previous suit for redemption brought by the present defendant in which the present plaintiff and her daughter were impleaded as *pro forma* defendants. In that written statement it was stated that the property left by Baldeo Sahai belonged to the plaintiff, but I am not satisfied that that written statement was fully explained to, and understood by,

(1) 26 C. 81 ; 25 I. A. 161 ; 2 C. W. N. 737.

(2) 6 A. L. J. 100; 11 Bom. L. R. 69; 13 C. W. N. 274; 9 C. L. J. 151; 5 M. L. T. 167; 31 A. 73; 19 M. L. J. 123; 12 O. C. 288; 1 Ind. Cas, 166.

(3) 11 A. 399.

Musammat Bedo, or her daughters, or that *Musammat* Bedo had any opportunity for obtaining independent advice before she made that admission and an admission of that kind obtained from a *pardanashin* lady by a person who was her *sarbarahkar* and manager in his own favour without consideration having been paid to her and without any opportunity having been given to her to obtain independent advice cannot be regarded as conclusive under section 31 of the Evidence Act. The rule of Law on the subject is laid down in the leading case of *Munshi Buz-lul Raheem* v. *Shamsunnissa* (4) where an endorsement of transfer by a wife in favour of her husband was set aside at the instance of the former and it was followed in *Mariam Bibi* v. *Sakina* (5) and *Shamboeti* v. *Jago Bibi* (6) and *Raghunath* v. *Varjiwandas* (7). The defendant Ram Pershad admits in his evidence that he worked as a *karinda* for *Musammat* Bedo for a year after the death of Ram Lal, which took place according to the evidence of his son Har Sarandas on the 16th April 1906. As a matter of fact, the defendant was acting as *Musammat* Bedo's manager and *sarbrahkar* from long previous, for in a receipt granted by him about arrears of rent on the 4th June 1905 on behalf of *Musammat* Bedo, he described himself as her *karinda* (*vide* the receipt Exhibit VI filed). The written statement was signed on the 21st April 1906, and filed on the 26th April 1906, ten days after the death of Ram Lal, the plaintiff's other *karinda*, and any statements or admissions contained therein in favour of her *sarbarahkar* and manager Ram Pershad must be regarded and accepted with very great caution. Shib Charandas, *Qanungo*, states that Ram Pershad was present when *Musammat* Bedo was examined at the time of mutation on the 29th April 1902, and it is unlikely that he would not have been present when *Musammat* Bedo's signature was taken to the above written statement, for Ram Lal, the only other *karinda*, had died a week previous and there was no one else to look after the plaintiff's affairs. The statements of Indarjit Singh and Har Pershad, witnesses, that *Musammat* Bedo affixed her seal on the written statement at her house cannot be believed, because in the written statement itself it is stated that it was signed and verified in the Court compound at Hapur. It is nowhere alleged in the evidence that *Musammat* Bedo went to the Court compound, and it is, therefore, obvious that improper advantage must have been taken of *Musammat* Bedo's seal which *Musammat* Bedo says she used to give to Ram Pershad whenever he required it as her *sarbarakar*. *Musammat* Bedo had no notice to relinquish her half share in the mortgaged property unless her relinquishment was obtained by a representation that by reason of the former suit having proved abortive, her title was weak and doubtful, but, assuming that she did relinquish, there is nothing to prevent a gratuitous relinquishment or admission from being withdrawn on the real facts becoming known to her.

The next question is whether she had paid her half share of the mortgage-money at the time of the second suit or at the time of redemption. The defendant was undoubtedly her *sarbarahkar* or manager at the time when the second redemption suit was filed, for as I have said above Ram Pershad admits that he acted as her manager for a year after Ram Lal's death and in a receipt dated the 4th June 1905, he described himself as her *karinda* (*vide* Exhibit VI filed). Shib Charandas states that the defendant was the plaintiff's manager in 1902 when the plaintiff was examined, and Din Dayal states that Ram Pershad worked till $2\frac{1}{2}$ years back on her behalf. The redemption-money was paid on the 10th July 1906, so that by either account, the defendant was then working on behalf of the plaintiff, and it is not improbable, that he may have paid the mortgage money out of the profits. There is, however, no clear evidence about it. The accounts have not been filed, and the plaintiff's sole statement on the point cannot be regarded as sufficient.

The plaintiff is, therefore, liable to pay Rs. 213-8-8 to the defendant exclusive of the costs incurred by the defendant in the redemption suit, under section 95 of the Transfer of Property Act, if she wants to recover possession over her half share. Rupees 59-14 were incurred as costs in the

(4) 11 M. I. A. 551; 8 W. R. (P. C.) 3.
(5) 14 A. 8.
(6) 29 C. 749.
(7) 30 B. 578; 8 Bom. L. R. 525.

Court of first instance and Rupees 22 5 in the Court of Appeal (*vide* the decrees in that record summoned). Those costs were not awarded to the then plaintiff in the redemption case. *Musammat* Bedo is liable accordingly to pay Rs. 41-1-6 about her half share of those costs. The costs incurred in the second appeal had been awarded to the then plaintiff against the then defendants and as they can be recovered from the latter they need not be included in the accounts. There is nothing to show that that amount is irrecoverable. No other costs are proved. The plaintiff is, therefore, entitled to possession over a half share on payment of Rs. 254-10-2 to the defendant.

No mesne profits can be allowed as the plaintiff is not proved to have paid her share of the mortgaged money to the defendant as yet.

The mortgaged property redeemed by the present defendant amounted to 33/40ths share out of No. 8 *khewat* measuring 46 *bighas* 6 *biswas*. The plaintiff will be entitled to a decree over a half share out of the same.

The claim is decreed accordingly for possession of a half share out of 33/40ths of No. 8 *khewat* measuring 46 *bighas* 6 *biswas pukhta* in *Mouza* Imtouri in dispute on payment of Rs. 254 10 2 within six months from this date. The decree will be framed in terms of Order XXXIV, rule 7 of the Civil Procedure Code. Six months' time will be allowed. In case of default, the defendant will be entitled to a decree for sale The rest of the claim will be disallowed The plaintiff's proportionate costs will be charged against the defendant, who shall bear his own costs.

Mr. *Hamilton*, for the Appellant.

Hon'ble Mr. *Sunder Lal*, with him Mr. *Parmeshawor Dayal*, for the Respondent.

JUDGMENT.—In our opinion the decision of the Court below was quite correct. It is admitted that the plaintiff's title to recover possession of the property in suit upon the terms and conditions mentioned in the decree of the lower Court is established, unless certain statements which the plaintiff made in certain mutation proceedings prevented her from bringing the present suit. In our opinion these statements mean at most that it was at that time the intention of the plaintiff to make a gift of her share in the property to the defendant. Under sections 54 and 123 of the Transfer of Property Act, a sale or gift of an interest in immoveable property must be proved by the production of documents executed and registered according to the provisions of the Act It cannot for one moment be urged that the statements made by the plaintiff in the mutation proceedings complied with the terms of these sections or that they estopped her from maintaining the suit. We accordingly dismiss the appeal with costs, including fees in this Court on the higher scale.

Appeal dismissed.

(s. c. 15 C. L. J. 17.)

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL No. 402 OF 1910.

August 30, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff

Maharaja RAM NARAIN SINGH—DEFENDANT—APPELLANT

versus

ODINDRA NATH MOOKEKJEE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Loan—Promise to pay implied—Bond—Mode of payment prescribed, whether creditor limited to that mode only—Personal obligation to re-pay—Limitation Act (XV of 1877) Sch. II, art. 116—Money due on registered bond—Time begins to run, when—Commission - Judicial functions of Court not to be delegated—Civil Procedure Code (Act V of 1908), s 75.

Every loan implies a promise to re-pay, and an unqualified admission of indebtedness is equivalent to an express covenant and creates a personal obligation.

Ethel Georgina Kerr v. *Clara B. Ruxton*, 4 C. L. J. 510 relied upon.

Where in a bond a mode of payment was provided but it was laid down that the debtor would be responsible for any deficiency:

Held, that the creditor was not limited to that mode alone, if it was found insufficient to satisfy the debt, and that a suit was maintainable as upon a personal obligation to re-pay the money borrowed.

A suit to recover money due on a registered bond is a suit for compensation for the breach of a contract in writing registered within the meaning of Article 116 of the second Schedule to the Limitation Act of 1877.

Nobocoomar v. *Siru Mullick*, 6 C. 94 and *Husain Ali* v. *Hafiz Ali*, 3 A. 600, relied upon.

And the time within which the suit must be instituted is six years from the date when the contract is broken, or where there are successive breaches, from the date of the breach in respect of which the suit

RAM NARAIN SINGH *v.* GOINDRA NATH.

is instituted, or where the breach is continuing from the date when it ceases.

Where a bond indicated that the debtor was to be allowed seven years for the re-payment of the loan and that if the debt remained unsatisfied at the end of that period, the creditor might recover damages for breach of contract and the creditor was put in possession of certain property belonging to the debtor, by which the debt was to be satisfied:

Held, that, the obvious intention of the parties was that their liabilities should be adjusted on the expiry of the term, and that the creditor was not bound to sue whenever he failed to realise a sum mentioned in the bond at the precise point of time when it was assumed to be recoverable from a tenant.

The judicial functions of a Court cannot be delegated to a Commissioner. The power of a Court to issue a Commission is defined in section 75 of the Code of 1908.

Appeal from the decree of the Subordinate Judge of Hazaribagh, dated the 30th June 1910.

Babus *Provash Chunder Mitter*, *Biraj Mohan Mojumdar* and *Susil Madhub Mullick*, for the Appellant.

Mr. *B. Chuckerbutty* and Babus *Sarat Chandra Roy Chowdhury* and *Khetra Mohan Sen*, for the Respondents.

JUDGMENT.

MOOKERJEE, J.—This appeal is directed against the preliminary decree in a suit for recovery of money. The circumstances under which the suit was commenced by the plaintiffs-respondents have not formed the subject of controversy in this Court. On the 14th April, 1896, Jadu Nath Mukerjee, the predecessor of the plaintiffs, advanced to the defendant by way of loan a sum of one lac and thirty thousand rupees, to bear interest at the rate of seven and a half per cent. per annum. The loan was intended to be secured by a mortgage, the mortgagee to be placed in possession of various properties of the defendant, and to apply the profits thereof in satisfaction of his dues A usufructuary mortgage-deed was drawn up and executed by the defendant; but for reasons about which we need not speculate, the instrument was not duly attested by two witnesses. The document was registered on the 10th June 1896, and the creditor took possession of the properties mentioned therein. He continued in possession up to the time of his death and thereafter the plaintiffs entered into occupation as his representatives in-interest. The case for the plaintiffs in substance is that by reason of the interference of the defendant, and his otherwise unjust acts and conduct, they could not realise from the properties in their possession the sums which it was assumed in the document of the 14th April, 1896, could be collected from year to year. They, therefore, commenced the present action on the 13th January, 1909, for recovery of one lac, fifty-seven thousand, nine hundred and eighty-five rupees as the sum still due to them. The defendant did not repudiate the transaction, but contended that the suit had not been properly framed; that the claim was barred by limitation, and that, in any event, the instrument had not created any enforceable charge on immoveable property. On the merits, the defendant denied the truth of the allegations in the plaint, and pleaded that the debt had been satisfied from the usufruct. The Subordinate Judge raised ten issues, some of which, at any rate, were superfluous. He discussed the pleas in bar, overruled them as untenable, and referred to a Commissioner the trial of the questions on the merits. Upon the present appeal, the preliminary decree of the Subordinate Judge has been assailed on three grounds, namely:—*first*, that the suit, as framed, is not maintainable; *secondly*, that the claim is barred by limitation, and *thirdly*, that the Subordinate Judge ought not to have delegated the trial of the suit on the merits to a Commissioner. No cross-objections have been preferred on behalf of the plaintiffs respondents against the conclusion of the Subordinate Judge that the document was inoperative as a mortgage, and did not create any charge on immoveable property.

In support of the first two grounds which are closely connected and may be considered together, it has been urged that the plaintiffs were bound to sue for damages, and that if time is taken to run from the successive dates when the plaintiffs suffered loss by reason of the alleged misconduct of the defendant, the claim is barred by limitation. To test the force of this objection, we must examine the provisions of the deed of the 14th April, 1896. The document recites that Rs. 1,30,000 was borrowed by the defendant Maharaja, and that for the re-payment of the said loan, principal with interest, the creditor was to be placed in possession of properties up to the end of *Pous*, 1959, *Sambat*, which corresponds with the 13th January, 1903. Lists were appended to the document of the

properties of which the creditor was to be in possession from year to year. It is desirable to mention that the creditor was to be placed in possession of one set of properties from the very first year, of another additional set from the beginning of the next year, and in the same manner, of further sets of properties from the beginning of the third and fourth years. The names of the tenants and the amounts recoverable from each of them were stated in detail. An account was also annexed to indicate how the debt was to be reduced from year to year, with the result, that on the 13th January, 1903, not only would the debt stand completely wiped out but there would be a balance due to the Maharaja to the extent of Rs. 230. The deed contained a provision that the creditor would be entitled to realise arrears of rent by institution of suits in his own name, but that, if any tenant was ejected, a new tenant could be inducted upon the land by the Maharaja at his pleasure, or he might occupy the land himself, with the result that the creditor would receive his dues from the new tenant or the Maharaja, as the case might be. The deed further provided, that if any excess collection was made by the creditor, the money would be refunded to the Maharaja year after year; while if the rent decreased in any village, the creditor would be entitled to the deficiency from the Maharaja. The deed also contained a covenant, that during the term, the debtor might at any time, upon payment of whatever was due, take back possession of the properties, and that, in any event upon the expiry of the term, he would be entitled to possession. The allegation of the plaintiffs is that, though they were in possession as provided in the deed, the debt has not been satisfied by reason of four circumstances, namely, *first*, that upon the death of some of the tenure-holders, the defendant himself entered into possession and prevented the collection of rents by the plaintiffs: *secondly*, that the rents realisable in respect of some villages were in fact less than the amounts mentioned in the schedule to the document: *thirdly*, that the defendant and his father had in some instances collected rents in advance, so that the plaintiffs could not realise as much as was mentioned in the document: and *fourthly*, that in the case of other villages, upon the ejectment of tenants in default, the defendant took possession, but neither satisfied the rent decrees, nor paid the subsequent rents. The plaintiffs have attached to the plaint a detailed specification of the properties comprised in each of these classes, and their claim is for recovery of the unsatisfied balance of the debt due to them. In answer to this claim, it is argued on behalf of the defendant, that as there was no personal covenant, the defendant cannot be held liable upon the document; that at best the plaintiffs can only claim damages which must be deemed to have accrued on each several occasion, when the plaintiffs found themselves unable to collect the sums mentioned in the document, and that, treated from this point of view, the claim is barred by limitation. In our opinion, these contentions are untenable. As was pointed out by this Court in *Ethel Georgina Kerr* v. *Olara B. Ruxton* (1), every loan implies a promise to re-pay, and an unqualified admission of indebtedness is equivalent to an express covenant and creates a personal obligation. In the case before us, the Maharaja took by way of loan a large sum of money; that, obviously, implied a personal obligation to repay the loan. No doubt, a mode of payment was prescribed, but it cannot be suggested that the creditor was limited to that mode alone, even if it was found insufficient to satisfy the debt. The case, therefore, does not fall within the principle laid down by the Judicial Committee in *Narotam Das* v. *Sheo Pargash Singh* (2) and *Kalka Singh* v. *Paras Ram* (3). As pointed out in *Parbati Charan* v. *Gobinda Chandra* (4), the cases just mentioned merely lay down that if there is a covenant and an agreement to pay which is not absolute, but qualified in its terms ,for instance, if there is a covenant to pay only in a particular manner or out of a specified fund, it does not create the relation of creditor and debtor as upon a simple loan of money. The case before us is of an entirely different description. The document provides a mode of payment of the debt, but expressly lays down that the debtor would be responsible for any deficiency. In our opinion, the suit can well be maintained as upon a personal obligation to repay the money borrowed.

The question next arises whether the claim or any portion thereof is barred by limitation. As pointed out in *Ethel*

(1) 4 C. L J. 510.
(2) 11 I. A. 83; 10 C. 740.
(3) 22 I. A. 68; 22 C. 434.
(4) 4 C. L. J. 246.

Georgina Kerr v. *Clara B. Ruxton* (1), a suit to recover money due on a registered bond is a suit for compensation for the breach of a contract in writing registered within the meaning of Article 116 of the second Schedule of the Limitation Act: that view accords with the earlier decisions in *Nobocoomar* v. *Siru Mullick* (5) and *Husain Ali* v. *Hafizali* (6). It is clear that Article 116 has to be read along with Article 115, and the time within which the suit must be instituted is six years from the date when the contract is broken, or where there are successive breaches, from the date of the breach in respect of which the suit is instituted, or where the breach is continuing, from the date when it ceases. It has not been suggested on either side, that the present case can be brought within the third division of the Article, which may, therefore, be at once dismissed from consideration. The real question is, within which of the other two divisions, this case falls. On behalf of the plaintiffs-respondents, it has been argued that the contract was that the entire debt would be re-paid within the 13th January, 1903, that the contract was broken, when upon that date the debt still remained unsatisfied in part, and that consequently six years ought to run from that date. On behalf of the defendant-appellant it is argued, on the other hand, that the contract was that a specified sum would be paid out of the income of certain properties at prescribed times towards the satisfaction of the debt, and that whenever the plaintiffs found it impossible to collect the sums mentioned at the appointed time, there was a breach of contract with the result, that time ran from the date of each successive breach. We are unable to accept the latter contention as well founded. The document must be construed as a whole, and the situation of the parties determined from all its terms. The document plainly indicates that the debtor was to be allowed seven years for the re-payment of the loan, and that if the debt remained unsatisfied at the end of that period, the plaintiffs might recover damages for breach of contract. It could never have been intended that upon failure of the plaintiffs to realise from a tenant the sum assumed in the deed to be payable by him in a particular year, they would at once become entitled to institute a suit for the recovery of the specific sum from the Maharaja. That would imply that the parties contemplated the possibility of numerous isolated suits during the term of seven years. There is no clause in the deed which compels us to impute such an extraordinary intention to the parties concerned. On the other hand, the plaintiffs might, so long as they were in possession, collect in one year what had remained unpaid during the preceding year; the position would necessarily be of this description in all cases where the plaintiffs might institute suits for arrears of rent as they were authorised to do by the document. We think the obvious intention of parties was that their liabilities should be adjusted on the expiry of the term when the possession of the plaintiffs would terminate, and when, if nothing went wrong, the debt of the defendant would also be wiped out. We are not prepared to accept the contention of the appellant and construe the document as if it were an instalment-bond, under which, upon default of payment of one instalment, the creditor becomes immediately clothed with the right to sue the debtor. In the case before us, the defendant was further entitled to be restored to possession upon payment of the amount due at any time within the seven years. In view of these provisions, the contention cannot be supported that the plaintiffs were bound to sue whenever they failed to realise a sum mentioned in the document at the precise point of time when it was assumed to be recoverable from the tenant in question. The first two grounds urged on behalf of the appellants consequently fail. It becomes, therefore, unnecessary for us to consider whether, if the case was considered to be one of successive breaches, there was such an acknowledgment by the defendant as would make section 19 of the Limitation Act applicable.

In support of the third ground, it has been urged by the appellant that the Subordinate Judge has improperly delegated his judicial functions to the Commissioner. This contention is obviously well founded and has not been seriously resisted by the respondents. The power of a Court to issue a Commission is defined in section 75 of the Code of 1908. It is not suggested that a local investigation has to be made in this case or any accounts examined or adjusted. The plaintiffs assert

(5) 6 C. 94.
(6) 3 A. 600.

that they have been able to collect only certain sums during the period of their possession of the properties, and that they have failed by reason of the misconduct of the defendant to collect various other sums which are set out in great detail in the schedule to the plaint. The burden is upon the plaintiffs to prove their allegations, and they must do so by relevant evidence taken in Court. If, in any particular instance, good reasons are made out for the issue of a commission for the examination of a particular witness, the Court can give appropriate directions in that behalf; otherwise the case must be tried out in Court. If the procedure adopted by the Subordinate Judge is permissible, all cases in their entirety may be sent to a Commissioner for trial. The third ground must, therefore, prevail.

The result is that this appeal must be allowed and the preliminary decree set aside. The case will be remitted to the Subordinate Judge to be tried on the merits. The allegations of the plaintiff must be considered point by point, and such relevant evidence as may be adduced must be taken by the Subordinate Judge. He will then make his decree in the suit on the basis of the evidence so recorded. The costs of the appeal will abide the result.

Appeal allowed; case remanded.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 913 OF 1911.

January 13, 1912.

Present:—Mr. Justice Chevis.

SUNDAR SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat HAR KAUR—PLAINTIFF—RESPONDENT.

Custom—Succession—Sister—Collaterals—Immoveable property acquired by father of last male holder—Mortgagee's right in occupancy lands.

A. died leaving two sons and two daughters. The sons died, one after the other, sonless. The collaterals of *A.* got his ancestral land but his self-acquired immoveable property was mutated in favour of the unmarried daughter. On her death, the latter property was mutated in favour of a collateral. *A.*'s married daughter thereupon sued for possession of this property:

Held, that the plaintiff as sister of the last male-holder must give way to the collaterals as regards the succession to *A*'s self-acquired immoveable property.

Hamira v. *Ram Singh*, 134 P. R. 1907; 85 P. W. R. 1907, followed.

A mortgagee's rights in occupancy lands are to be regarded as immoveable property for the purposes of succession

Bantu v. *Ganda Singh*,, 18 P. R. 1909; I Ind. Cas. 450; 22 P. W. R. 1909, distinguished.

Second appeal from the order of the Divisional Judge, Ludhiana, dated the 23rd March 1911, reversing that of the Munsif, 1st Class, Ludhiana, dated the 3rd January 1911, dismissing plaintiff's claim.

Lala *Durga Das*, for the Appellants.

Mr. *Devi Dayal*, for the Respondent.

JUDGMENT.—The facts of this case are as follows. Sital held land in Rachin, but took in mortgage the occupancy tenure of certain land in Dad village. Sital died, leaving two sons and two daughters. The sons both died, one after the other, sonless. The collaterals got the ancestral land, but the mortgaged land was mutated in favour of the unmarried daughter. She then died unmarried, and it was mutated in favour of the collaterals. The married daughter sues for possession alleging (1) an oral Will, and (2) a right by custom to succeed to the self-acquired immoveable property of her father in preference to the collaterals. As to the Will both the lower Courts have found against plaintiff, and nothing more need be said on this point.

The first Court dismissed the suit holding that plaintiff, as sister of the last male owner, must give way to the collaterals, whatever the nature of the property. The learned Divisional Judge on appeal held that the collaterals could only succeed to the self-acquired property of Sital in the absence of any descendants of Sital, male or female, and so gave the plaintiff a decree against which the collaterals appeal to this Court.

The case seems to me to be fully settled by the Full Bench ruling *Hamira* v. *Ram Singh* (1). In that case certain property had been acquired by one Saudagar, on whose death it passed to his son. The son died and the son's widow re-married; Saudagar's widow then succeeded, and on her death the contest was between a married daughter of Saudagar and Saudagar's collaterals. It was held that the former, as sister of the last male owner, must give way to the collaterals so far as the immoveable part of the property was concerned, even though the property was

(1) 134 P. R. 1907: 85 P. W. R. 1907.

self-acquired by Saudagar. Here the case is exactly the same. The contest is between the sister of the last male owner and the collaterals of the father of the last male owner, and the property was acquired by the father of the last male owner. Following the Full Bench ruling I must, in the absence of proof of any special custom, give the preference to the collaterals. No special custom is proved; all that can be said is that an unmarried daughter of Sital's held the land for some time after the death of her brothers; but, in the first place, there is nothing to show that the collaterals ever had notice of the fact that it was proposed to effect mutation of the land in her favour: I am informed by the parties that the two villages are 14 or 15 *kos* apart; and, in the next place, the collaterals may have been willing to let an unmarried daughter hold for her maintenance till her death or marriage. They had, I think, a right to succeed even in preference to an unmarried daughter, but possibly they thought they had no right, and so did not contest, their mistake then would not estop them from claiming now as against a married daughter of Sital. (The unmarried daughter did not, I note, hold the land long enough for any right to be established by reason of adverse possession.)

Then, it is urged for the plaintiff that mortgagee's rights in occupancy lands are not inmoveable property, and *Bantu* v. *Gandla Singh* (2) is quoted, but this ruling merely lays down that a debt secured by a mortgage is not immoveable property for the purposes of section 268, Civil Procedure Code of 1882. I cannot regard this as sufficient ground for holding that the rights in dispute in this suit should be regarded as moveable property for purposes of succession under Customary Law. It is urged that the mortgagor may redeem the land at any time. Had the mortgagor paid the money and redeemed the land in the life-time of Sital or of his sons then, of course, the money would have been moveable property and I think Sital's daughter would have been entitled to succeed to it and not the collaterals. But, in the same way, if Sital had acquired proprietary rights in land which after his son's death would have gone to his collaterals and not to his son's heirs, it is clear that Sital might, had he chosen, have again sold that land and the sale-money would as moveable property have gone to his sons, and after the last son, to the son's sister to the exclusion of the collaterals.

On the strength of *Hamira* v. *Ram Singh* (1), I hold that the plaintiff's claim must fail. I, therefore, accept this appeal, and reversing the decree of the Divisional Judge, I restore that of the first Court dismissing the suit. The plaintiff will pay costs in all Courts.

Appeal accepted.

(2) 18 P. R. 1909; 1 Ind. Cas. 450; 22 P. W. R. 1909.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No 791 OF 1909.

January 18, 1912.

Present:—Mr. Justice Johnstone and Mr. Justice Rattigan.

JAN KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

AHMAD AND OTHERS—DEFENDANTS—RESPONDENTS

Civil Procedure Code (Act V of 1908), *s.* 11—Res-judicata—*Partition proceedings—First suit that certain land was not* shamilat deh—*Dismissal of suit—Land allotted to defendants—Subsequent suit that defendant had no right to share in* shamilat.

In partition proceedings a dispute arose between plaintiffs and certain other persons including the defendants as to whether a certain area of land was the proprietary land of plaintiffs or was part of the *shamilat deh*. Plaintiffs were directed to establish their rights in a Civil Court. Consequently, plaintiffs brought a declaratory suit in which it was held that the land was *shamilat deh*.

The land in suit was in subsequent partition proceedings allotted to defendants. Plaintiffs thereupon brought this suit for possession of the land on the ground that the defendants were not *khewatdars* in the village, that they had no right to share the *shamilat deh*, and that the award of the land to defendants was erroneous:

Held, that the suit was not barred by reason of the previous suit. The only issue in the previous suit was whether or not the land was *shamilat deh* and plaintiffs were not bound to urge in the previous suit that defendants had no right to share in the *shamilat* as they were not *khewatdars*.

Second appeal from the order of the Additional Divisional Judge, Shahpur Division, dated the 21st of April 1909, reversing that of the District Judge, Jhang, dated the 30th of April 1908, decreeing the plaintiff's claim.

JAN KHAN *v.* AHMAD.

Mr. *Nand Lal*, for the Appellants.

Mr. *Nanak Chand*, for the Respondents.

JUDGMENT.—The plaintiffs are *Biloch* proprietors of *Mauza* Islampur Nashib, Shorkot *Tahsil*, Jhang District, and the defendants are *Sials* of the same village. The plaint alleges that the land in suit was *shamilat deh* but was awarded on partition to defendants, and that as the latter are not *khewatdars* in the villages, such award was erroneous and not binding on plaintiffs, to whom the said land should have been allotted. Plaintiffs accordingly sue for possession thereof.

Plaintiff's claim was decreed by the District Judge, but upon appeal by the defendants, the Additional Divisional Judge held that the present suit was barred by reason of a previous suit between the parties in 1904, and he, therefore, accepted the appeal and dismissed the suit with costs.

From this decree plaintiffs have preferred a further appeal in this case and have also applied for revision of the decree of the Additional Divisional Judge in another connected case, which related to a smaller plot of land and in which the points at issue between the parties were identical which those in issue in this case. In this judgment we shall deal with both cases. It appears that in 1903-04 a dispute arose during partition proceedings between plaintiffs and defendants as to whether a certain area of land, in which the land now in suit was admittedly included, was the proprietary land of the plaintiffs or was part of the *shamilat deh*. Before the Revenue officer who was engaged in effecting the partition, plaintiffs asserted that the said area belonged to them as proprietors, whereas the present defendants and others asserted that it was *shamilat deh*. The Revenue officer directed plaintiffs to institute a suit in the Civil Courts to establish their alleged rights, and in accordance with this direction, plaintiffs lodged a suit in the Court of the District Judge, L. Ganga Ram (who happened to be the same officer who, as Assistant Settlement officer, had heard their objections in the first instance) and prayed for a declaration that the said area was the property of plaintiffs. To that suit the present defendants and all other persons who claimed interest in the land were impleaded as defendants. The three defendants pleaded that the land was *shamilat* and that they as *khewatdars* were entitled to a share in it. L. Ganga Ram did not decide the latter question, nor was any issue framed with regard to it. He held, however, that the land was *shamilat deh* and as a result of this finding he very rightly dismissed the claim for a declaration that it was the exclusive property of the plaintiffs.

In the present suit the same persons who were plaintiffs in 1904 sue for possession of the same land on the ground that it was *shamilat deh* but has been wrongly allotted to defendants, who are not *khewatdars* and are, therefore, not entitled to it upon partition.

The Additional Divisional Judge has, as above remarked, held that this question is *res judicata* between the parties, but it is not very easy to follow his reasoning. It is admitted by Mr. Nanak Chand, for respondents, and is indeed obvious upon the record of the former case, that in 1904 the question whether the defendants were *khewatdars* was not decided, and that the only issue that was determined was whether the land belonged exclusively to plaintiffs or formed part of the *shamilat deh*. The learned Additional Divisional Judge, however, seems to infer, that simply because the present defendants were impleaded in the previous suit, it must be assumed that they were recognized both by plaintiffs and by the District Judge as *khewatdars*. No doubt, in that suit they claimed that *status*, but it was wholly unnecessary for the Court to decide that point in a case in which the sole material issue was whether the land was the property of the plaintiffs or was part of the *shamilat deh*, and in point of fact that was the only issue then determined. Defendants were naturally impleaded as co-defendants in that suit as they were asserting certain rights in the land, but we fail to find anything on the record of that case from which it can fairly be inferred that plaintiffs recognized them as *khewatdars*. The learned Judge observes that in that suit all the defendants were treated alike and that plaintiffs raised no objection. But why should they have done so? The only question then at issue was whether or not the land was *shamilat*, and plaintiffs who were then contending that it was their exclusive property were not concerned with the further question whether if it was *shamilat*, all of the defendants would be entitled to a share therein. In our opinion, the latter question did not directly

arise in that suit and it certainly was not directly or subsequently in issue between the then parties. Admittedly, there was no adjudication upon the point, and we cannot accept the contention that it was the duty of the plaintiffs in that suit to urge, in the alternative, that even if the Court saw fit to hold that the land was *shamilat*, certain of the defendants, at all events, had no right to share therein, as they were not *khewatdars* in the village.

We accordingly hold that the present claim is not *res judicata* between the plaintiffs and the defendants, and accepting this appeal, and the application for revision in the connected case (Civil Revision No. 1975 of 1909), we remand both cases, under Order XLI, rule 23, Civil Procedure Code, to the Divisional Judge for determination of the appeals to his Court in accordance with law.

The Court-fee stamp on this appeal and on the application for revision will be refunded, but all other costs will abide the event.

Cases remanded.

PUNJAB CHIEF COURT.

CIVIL REFERENCE CASE NO 37 OF 1911.

January 12, 1912.

Present:—Mr. Justice Chevis.

HETA RAM—

versus

CHANDAN AND OTHERS—

Jurisdiction of Civil or Revenue Court—Suit by tenant for share of produce, forcibly removed by landlord—Punjab Tenancy Act (XVI of 1887), ss. 50, 77 (3) (i)—Practice—Civil or Revenue Court returning plaint—Reference to Chief Court.

When a plaint has been returned once by a Revenue Court for presentation to a Civil Court, the Civil Court, if it thinks that the suit is cognizable by a Revenue Court, should at once refer the question of jurisdiction for decision to the Chief Court. So, too, if a Revenue Court disagrees with the opinion of the Civil Court, it should at once refer the question of jurisdiction.

A suit by a tenant for his share of the produce forcibly removed by the landlord is cognizable by a Revenue Court.

Case referred by the District Judge, Dera Ghazi Khan, with his letter No. 288, dated the 10th May 1911, for the orders of the Chief Court, Punjab.

ORDER.—In this suit the plaint recites that the defendants, mortgagees of the land, gave it to plaintiffs for cultivation on $\frac{1}{4}$th *batai*, that the plaintiffs cultivated the *kharif* crop in 1909, but that when the crop was ripe, the defendants removed it forcibly and took the whole of it. So the plaintiffs sue for the value of the cultivator's share of produce.

The suit was instituted in a Revenue Court, but the plaint was returned for presentation to a Civil Court. The plaint was then presented to a Munsif, who returned it for presentation to a Revenue Court. Then the *Tahsildar* again returned the plaint. Then the Munsif again returned it. Then the plaintiffs, finding that neither the Civil nor the Revenue Court would entertain their claim, put the plaint into the District Judge's petition-box, and the District Judge has referred the case to this Court.

As pointed out by the District Judge the Courts have acted wrongly in repeatedly returning the plaint. When a plaint has been returned once by a Revenue Court for presentation to a Civil Court, the Civil Court, if it thinks that the suit is cognizable by a Revenue Court, should at once refer the question of jurisdiction for decision by this Court. So, too, if a Revenue Court disagrees with the opinion of a Civil Court, it should at once refer the question.

The suit as lodged is, in my opinion, clearly entertainable by the Revenue Court. According to the plaint, the plaintiffs are the tenants and the defendants the landlords. The plaintiffs do not say they have been dispossessed of the land, so it is not a suit falling under section 50, Tenancy Act, but it is clearly a suit falling under section 77 (3) (*i*) of the Act. Even if plaintiffs had asserted dispossession still the suit, lodged on 15th August 1910 and thus instituted within one year of the dispossession, would be cognizable by a Revenue Court, as a tenant who has been dispossessed can for the period of one year claim to be still regarded as a tenant, *vide Kesar Singh* v. *Nihal Singh* (1).

I hold that the suit is cognizable by a Revenue Court only. It is cognizable, under section 77 (4), by an Assistant Collector of the 1st grade. I direct the District Judge to return the plaint for presentation to a Revenue Court exercising powers not lower than those of an Assistant Collector, 1st grade.

Ordered accordingly.

(1) 45 P. R. 1891.

KURI v. DES RAJ.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No 158 OF 1909.

January 18, 1912.

Present:—Mr. Justice Robertson and Mr. Justice Shah Din.

Musammat KURI—DEFENDANT—APPELLANT

versus

DES RAJ AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Widow—Unchastity—Forfeiture of life estate—Burden of proof—Jats *of Panipat* Tahsil—Riwaj-i-am *unsupported by instances—Evidentiary value.*

The burden of proving a custom by which a widow forfeits the estate of her husband by reason of her unchastity lies on the person asserting the custom.

Fatteh Singh v. *Kalu*, 107 P. R. 1888, followed.

The value of an entry in the *Riwaj-i-am* must depend largely, if not wholly, upon the instances quoted in support of it:

Held, in the present case, that plaintiff had failed to prove that among *Jats* of the Panipat *Tahsil* a widow forfeits her life estate by reason of her unchastity.

Second appeal from the order of the Additional Divisional Judge, Delhi Division, dated the 30th October 1908, reversing that of the District Judge, Karnal, dated the 1st August 1908, dismissing plaintiff's claim.

Lala *Sundar Das*, for the Appellant.

Mr. *Harris*, for the Respondents.

JUDGMENT.—In this case the collaterals of a widow *Musammat* Kuri claimed possession of the land of *Musammat* Kuri's husband, which she was holding on a widow's tenure, on the ground of her unchastity. The parties are *Jats* of the Panipat *Tahsil*.

It is proved, and is not contested, that *Musammat* Kuri gave birth to a child 18 months after the death of her husband and therefore her unchastity is beyond dispute. A marriage on her part is denied and the question before us is this: Does the unchastity of a widow after her husband's death entail forfeiture of that husband's estate? It is admitted and clearly is the case that where the custom is alleged by which a widow forfeits the estate of her husband by reason of her unchastity, it lies upon the person making the allegation to prove it [*Fatteh Singh* v. *Kallu* (1).] The learned Divisional Judge in this case, on the ground that the entry in the *Riwaj-i-am* of the Panipat *Tahsil* lays down that such forfeiture does take place, and also upon his own knowledge of the custom prevailing in those tracts, has found that *Musammat* Kuri did forfeit her husband's estate. The first Court had held the opposite view on the ground that no such custom was proved and that it lay upon the plaintiff to prove it.

It is to be noted that in answer to question 35 "How are the rights of a widow affected by unchastity" in the English copy of the Customary Law of the Panipat *Tahsil* prepared in 1910, it is stated that in all cases undeniable unchastity on the part of a widow annuls her right to the land which she has received from her husband. In judging the value of such statements it must always be remembered that the parties making them are giving answers in their own interests, and this is one reason why it has been so frequently laid down, a proposition with which we fully agree, that the value of the entry in the *Riwaj-i-am* must depend largely if not wholly upon the instances quoted in support of the answer. Now we find under question 35 in Mr. Garbett's Customary Law that 5 illustrations are given of decided cases, in 3 of which the decision was against forfeiture by unchastity.

There has been absolutely no evidence on the record in proof of the alleged custom in this case, not even a copy of the *Riwaj-i-am*, and it lies clearly upon the plaintiffs to prove the custom under which they claimed possession of this land. We are obliged to hold that no such custom has been proved. The entries in the volume of Customary Law appear to be largely of the nature of an opinion as to what should be rather than a statement regarding the custom which has actually been shown to have the force of law, and as we have pointed out, the illustrations given do not fully support the statement made. This is a case in which no evidence was tendered by the plaintiffs. We do not, therefore, propose to treat it in any way as a precedent, but we simply decide that the burden of proof clearly lay upon the plaintiffs and that they have failed to discharge it.

We, therefore, accept the appeal, and setting aside the judgment of the Divisional Judge, restore that of the first Court.

Appeal accepted.

(1) 107 P. R. 1888.

RAJ KUMAR SARKAR v. RAJANI KANTA CHAKRAVARTI.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 1446 OF 1909.
July 20, 1911.
Present:—Mr. Justice Chitty and Mr. Justice D. Chatterjee.
RAJ KUMAR SARKAR—PLAINTIFF—APPELLANT
versus
RAJANI KANTA CHAKRAVARTI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 92, proviso (4)—Durpatni—*Original rent reduced by letter—Payment at lower rent for more than* 30 *years—Bengal Tenancy Act (VIII of* 1885),*s.* 88—*Division of* durpatni—*Written consent of landlord*—Dakhila *by landlord's agent showing division, if binding on landlord.*

A *durpatni* lease stated the annual rent to be Rs. 69. A few days after the landlord wrote to the lessee that as the rent of Rs. 69 was not supported by the state of things in the *Mofussil*, it should be reduced to Rs. 64. The rent was paid at that rate for over 30 years:

Held, that the landlord's transferee cannot claim rent at the higher rate.

A *dakhila* signed by the landlord's agent containing a recital that the rent in half share is Rs. 32, amounts to a consent in writing by the landlord to a sub-division of the *darpatni* within section 88 of the Bengal Tenancy Act.

Payari Mohun Mukhopadhya v. *Gopal Paik*, 25 C. 531; 2 C. W. N. 375, relied on.

Appeal from the decree of the District Judge of Pabna and Bogra, dated April 16th, 1909, affirming that of the first Munsif of Bogra, dated November 30th, 1908.

Babus *Kishori Lal Sarkar* and *Bimal Chandra Das Gupta*, for the Appellant.

Babu *Shyama Charn Roy*, for the Respondents.

JUDGMENT.—In this case the plaintiff has appealed. He sued for the rent of a *durpatni mehal* at the rate of Rs. 69. The defendants admitted rent at the rate of Rs. 64, and said that it was divided into halves each defendant being liable for Rs. 32. The lower Courts passed a decree for the plaintiff on these terms

It appears that the tenancy was created in September 1866 by a *kabuliat* which, no doubt, stated the annual *jama* to be at Rs. 69. But we find a letter on the record within a few days after (Exhibit B) in which it is expressly stated that the *jama* should be reduced to Rs. 64: It has been found by the lower Courts that the rent was paid at the rate of Rs. 64 per annum for over 30 years. In 1871 there was an alienation of the tenant's interest and the purchasers applied to the landlord for mutation of their names (Exhibit C). Five years later in 1876 we find the document, Exhibit D, a letter, showing that the *jama* was then recorded at Rs. 64 The plaintiff purchased the landlord's interest in 1904 and he now claims after all these years at the higher rate. I do not think that he can do so.

The point taken by the learned Vakil for the appellant is that oral evidence cannot be taken to vary a written contract which has also been registered and he relies upon proviso 4 to section 92 of the Indian Evidence Act. The short answer to that is that the agreement by which the original contract in this case was varied was not a mere verbal agreement, as the Pleaders suggest, but an agreement in writing, by which the parties can always vary, rescind or modify a contract.

As to the second point, it is said that the *jama* could not be split up, and that the Courts below are wrong in giving a separate decree against each defendant for Rs. 32. It is argued that the division of the tenure could not take place without the consent in writing of the landlord. We find in this case a number of *dakhilas* which were signed by the *am-mukhtar* of the landlord. That would amount to a consent in writing, as has been held by the Full Bench in the case of *Pyari Mohun Mukhopadhya* v. *Gopal Paik* (1).

For these reasons we dismiss the appeal with costs.

D. CHATTERJEE, J.—The disputed *kabuliat* is dated sometime in *Bhadra* 1273 and one of its terms is that the lessee was given to understand that no settlement had been made by a reduction of the *jama*. A few days after, on the 15th *Assin* 1273, the lessor said that the *jama* of Rs 69 not being supported by the state of things in the *Mofussil*, he made a reduction of Rs. 5 and would take Rs. 64 as *jama*. This was by a letter sealed and signed by the lessor, and ever since the rent has been paid at the reduced rate notwithstanding transfers and sub-divisions. One of the defendants deposed that the *jama* was reduced, as the assets found on the *Mofussil* inquiry were not sufficient for making up the *jama* in the lease. The plaintiff who is a new purchaser claims at the *kabuliat* rate.

It is contended by the learned Vakil for the appellants, that neither the letter nor

(1) 25 C. 531; 2 C. W. N. 375.

the other evidence in the case is admissible, for it must be for varying the contract, and he relies upon proviso 4 to section 92 of the Evidence Act, and says that the reduction of rent can be proved only by a registered document. I think the contention is wrong. In the first place, the original *kabuliat* contemplated that the assets were sufficient and the contract was not complete until the lessee had satisfied himself of the same: until such time it could not be said that the contract was complete. So that the existing state of things and the contemporaneous acts of the parties are admissible to show what the ultimate contract was; and in the second place, I should think that the first proviso to the section would entitle the lessee to show want or failure of consideration or mistake of fact so that he would be entitled to prove that the assets not being sufficient there was a failure of consideration leading to a final settlement at a lower rent. Evidence of conduct where relevant has always been held as admissible and the books are full of cases in which a *kobala* has been proved to be a mortgage [see the cases of *Preonath Shaha* v. *Madhu Sudan Bhuiya* (2); *Khankar Abdur Rahman* v. *Ali Hafez* (3); *Mohomed Ali Hossein* v. *Nazar Ali* (4)]. In the case of *Ismil Mussajee Mookerdum* v. *Hafiz Boo* of (5), the Privy Council held that a transaction that was on the face of it a sale was a gift. In the same way, there are lots of cases in which it is held that although consideration is written as paid in a registered document, evidence is allowed to show that no consideration was paid. In this case the conduct of the lessor and of the lessee has been uniform and unchanged for a period of more than 40 years. There have been several transfers in the meantime and the rent has always been considered to be Rs. 64 for the whole, and Rs. 32 for the half. So that I think it does not now lie in the mouth of the plaintiff who is a private purchaser from the lessor to say that there ought to be a different state of things in his relations with the defendants. In this view of the case the learned Vakil for the appellants is wrong in his first contention.

As regards the second contention that the tenure ought not to have been held as validly sub-divided, I find that when the two purchasers of the two eight-annas shares made an application for registration of their names in the *sheresta* of the lessor, the lessor gave them a *roka* in which it is stated that these two purchasers put in two separate *ekrarnamas* agreeing to pay the rent in two halves in different *kists*. These *ekrarnamas* are not before us. One would expect that the plaintiff being a private purchaser would be in a position to produce these documents. However, they are not on the record, and the documents that are on the record show that the lessors have uniformly and steadily given receipt for the 8-annas of the *durpatni jama* at Rs. 32 instead of giving the same as Rs. 32 out of Rs. 64. So that upon the evidence it was quite competent for the lower Courts to come to the conclusion that the *durpatni* had been sub-divided. The result, therefore, is that these contentions taken by the learned Vakil for the appellant fail and this appeal is accordingly dismissed with costs.

Appeal dismissed.

(2) 25 C. 603; 2 C. W. N. 562.
(3) 28 C. 256.
(4) 28 C. 289.
(5) 10 C. W. N. 570; 3 A. L. J. 353; 3 C. L. J. 484; 8 Bom. L. R. 279; 16 M. L. J. 166; 1 M. L. T. 137; 33 C. 773.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1166 OF 1908.

December 1, 1911.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

NALLASAWMI PILLAI AND OTHERS APPELLANTS

versus

RAMASAWMI PILLAY AND ANOTHER—RESPONDENTS.

Hindu Law—Alienation by widow—Suit by reversioners—Refund of purchase-money to alienee and delivery of property to plaintiff—Alienee's right to interest from date of widow's death—Excess extent discovered on later measurement—Compensation.

A Hindu widow having alienated property belonging to her husband, her reversioners sued the alienee after her death, for recovery of the property. On measurement, the lands were found to comprise a larger extent than was shown in the sale-deed by the widow. The Courts found for plaintiff and directed delivery of property on his refunding the purchase-money to the defendant. The Court allowed compensation to the defendant for the excess lands:

Held, (1) that as the excess of land in extent was

only the rectification of a mistake in the sale-deed, defendant was not entitled to any compensation;

(2) that plaintiff was entitled to interest at 6 per cent. on his purchase-money from the date of widow's death.

Mutteeram Keewar v. *Gopaul Sahoo*, 11 B. L. R. 416 at p. 422, 20 W. R. 187, referred to.

Second appeal against the decree of the District Court of Trichinopoly, in A. S. No. 186 of 1908, presented against the decree of the District Munsif of Trichinopoly, in O. S. No. 387 of 1906.

Mr. *T. Rangaramanujachari*, for the Appellants.

Mr. *B. Govindan Nambiyar*, for the Respondents.

JUDGMENT.—No question of law has been argued with regard to the validity of the alienation of any of the items except item 5. With respect to that item it is contended by the learned Vakil for the third appellant that as, according to the measurement in Exhibit VIII, the item comprised only 86 cents and as item 5 now measures 127 cents, the plaintiffs are not entitled to recover the difference. The 11th defendant did not contend in his written statement that the excess was not part of the property of the deceased Navakotiapillai and no definite statement is made in this Court as to how the 11th defendant acquired it if he did not do so under the sale-deed, Exhibit VIII. The difference in measurement is apparently due only to the greater accuracy of the later measurement than of the earlier one. The judgment of the lower Appellate Court must be upheld with regard to this item also.

The first respondent in his memo. of objections contends that the award of Rs. 150 for improvement made in item 5 is wrong. It does not appear from the judgment of th Judge on what grounds he has allowed it. He says that he allows Rs. 150 for the addition in the extent. If it was due merely to more accurate measurement then undoubtedly the 11th defendant would not be entitled to the amount. It was contended in the Court of first instance that the 11th defendant had made improvements, but the District Munsif disbelieved the evidence adduced to prove the contention. No objection is raised to his finding in the memorandum of appeal.

We have examined the evidence on the question and have come to the conclusion that the 11th defendant has not proved any right to compensation for improvements made by him. Examined as a witness, he said that he had spent about Rs. 200 but in cross-examination admitted that he could not say how much he spent. The defendant's 11th witness who was a lessee under the 11th defendant said that he spent the money and that the 11th defendant kept the accounts for him. He does not say that the 11th defendant paid him any compensation, nor does the 11th defendant say that he made any payment to the 11th witness. No compensation can be awarded unless it be found that the person claiming it incurred the expenditure.

We must hold that the evidence is insufficient to prove any claim to compensation for improvement. We must, therefore, disallow the award of Rs. 150 and modify the decree of the lower Appellate Court by substituting Rs. 100 for Rs. 250 as the sum to be paid to the 11th defendant before the plaintiffs can recover item 5. The plaintiffs are entitled to mesne profits for 2 years and 10 months and further mesne profits from the date of delivery of possession. The 11th defendant will be entitled to interest on Rs. 100 from the date of the widow's death at 6 per cent. per annum up to the date of payment. Our award of interest to the 11th defendant is in accordance with the judgment in *Mutteeram Kowar* v. *Gopaul Sahoo* (1).

The second appeal must be dismissed with costs. There will be no costs on the memorandum of objections.

Appeal dismissed.

(1) 11 B. L. R. 416 at p. 422; 20 W. R 187.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1738 OF 1909.

January 12, 1912.

Present:—Mr. Justice Caspersz and Mr. Justice Coxe.

SHARASHI MOHAN ROY—DEFENDANT—APPELLANT

versus

RAMESH CHARAN ROY—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), *s.* 60—*Landlord's name registered in respect of certain share—Collection of rent by him for larger share—Suit for larger share, whether maintainable.*

SHARASHI MOHAN ROY *v.* RAMESH CHARAN ROY.

Where the name of a landlord is registered in respect of a certain share but it is found that he has collected rent separately in respect of a larger share, he is entitled to sue in respect of the larger share.

Appeal from the decree of the Sub-Judge of Chittagong, dated May 8th, 1909, modifying that of the Munsif of North Raojan, dated December 1st, 1908.

Babus *Dhirendra Lal Kastagir* and *Jyotish Chandra Hazra*, for the Appellant.

Babus *Mohendra Nath Roy* and *Probodh Kumar Das*, for the Respondent.

JUDGMENT.

CASPERSZ, J.—This is a second appeal in a suit brought by the plaintiff-respondent to recover an 8-annas share of rent at an annual rental of Rs. 5-10. With regard to the *jama*, the plea was that the rental was Rs. 4-6.

The first Court dismissed the suit on the ground that the provisions of section 60 of the Bengal Tenancy Act were not quite applicable to the present case. In appeal, the Subordinate Judge has applied section 60, and he has given effect to the plea as to the *jama* and awarded the plaintiff a decree for rent at the rate of Rs. 2-3 only.

In second appeal it has been argued that section 60 of the Bengal Tenancy Act does not cover the present facts, that the plaintiff never realized any rent or paid Government revenue in respect of this *mahal*, wherein the tenancy is situated, and that in virtue of some agreement the tenancy fell to the share of the defendant No. 3, the appellant before us.

We have listened to an interesting discussion at the Bar upon some reported cases on section 60. Reliance is placed, by the learned Vakil for the appellant, on the case of *Durga Das Hazra* v. *Samash Akon* (1). That case, however, was distinguished by Mr. Justice Geidt in *Sadhu Charan Pal* v. *Radhika Mohan Roy* (2), where that learned Judge says that in the earlier case the plaintiffs were out of possession of the land for which they claimed rent. In that consideration, the rule that commended itself to Norris and Gordon, JJ., could not be applied.

The facts of the present case are quite clear and the plaintiff has been rightly held to be entitled to recover rent. The tenancy is within the 5-annas 4-pies share of a certain *mahal* and within one and the same *mouzah*. The plaintiff has his name registered in respect of a 2-annas 8-pies share, whereas the moiety share of the defendant No. 3 is represented by Moheswari, the mother of that defendant. The Subordinate Judge has found that the plaintiff has collected rent separately in respect of the 8-annas share, and that the mere fact that he has his name registered will entitle him, under section 60, to recover his share of the rent. It has been repeatedly pointed out that the provisions of section 60 are extremely stringent, and, as was explained by Geidt, J., in *Sadhu Charan Pal* v. *Radhika Mohan Roy* (2), it does not signify whether the plaintiff is the proprietor or whether the defendant is the proprietor.

It is not necessary, therefore, to show that the plaintiff is the real proprietor of the estate, nor is there any such finding in the lower Appellate Court that, in virtue of some private arrangement, the plaintiff agreed not to realise rent from the present tenants and that the defendant No. 3 alone is entitled to do so on the basis of his *kabuliat* of 1881. The object of the section is the speedy recovery of rent by the person who registers himself on the Collector's books.

The decision of the Subordinate Judge, therefore, must be sustained and this appeal dismissed with costs.

COXE, J.—I agree generally with the judgment that has been delivered by my learned colleague.

As pointed out by Mr. Justice Geidt in the very similar case of *Sadhu Charan Pal* v. *Radhika Mohan Roy* (2), the case of *Durga Das Hazra* v. *Samash Akon* (1) can be distinguished inasmuch as in that case the plaintiffs were out of possession; whereas this has not been found in the present case. But with the greatest respect, I desire to guard myself from being supposed to hold in consonance with the decision in *Durga Das Hazra* v. *Samash Akon* (1) that, if the plaintiffs were out of possession, the defendant would be entitled to resist his claim to recover rent with respect to the interest for which the plaintiff was properly registered.

Appeal dismissed.

(1) 4 C. W. N. 606.
(2) 8 C. W. N. 695.

ALBRECHT *v.* BATHEE JELLAMMA.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 132 OF 1910.

December 29, 1911.

Present:—Mr. Justice Wallis and Mr. Justice Abdur Rahim.

REV. DR. GEORGE ALBRECHT AND ANOTHER—COUNTER-PETITIONERS—RESPONDENTS

versus

BATHEE JELLAMMA—PETITIONER—APPELLANT.

Hindu Law—Guardianship—Minor made Christian—Right of Hindu father to nominate a guardian for his minor child—Welfare of minor—Discretion of Court—Guardians and Wards (Act VIII of 1890) *s.* 17—*Minor brought up in a certain style of living—Delay in presenting the application, effect of.*

A Hindu father is entitled to appoint a guardian for his child by Will or by word of mouth to the exclusion of the mother.

Soobah Pirthee Lal Jha v. *Soobah Doorgah Lal Jha*, 7. W. R. 73, referred to.

This right the father would not lose by becoming a Christian.

Under section 17 of the Guardians and Wards Act, the Court has to decide the question of guardianship with reference to all the considerations set forth in the section. Where, in the opinion of the Court, it would be injurious to the minor to give effect to the father's wishes, the Court will interfere, even in his life-time.

Mokoond Lal Singh v. *Nobodip Chunder Singh*, 25 C. 881; 2 C. W. N. 379, referred to.

N., the father of the minor, had all his sons baptized by the respondent, a missionary. He also wished to be baptized himself, but the respondent refused to baptize him as *N.* was living with a concubine. *N.* was living away from his wife and, sometime before his death, delivered the minor to the respondent to be brought up by the latter. The minor was brought up by the respondent in Christian style of living. Three years later, petitioner, the mother of the minor, applied to be appointed guardian of the minor.

Held, that, under the circumstances, the minor should not be removed from the respondent's custody.

Appeal against the order of the District Court of Guntur in O. P. No. 144 of 1909, dated 14th April 1910.

Mr. *R. Kuppusawmi Aiyar*, for the Appellant.

Mr. *T. Ramachandra Row*, for the Respondent.

JUDGMENT.

WALLIS, J.—This is an appeal from an order of the District Judge of Guntur appointing the respondent, a Hindu widow, guardian of her minor daughter and directing the counter-petitioner, Dr. George Albrecht, who belongs to an American Mission, to deliver up the minor to her mother. There was some conflict of evidence, but on a careful examination the facts proved seem to me as follows. The petitioner and her deceased husband lived at Tallapalli, some 14 miles from Rentachintalla, the headquarters of the respondent, who accordingly visited Tallapalli in the course of his missionary tours. According to his evidence, which I see no reason to disbelieve, Narasayya, the petitioner's husband and father of the minor, came to him and asked to be baptized. The request was refused as he was living with a concubine but he continued to attend the counter-petitioner's services. His wife also asked the counter-petitioner to baptize her and get her husband to take her back. The counter-petitioner accordingly went to Tallapalli, held an inquiry and induced Narasayya to take back the petitioner as there was no proof that she was leading a bad life as he suspected. About a week later, she came and complained that Narasayya had put her away and he also came and explained that he had found her pregnant when he took her back. Later, there was another inquiry, when Narasayya disowned the child which had been born in the meantime. Narasayya and the petitioner went on living apart, the minor at first living with the petitioner. In 1903 Papamma, Narasayya's daughter by a concubine, was baptized, and in October 1905 Venkiah, a grown up son of Narasayya by a concubine, was also baptized.

In November 1905 Narasayya came to Rentachintalla and got the respondent to baptize the minor and sometime later he came again and said that his toddy had been poisoned and that he was not likely to live long and asked the respondent to take charge of the minor in case anything happened to him, and the respondent promised to do so at his house in Rentachintalla but did not then take the girl into his school. According to the respondent's evidence, Narasiah had previously asked Mrs. Albrecht to take the girl and look after her, but she had not then consented.

The respondent's witness No. 3, who had for many years been Village Munsif and has since retired, says that Narasayya took the minor from the petitioner's custody about 4 months before his death in January 1906, that when the counter-petitioner came to the village, Narasayya asked him and Mrs. Albrecht to take charge of the child, but they told him to keep it for six months. The respondent's witness No. 4, Narasayy's younger brother,

also speaks to this as does the respondent's witness No. 6, another relative of Narasayya.

In January 1906 Narasayya was found murdered and when the Acting *Tahsildar*, the respondent's witness No. 1, went to inquire he found living in Narasayya's house in addition to Narasayya's concubine and a son by a former concubine (Venkiah) a little girl aged 5 or 6 who was said to be the daughter of Narasayya and the petitioner, but not the petitioner herself who was living elsewhere. There was then no reason for pretending that the minor was living there if she was not, and I have no doubt that the minor was living with her father and not with her mother at the time of his death. A short time afterwards the minor and Narasayya's daughter by his concubine were brought to the respondent at Rentachintalla by Venkiah, his grown up son by a previous concubine. The petitioner and also Venkiah were afterwards charged with Narasayya's murder but discharged. At the present inquiry Venkiah was not called by either side, but was present and said to be assisting the petitioner. The petitioner in her evidence not only denies misconduct but also that she was ever put away by her husband. She denies that she ever asked the respondent to get Narasayya to take her back, or that there was any *panchayat*, or that her husband repudiated the son who was born 2 years before his death. She says that, after her husband's death, she was at her husband's house when the Magistrate came to the village, but his evidence is the other way. She also says that the minor was living with her and was kidnapped while she had gone to a field. The petitioner's witness No. 1 says that the minor was living with the petitioner when she was taken to the respondent and that the petitioner was living amicably with the deceased. The petitioner's witness No. 2 also says that the petitioner was living with Narasayya till his death. Her brother the petitioner's witness No. 3 also says she was living amicably with her husband and that she was at his house when the Magistrate came to inquire after the murder.

On a careful consideration of the evidence I am unable to take the same view of it as the District Judge. I see no reason to disbelieve the respondent's story as to the difference between the petitioner and her husband, as to his attempts to settle them, as to Narasayya having had his illegitimate daughter baptized in 1903, and having brought the minor to Rentachintalla to be baptized in November 1905, and as to his having asked the respondent, both at Rentachintalla and on an earlier occasion, to look after the minor after his death. He was then under an apprehension of danger to his life, an apprehension which proved well founded. He had separated from his wife on an allegation of misconduct and had subsequently taken the minor away from her. He had made all his children Christians and was only prevented from being baptized himself because he was unwilling to put away his concubine. These considerations appear to me to sufficiently explain his action. After his death the minor early in 1906 was handed over to the respondent and has since been in his charge. She was produced in Court and appeared to be healthy and well-cared for. In September 1906, the petitioner prosecuted the respondent for kidnapping but the complaint was dismissed. In her present petition, she states that she subsequently sued him but in her evidence she denied this and the respondent was not asked about it. The present petition was not presented until March 1909, 3 years after the minor came into the respondent's custody, and the delay is not satisfactorily explained. On these findings of fact it remains to be considered what order ought to be passed. As a Hindu the father was entitled to appoint a guardian for his child by Will or word of mouth to the exclusion of the mother [*Soobah Pirthee Lal Jha* v. *Soobah Doorgah Lal Jha* (1)] and this right, under the Act of 1850, he would not lose by becoming a Christian. Further, the result of authorities as held in *Mokoond Lal Singh* v. *Nabadip Chunder Singh* (2) is that *prima facie* the father is entitled to say in what religion an infant child should be brought up. These wishes, however, are not conclusive. The paramount consideration is the welfare of the minor, and when applied to as here under section 17 of the Guardians and Wards Act the Court has to decide the question with reference to all the considerations set out in the section. Where, in the opinion of the Court, it would be injurious to the minor to give effect to the father's wishes, the Court will interfere even in his

(1) 7 W. R. 73.
(2) 25 C. 881; 2 C. W. N. 379.

NARAK LAL v. THAGOO LAL.

life-time as in *Mokoond Lal Singh* v. *Nobodip Chunder Singh* (2), where a father was prevented from altering the religion of his son. In considering in the present case whether to disregard the wishes of the father and restore the child to the mother, the fact that before the present application was put in the minor had been left for 3 years in her present custody and was being educated as a Christian, in my opinion most materially affects the question, and makes it much more difficult to interfere than if the application had been made before the child had become accustomed to its present surroundings and the ways of thought in which it is being brought up.

On a consideration of all the circumstances, I do not think it would be for the welfare of the minor to interfere on this application with the arrangements which the deceased father made for the minor's custody after his death and I would, therefore, refuse the application and reverse the order of the lower Court. There will be no order as to costs.

ABDUR RAHIM, J.—I agree.

Order reversed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1475 OF 1909.

July 24, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

NARAK LAL—DEFENDANT No 1—APPELLANT

versus

THAGOO LAL—PLAINTIFF AND OTHERS—REMAINING DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), *s.* 100—*Second Appeal—Failure to realise true question in controversy—Defect in procedure—Civil Procedure Code (Act XIV of* 1882), *s.* 283—*Title suit after defeat of claim—Burden of proof—Release, not conveyance, but admission.*

Where a lower Appellate Court failed to appreciate the true question in controversy between the parties but considered the case from an erroneous point of view, in consequence of which the appeal to that Court was not properly tried, it was held that the appeal should be re-heard.

In a suit under section 283 of the Civil Procedure Code, 1882, the burden of proof is upon the unsuccessful intervenor in the claim case.

A release does not operate as a conveyance; it is at the most an admission by the party executing the release that he has no interest in the property.

Appeal from the decree of the District Judge of Saran, dated May 11th, 1909, reversing that of the Munsif of Sewan, dated November 17th, 1908.

Babu *Akshoy Kumar Banerjee*, for the Appellant.

Babus *Jogosh Chandra Roy* and *Rajendra Chandra Guho*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the first defendant in an action commenced by the plaintiff-respondent under section 283 of the Code of Civil Procedure, 1882. It appears that in 1907 the first defendant in execution of a decree held by him against the second defendant sought to attach the property now in dispute. The plaintiff preferred a claim under section 278 of the Code of Civil Procedure of 1882 on the allegation that the second defendant had neither any title to, nor possession over, the disputed property and that the land was his private land and was not liable to be sold in execution of the decree held by the first defendant. The execution Court adjudicated upon the claim and disallowed it. On the 4th April 1908, the plaintiff commenced this action for declaration that the order of the 25th May 1907 was erroneous, that he was the proprietor of the land and that the first defendant had no right in execution of his decree against the second defendant to bring the property to sale. The suit was resisted at first by both the defendants but it appears that at a later stage of the proceedings, the debtor defendant did not appear.

The Court of first instance found that the plaintiff had failed to establish that the land was his private land and that consequently the suit must fail. On appeal the District Judge has held, upon the authority of the decisions of this Court in the cases of *Narsingh Narian Singh* v. *Dharam Thakur* (1) and *Baraik Kamal Sahai* v. *Lilhu Christian* (2), that the burden is upon the second defendant to establish the tenancy right alleged by him. The District Judge has in fact treated the case as if it was an action in ejectment by the landlord proprietor against the second defendant, and his judgment does not contain any reference to the position of the execution creditor, the first defendant, who was the person really sought to be affected by this litigation.

(1) 9 C. W. N. 144.

(2) 8 C. L. J. 170.

No doubt, in the latter portion of the judgment the District Judge has considered the evidence of the plaintiff, but it is manifest from the judgment taken as a whole that the District Judge has thrown the burden of proof upon the second defendant and has made a decree in favour of the plaintiff because that burden has not been satisfactorily discharged. On behalf of the first defendant this decision has been assailed on the ground that the District Judge has not appreciated the true question in controversy between the parties and that he has considered the case from an erroneous point of view. The learned Vakil for the plaintiff-respondent has strenuously contended that the case is concluded by the findings embodied in the judgment of the District Judge and he has placed reliance upon the facts which, he contends, have been found by the lower Appellate Court in his favour. In our opinion, there is no room for serious controversy that the appeal has not been properly tried by the District Judge, because he failed to realize the true question in controversy between the parties.

As we have already explained, the suit is one commenced by the plaintiff under section 283 of the Code of 1882. The grievance of the plaintiff is that the adverse decision in the claim case was erroneous and unjust. It is well settled that, in a suit of this description, the burden of proof is upon the unsuccessful intervenor in the claim case. It is sufficient in support of this proposition to refer to the cases of *Mohima Chandra Koondoo* v. *Noorooddin* (3), *Sri Narain Chuckerburty* v. *A. B. Miller* (4) and *Ram Nath* v. *Bindraban* (5). The same view is also supported by the observations of their Lordships of the Judicial Committee in the case of *Mitchell* v. *Mathura Das* (6). If the District Judge had realized the true nature of the suit he would have placed the burden of proof upon the plaintiff to establish the specific title alleged by him. On the other hand, the two cases mentioned by the District Judge have no application to suits of this description. Those cases merely show that when the admitted proprietor sues to eject a person on the ground that he is a trespasser and the latter sets up a tenancy, the burden is upon him to establish the tenancy alleged because, if the tenancy is not proved, the plaintiff is entitled to recover possession on the strength of his proprietary title, unless, indeed, that title has been barred by limitation. There is also no question that the District Judge has not appreciated the true bearing of the fundamental question in the case; for instance, he makes an adverse comment upon the case of the defendants because the second defendant had not produced any rent receipt in support of the tenancy alleged by the first defendant. Now, if the contest was between the plaintiff and the second defendant, this circumstance might have carried considerable weight; but when the contest is between the plaintiff and the first defendant who seeks to sell the property which, he alleges, belongs to the second defendant, the latter cannot very well be expected to assist his execution-creditor. Again, the District Judge relies upon the circumstance that, in the partition proceedings of 1894, the land is described as the private land of the proprietor; but he overlooks that the primary question to be decided in the case is whether, at the time of the attachment of the land by the first defendant, the second defendant had a tenancy right therein. Now, as this attachment proceeding took place in 1907, it is conceivable that although the land might have been in the possession of the proprietor as his private land in 1894, in the course of the thirteen years which subsequently elapsed the second defendant might have acquired a tenancy right in the disputed land. The District Judge also does not attach any weight to the entry in the record of rights. Here, again, he has clearly misconceived the law. The burden of proof lies upon the plaintiff, not merely in view of the fact that he was unsuccessful in the claim case but also in view of the circumstance that the entry in the record of rights tends to support the case of the defendant. The District Judge has also attached considerable weight to the release alleged to have been executed by the second defendant in favour of the plaintiff on the 11th April 1907. Apart from the circumstance that the release in question was executed on the date on which the first defendant applied for execution of

(3) 11 W. R. 422.
(4) 15 W. R. (o. c.) 7.
(5) 18 A. 369.
(6) 12 I. A. 150; 8 A. 6.

his decree against the second defendant, the position is unassailable that the release did not operate as a conveyance. It could at most be taken as an admission by the second defendant that he had no interest in disputed land. [*Jadunath* v. *Roop Lal* (7)]. Consequently, if it is found that the second defendant was a tenant in respect of this land the release is of no assistance to the plaintiff; and whether the admission by the second defendant is of any avail must necessarily depend upon the surrounding circumstances of the case. We have said enough to show that the District Judge has not truly appreciated the questions in controversy before him. The result, therefore, is that this appeal is allowed, the decree of the lower Appellate Court set aside and the case remanded to that Court in order that the appeal may be re-heard. The costs of this appeal will abide the result.

Appeal allowed and case remanded.

(7) 33 C. 967 at p. 984; 4 C. L. J. 22; 10 C. W. N. 650.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1072 OF 1909.

December 21, 1911.

Present:—Mr. Justice Stephen and Mr. Justice Coxe.

HARI NARAYAN CHATTERJEE—DEFENDANT No. 1—APPELLANT

versus

ISWAR CHANDRA CHATTERJEE—PLAINTIFF AND OTHERS—REMAINING DEFENDANTS—RESPONDENTS

Contract Act (IX of 1872), s. 70—Contribution suit—Rent-decree against co-sharer tenant—Decree satisfied by judgment-debtor—Suit by him against co-sharers—Liability of co-sharers.

A co-sharer tenant against whom the landlord gets a decree for rent of the whole holding and who pays in full the decretal amount, is entitled to get contribution from his co-sharers in respect of their shares, under section 70 of the Contract Act.

Appeal from the decree of the Sub-Judge of Bankura, dated February 27th, 1909, affirming that of the Munsif of Bishnupur, dated May 16th, 1908.

Babu *Khetra Mohan Sen*, for the Appellant.

Babu *Shibu Prosonna Bhattacharyya*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for contribution. The plaintiff and the defendants are the heirs of some recorded tenants. The landlord brought a suit against the plaintiff for rent of the whole holding of the recorded tenants and succeeded in obtaining a decree against him. The plaintiff paid the full decretal amount and he now seeks for contribution from his co-sharers. In the lower Appellate Court his claim has been held to be good under section 69 of the Contract Act.

It is now argued before us that this finding is wrong because the plaintiff was under a legal liability to pay the rent, and that, therefore, the case falls under the ruling laid down in the case of *Maharaja Manindra Chander Nandy Bahadur* v. *Jamuhar Kumari Bibi* (1). Without discussing the question how far this ruling has been followed in other cases in this Court or the further question of the liability of the co-sharer tenants in respect of rent of the holding, we are of opinion that this case certainly falls under section 70 of the Contract Act, a point which has not actually been decided by the lower Appellate Court. The plaintiff in this case, no doubt, lawfully paid the money in question. Without attemtping to define so general a term as the word "lawfully" we should like to refer to the judgment of the Chief Justice in the case of *Mohendra Ghoshal* v. *Bhuban Mardana* (2), where lawful payment is contrasted to officious payment. This being a payment of rent, for a part of which the plaintiff was certainly liable, and for the rest of which he might be liable, we cannot hold that the payment by him was officious, as it would have been if it had been made by a stranger to the suit for his benefit, or if it had been of a speculative nature such as is referred to in the case of *Ram Tuhul Singh* v. *Beseswar Lall Sahoo* (3). Further, in this case the plaintiff paid "for another," namely, the defendants, because he knew that the payment which he made was for their benefit, and there is no evidence of fraud or improper dealings on his part. He thus made the payment for the defendants under section 70, Contract Act. It needs no argu-

(1) 2 C. W. N. 670; 32 C. 643.

(2) 38 C. 1; 14 C. W. N. 945; 12 C. L. J. 566; 6 Ind. Cas. 810.

(3) 2 I. A. 131; 15 B. L. R. 208; 23 W. R. 305.

ment that the defendants have enjoyed the benefit of the payment because they have been relieved of the liability to pay the rent which the plaintiff had paid. It is to be observed in this connection that it is the case of the defendants that the plaintiff was bound to make the payment that he did, which is said to support the argument that section 69 does not apply. Without, therefore, considering whether section 69 does apply or not we hold that section 70 does apply and we accordingly uphold the decision of the lower Appellate Court and dismiss this appeal with costs.

Appeal dismissed.

[(1912) M. W. N. 59: 11 M. L. T. 63.]

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 943 OF 1910.

December 14, 1911.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

S. A. ANANTANARAYANA IYER AND OTHERS—DEFENDANTS—APPELLANTS

versus

SAVITTRI AMMAL—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), *s.*43—*Hindu Law—Partition* karar—*Agreement to give one brother Rs.* 5,000 *for daughter's marriage—Pro-notes executed in pursuance of such agreement—Consideration—Family settlement—Pro-note binding on minor members—Suit for partition in* 1904—*Suit on pro-note in* 1905—*Former suit no bar—Causes of action altogether different.*

A., *B.*, *C.* and *D.* were 4 brothers in an undivided Hindu family. In consequence of disputes that arose between them, they entered into a partition *karar* in 1901, whereby *B*, *C.* and *D.* agreed to pay *A.* Rs. 5,000 towards the expenses of the marriages of his daughters. Subsequently, in pursuance of the said *karar*, *B.* on behalf of himself and as guardian of the minor son of *C*, who died in the meanwhile, executed a pro-note in 1902 in favour of *A* for Rs. 3,333-5-4; and *D.* executed another pro-note in *A.*'s favour for the balance of Rs. 5,000. In 1904 *A.* sued his brothers for partition of the family properties and obtained a decree. Now, in 1905 *A.*'s widow sued *B.* and the minor son of *C.* for Rs. 3,333-5-4 on the pro-note executed by them. The defendants contended (1) that the suit pro-note had no consideration; (2) that at any rate it does not bind the minor son of *C.*, as it was not for his benefit; (3) that the claim is barred under section 43 of Act XIV of 1882, as it ought to have been included in the previous suit of 1904:

Held, (1) that the agreement to pay Rs. 5,000 was not an independent promise, but was one of the terms of the contract of partition, and *A*'s agreement to the other terms of the contract was sufficient consideration.

(2) that it would bind the minor son of *C* as being one of the terms of a *bona fide* compromise constituting a settlement between the members of the family;

(3) that the suit was not barred by section 43 of the old Civil Procedure Code, as the pro-note constituted a separate cause of action, different from the obligation existing under the *karar*.

Nannu Iyer v. *Raman*, 16 M. 335, referred to.

Sesha Iyer v. *Krishna Iyengar*, 24 M. 96, *Umed* v. *Pir Sahib*, 7 B. 134, *Sundara Singh* v. *Bholu*, 20 A. 322 *Moro Raghunath* v. *Balaji*, 13 B. 45, followed.

Appasamy v. *Ramasami*, 9 M. 279, *Shunmugam* v. *Syed Gulam*, 27 M. 116, distinguished.

Preonath v. *Bisnath*, 29 A. 256; A. W. N. (1907) 41; 4 A. L. J. 85, dissented from.

Second appeal against the decree of the District Court of Tanjore, in Appeal Suit No. 392 of 1909, presented against the decree of the Court of the Subordinate Judge of Tanjore in Original Suit No. 5 of 1905.

Mr. *T. Rangachariar*, for the Appellants.

Mr. *T. R. Venkatram Sastry*, for the Respondent.

JUDGMENT.—The suit out of which this second appeal arises was instituted on a pro-note executed in favour of the plaintiff's husband by the 1st defendant on behalf of himself and as guardian of the 2nd defendant, who is his natural son given away in adoption to a brother of his. There were four brothers in an undivided Hindu family, namely, the plaintiff's husband Aiyasami Aiyer, the 1st defendant, the 2nd defendant's adoptive father and one Subramania Aiyar. Disputes arose between them in connection with the partition of their family property. Aiyasami Aiyer, the plaintiff's husband, was burdened with 6 daughters only two of whom had been given away in marriage. Several daughters of some of the other brothers had been married at the expense of the family. Aiyasami Aiyer made a claim that he was entitled to have an allotment towards the expenses of the marriages of his other daughters. The other brothers in settlement of this claim agreed to pay him Rs. 5,000. This agreement is one of the stipulations contained in the partition *karar*, Exhibit C, dated the 5th September 1901. According to Exhibit C they were bound to make the payment within 3 months by which time apparently the parties intended the partition would be completed. Lists of properties to be allotted to each of the co-parceners were drawn up on the 11th January 1902. As payment of the Rs. 5,000 promised has not been made to the plaintiff, two pro-notes

were executed for the amount, one of them Exhibit A for Rs 3,333 5-4 and the other by Subramaniya Iyer for the balance on 10th January 1902. The lower Courts have held the plaintiff entitled to decree for the amount due on the pro-note Exhibit A. The defendants object to the decree on three grounds (1) that there was no consideration in law for the promise to pay Rs. 5,000, (2) that the promise was not of such a character as would be binding on the minor 2nd defendant when made by his guardian the 1st defendant, and (3) that the suit is barred by section 43 of the Civil Procedure Code.

The first contention may be disposed of in a few words. The appellant's argument is that the agreement to pay Rs. 5,000 was not one of the terms of the agreement between the parties for the division of the family properties but an independent promise, that there was no obligation under the Hindu law on Aiyasamy's brother to contribute towards the expenses of his daughters' marriage and that there was, therefore, no legal consideration to support the promise.

We are entirely unable to accede to this argument. Page 13 of Exhibit C. says: "As it has been settled that for the expenses of marriages, etc., that have to be celebrated for the daughters of Aiyasami Aiyer, one of us, the other 3 co-parceners shall pay Rs. 5,000 in a term of 3 months from now; the said sum of Rs. 5,000 shall be accordingly paid off in cash in the aforesaid term." The natural construction of the clause is that the parties agreed under the instrument Exhibit C to pay the sum. But assuming that it had been previously settled that Rs. 5,000 should be paid to Aiyasami Aiyer that fact would certainly make no difference, for the effect of the clause is to make the previous agreement about the payment of Rs. 5,000 part of the agreement of partition which the parties were at perfect liberty to do. Mr. Rangachari attempted to perform the impossible feat of separating the promise contained in clause 13 from the other terms of Exhibit C and he would regard the statement in page 13 as a mere recital of an independent promise even if the promise was made at the same time as the other terms in Exhibit C were agreed to. He contends that the plaintiff himself so treated the matter in the plaint, but we can find nothing in the plaint to support the argument. He also relies on a sentence in Exhibit B, a letter written by the 1st defendant and Subramania Iyer on the same day as they executed the pro-notes, in which they say, "Even though other matters relating to partition among us may not be settled we shall pay off the said amount without raising any objection." But this does not show that the promise was a transaction independent of the agreement of partition. The object of the letter was merely to prevent the executants of the pro-notes, in case litigation should ensue with regard to the enforcement of the agreement of partition, from resisting the payment of the amount of the pro- notes until the other terms of the partition agreement were also fulfilled by the various parties thereto. In other words, the object was to prevent them from raising the plea that no term of Exhibit C could be enforced prior to the fulfilment of the other terms. This does not show that the promise was not to be enforced as one of the terms of Exhibit C. It is not contended that the defence of absence of consideration could be set up if the promise be regarded as one of the terms of Exhibit C. It is not contended that the defence of absence of consideration could be set up if the promise be regarded as one of the terms of the contract of partition as Aiyasami Iyer's agreement to the other terms of the contract would then be sufficient consideration.

With regard to the second contention that the 1st defendant had no right to bind the minor 2nd defendant by such a promise, the argument is that according to Hindu Law there is no obligation on the part of co-parceners to provide at a partition for the marriages of the daughters of one of them out of the general family funds and that it was, therefore, beyond the powers of the 1st defendant as a guardian to bind his ward for a purpose which created no legal obligation on the ward. But it is clear that Aiyasami Iyer made claim that he was legally entitled to a portion for his daughter's marriages. Three daughters of the 1st defendant had been married at the expenses of the family estate and the only daughter of Subramania Iyer had been married and provided out of the family funds. There is no reason for supposing that Aiyasami Iyer did not believe that he had ground for

making the claim or that the 1st defendant did not believe that there were some grounds for the claim. Nor can we assume that the claim was altogether unfounded according to Hindu Law, although the plaintiffs in the Court of first instance seems to have conceded that the claim would not be enforced by a Court of Law. Further, it appears from paragraph 12 of the Subordinate Judge's judgment that there were other matters in dispute between Aiyasami Iyer and his brothers. All of them were settled by Exhibit C and it is impossible to separate the promise contained in paragraph 13 from the other terms of Exhibit C and to test its validity by a consideration merely of the abstract legal question which is raised to resist the promise. We must uphold it as one of the terms of a *bona fide* compromise constituting a settlement between the members of the family.

We now proceed to the consideration of the last question, whether the suit is barred by section 43 of Act XIV of 1882. The defendant's contention is that the plaintiff should have included the present claim in the Suit No. 31 of 1904 on the file of the Additional Subordinate Judge's Court of Tanjore instituted by the plaintiff's husband against the defendants and Subramania Iyer for division of the family properties. The learned Vakil for the appellants contends that the cause of action was the same in both suits namely the agreement of partition, Exhibit C, and that the suit is, therefore, barred by section 43. The argument is fallacious for several reasons. In the first place the present claim is one against the 1st and 2nd defendents only, while the right to division of the properties was against all the members of the family including Subramania Iyer. See *Nannu* v. *Raman* (1). Secondly, the parties agreed to execute separate pro-notes for the sum of Rs. 5,000, Exhibit A being executed by defendants Nos. 1 and 2 and another pro-note by Subramania Iyer for the remainder of the amount. The original agreement to pay Rs. 5,000 was thus split up into two contracts. In Exhibit B, the letter already referred to, the 1st defendant and Subramania Iyer say, "As we have not found it convenient to settle it now (that is, the payment of Rs. 5,000) according to the aforesaid arrangement (that is, to pay the amount within 3 months from the date of Exhibit C) we have on this day separately executed promissory-notes to you for the said amount and thereby the said matter has been settled." In other words, the obligation created by Exhibit C is regarded as discharged by the execution of different pro-notes. There can, therefore, be no doubt that the promise contained in paragraph 13 to Exhibit C became separated from the other obligation contained in that instrument and was split up into two different obligations by two pro-notes. Each pro-note, therefore, furnishes a separate cause of action different from the obligation existing under Exhibit C. Thirdly, even apart from the effect of Exhiblt B, we have no doubt that although the original obligation may be single and entire, if the parties agree to execute a separate document for a part of the obligation that document will constitute a distinct cause of action.

In *Sesha Ayyar* v. *Krishna Iyengar* (2) a sum of Rs. 10,500 was found due by a debtor, and for this amount two mortgage bonds were executed by him, one for Rs. 10,000 and the other for Rs. 500, on the same date. It was contended that a suit instituted on the bond for Rs. 10,000 was barred by a previous suit on the one for Rs. 500. Sheppard and Davies, JJ., held that it was not. The learned Judges say: "It may be true that the term 'cause of action' is used in that section in a peculiar way, but we do not think that when parties for whatever reason choose to agree that there should be two instruments and two obligations, the Courts are justified in saying that there is only one obligation." The same view was held in *Umed Dholchand* v. *Pir Saheb Jiva Miya* (3). There, for the amount due on a previous bond, two different bonds were executed by the debtor. Sargent, C. J., and Melville, J., held that the bonds furnish different causes of action for purposes of section 43. Their Lordships say: "There can be no doubt that the two bonds and the default in payment of them constitute, in any view of the expression 'cause of action', two distinct causes of action and there is nothing, we think, in the language

(1) 16 M. 335.

(2) 24 M. 96.

(3) 7 B. 134.

of the section (which would appear to have been mainly designed to discourage multiplicity of suits) which would justify the Court in going behind the bonds to consider the circumstances out of which they sprung, albeit those circumstances might themselves at the time have constituted a cause of action." See also *Sundar Singh* v. *Bholu* (4) and *Moro Raghunath* v. *Balaji Trimbak* (5).

It is immaterial, as pointed out by the Bombay High Court, for the decision of an objection under section 43 to consider whether a suit could have been instituted on the original indebtedness apart from the pro-notes. It is often the case no doubt where a pro-note is executed for a previously existing debt, that an action may be maintained on the debt, apart from the pro-note. And it is sometimes necessary to do so, as when the pro-note is unenforceable for defect of stamp or otherwise. But this does not show that the pro-note itself is not a cause of action. There are two causes of action in a case on either of which a suit may as such be maintained. The presumption would, ordinarily, be that the cause of action for debt is merged in the pro-note. But there would be no effective legal merger where the pro-note cannot be sued on. If several pro-notes are executed for portions of the same debt, each pro-note creates a cause of action, and this would be so, even if it be assumed that a suit might be instituted for the whole debt on the original cause of action. If the creditor neglecting one of the pro notes institute a suit for the amount secured by it on the original cause of action, there is no doubt he would not be entitled to maintain another suit for the remaining amount on the original debt. In such a case he could claim no more than the amount secured by the particular pro-note. That pro-note is not a cause of action on which he could claim the value of the debt. Section 43 compels a person only to include the whole of the claim arising from the same cause of action. It does not require him to include what he could claim on a cause of action distinct from that which he sues on. Mr. Rangachari has referred to three cases in support of his contention: *Appasami* v. *Ramasami* (6), *Shanmugam Pillai* v. *Syad Ghulam Ghose* (7), and *Preonath Mukerjee* v. *Bishnath Prasad* (8). In the first of these, *Appasami* v. *Ramasami* (6), upon a settlement of accounts a sum of money was found due to a creditor, which the debtor agreed to pay. He gave the creditor an order on his agent to pay a portion of the amount from the profit of certain lands and promised to pay the balance within a month. The agent having failed to make payment, two different suits were instituted on the same day against the debtor for the amount which he had directed the agent to pay and for the balance respectively. It was contended that both suits were barred by sections 42 and 43. Brandt and Parker, J J., held that the giving of the order on the agent was not similar to the execution of a pro-note so as to give the creditor a separate cause of action for the amount of the order, and that the cause of action for the whole amount remained the same. They distinguish *Umed Dholchand* v. *Pir Saheb Jiva Miya* (3) and hold that one of the suits must be held to be barred. That case is clearly not analogous to the present one where a distinct source of obligation was created by the execution of the pro-note. In the second case, *Shanmugam Pillai* v. *Syed Ghulam Ghose*(7), an *inamdar* obtained separate *muchilikas* from the occupying *ryot* of his land for two different years. He first instituted a suit for rent for the later year and subsequently instituted another for the rent of the earlier year. Benson and Bashyam Ayangar, J J., held that the second suit was barred. The judgment was based on the ground that the *muchilikas* did not furnish the cause of action for rent. They apparently regarded a *muchilika* as merely evidence of the terms of tenancy between the landholder and the *ryot*. They observe: " Though there were separate *muchilikas* for *faslis* 1306 and 1305 yet there was but one cause of action, namely non-payment of rent by a tenant to his landlord. Though the rents became payable under different documents and at different times, they are only different claims under the same cause of action or tenancy. The case is very similar to the case where several articles are sold in succession by *A*. to *B*. If the vendor sues for

(4) 20 A. 322.
(5) 13 B. 45.
(6) 9 M. 279.
(7) 27 M. 116.
(8) 29 A. 256; A. W. N. (1907) 41; 4 A. L. J. 85.

the price, he must sue for the price of all the goods sold up to the date of his suit, and cannot sue separately first for one and then for another." In *Preonath Mukerji* v. *Bishnath Prosod* (8), the third case, *A*, "a doctor, agreed with *B*. to accompany *B*. to Hardwar as his medical attendant on a fee of Rs. 100 a day. After seven days *B*. gave *A* a promissory-note for Rs. 700 representing seven day's fees. *B*. who was a Vakil also promised to assist *A*. professionally in certain litigation. *B*., however, died before he could fulfil his agreement to render professional services. *A*. sued *B*.'s son upon the promissory-note first and subsequently in a separate suit for the balance of his fees for attendance at Hardwar under the alleged agreement and for fees for later attendance at Benares." It was held that the second suit was barred by the provisions of section 43 of the Civil Procedure Code so far as the fees for attendance at Hardwar were concerned, though not in respect of the other fees claimed. The learned Judges, Stanley, C. J., and Burkitt, J., say that the cause of action for medical fees was the same in both cases and that it was in reality the breach of the agreement to pay a fee of Rs. 100 per day for attendance on the deceased. They observe: "It is true that Raghunath Prasad executed a promissory-note to secure the payment of Rs. 700 on account of fees for seven days, but the fact that this security was given does not take the case out of section 43 because of the proviso to that section which is in the following terms: 'For the purposes of this section an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action.' The contention, therefore, that the cause of action on the promissory-note is one cause of action and the cause of action for the recovery of the balance of Rs. 600 forms another cause of action, is not well founded." With all deference, we are unable to agree with the learned Judges that a pro-note executed for payment of a debt is ordinarily to be regarded merely as a collateral security for the debt. The deposit of title-deeds or mortgage as security is only an accessory right to secure the rendering of the main right, namely, the debt. But a promissory note is *prima facie* to be regarded as the record intended by the parties of the obligation to pay the debt. The decision is not in accordance with the case already referred to above, including the judgment of the Allahabad High Court, in *Sundar Singh* v. *Bholu* (4), which is not referred to in the judgment.

For the reasons mentioned above, we hold that the present suit is not barred by section 43 of the Civil Procedure Code.

We dismiss the second appeal with costs.

Appeal dismissed.

(s. c. 14 O. C. 287.)

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL No. 16 OF 1911.

July 20, 1911.

Present:—Mr. Evans, J. C., and Mr. Lindsay, A. J. C.

Raja RUDRA PRATAB SAHI—PLAINTIFF

versus

GAJADHAR SINGH AND OTHERS—DEFENDANTS.

Suit for arrears of rent—Joinder of claims in respect of several holdings—Oudh Rnet Act (XXII of 1886), s. 108, cl. (2).

Under the Oudh Rent Act a single suit by a landlord for arrears of rent due from a tenant in respect of several holdings in one and the same village is competent.

Where the holdings are not all held under the same tenure the Court may, if necessary, specify in its judgment the arrears due with respect to each holding.

Jaganath Prasad v. *Tori*, 29 A.18; 3 A. L. J. 610; A W. N. (1906 253, distinguished.

Appeal against the order of the District Judge, Rae Bareli, dated 23rd December 1910, upholding that of the Deputy Collector, Sultanpur, dated 19th September 1910.

Babu *Ishri Prasad*, for the Appellant.

Mr. *G. H. Thomas*, for the Respondents.

JUDGMENT.—The appellant instituted a suit for arrears of rent against the respondents and the suit has been dismissed because the claim referred to three different holdings. The learned Judge held that there was an obvious inconvenience in the trial of the joint suit with respect to three holdings of a different character as the tenant might be ejected from all the holdings merely because he had failed to pay the rent due for one only. He referred to the case of *Jagannath*

Prasad v. *Tori* (1), where it was held for similar reasons that a single suit for arrears of rent in respect of separate holdings cannot be brought under the Agra Tenancy Act of 1901.

We cannot find any provision in the Oudh Rent Act which prohibits one suit for all arrears due from a tenant in one village to the landlord and no question relating to ejectment for non-payment of arrears need be discussed at present. But, if necessary, the Court trying the suit can specify in the judgment the arrears due with respect to each separate holding, as it is possible that the holdings may not all be held under the same tenure.

We accept the appeal and, setting aside the decision of the lower Court, remand the case, through the lower Appellate Court, to the Court of first instance for trial on the merits. Costs to abide the result.

Case remanded.

(1) 29 A. 18; 3 A. L. J. 610; A. W. N. (1906) 253.

[s. c. (1912) 1 M. W. N. 65; 11 M. L. T. 84.]

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1027 OF 1910.

December 14, 1911.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

VENKATESA IYENGAR—PLAINTIFF—APPELLANT

versus

KOMALAMMAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Practice — Holiday — Delivery of judgment — Not illegal.

The delivery of a judgment on a holiday in not illegal.

A Judge is not prohibited from doing any particular kind of work during holidays. But if any party is injuriously affected by a Court doing any judicial work on a day when the Court is closed he will be entitled to a redress for the grievance.

Sri Nilmoney Singh v. *Bhowani Churn*, 1 Marsh. 327, *Bennet* v. *Potter*, 2 C. and J. 622, 1 L. J. Ex. 258, *Gobind Kumar* v. *Huro Gopal*, 11 W. R. 537; 3 B. L. R. Ap. 72, *Ununto Ramchetterjee* v. *Protab Chunder*, 16 W. R. 231, *Bisram Mahton* v. *Sahibunnissa*, 3 A. 333 *Ram Das Chakarbati* v. *Official Liquidator*, 9 A. 366, referred to.

Sheoram Tiwari v. *Thakur Prasad*, 30 A. 136, 3 M. L. T. 211, 5 A. L. J. 106; A. W. N. (1908) 43, referred to.

Semble:—The English rule with regard to Sundays being a *dies non* does not apply in India.

Paramshook Das v. *Rood Dowlah Bahadur*, 7 M. H. C. R. 285, referred to.

Second appeal against the decree of the District Court of South Arcot, in Appeal Suit No. 132 of 1909, presented against the decree of the Court of the District Munsif of Panrutti, in Original Suit No. 221 of 1908.

Mr. *G. S. Ramachandrier*, for the Appellant.

Mr. *V. C. Seshachariar*, for the Respondents.

JUDGMENT.—In this case we intimated our opinion at the hearing that the conclusion arrived at by the lower Appellate Court regarding the plaintiff's title was binding on us, the question being purely one of fact. But the validity of that Court's judgment was also attacked on the ground that the District Judge acted without jurisdiction in delivering his judgment on the 29th December 1909 when the Court was closed for the Christmas holidays.

We are of opinion that the delivery of judgment on a holiday (we are taking it that the 29th December 1909 had been notified as a general holiday) is not illegal. It is not contended that there is any express provision of law prohibiting the performance of any judicial work on a holiday or laying down that a judgment delivered on a holiday shall be void. Section 30 of the Madras Courts Act, III of 1873, enacts: "The High Court may permit the Civil Courts under its control to adjourn from time to time for periods not exceeding in the aggregate two months in each year." The section merely gives permission to adjourn. There is no prohibition of the doing of all work of a judicial character during the time when the Court is adjourned. Under whatever authority the Court may have been adjourned during the Christmas holidays, the appellant has not shown that the Judge was prohibited from doing any particular kind of work during the period. If any party is injuriously affected by a Court doing any judicial work on a day when the Court is closed, he will, no doubt, be entitled to redress for the grievance. But it is not contended in this case that the appellant has been prejudiced by the delivery of judgment on the 29th December. Reliance has been placed on Order XX, rule 1 of the Civil Procedure Code, which provides that "the Court shall pronounce judgment *in open Court* either at once, or on some future day of which due

notice shall be given to the parties or their pleaders." The expression *in open Court* refers to the place and manner of the pronouncement of judgment. The provision with regard to the time of pronouncement is merely that it shall be at once or on some future day of which notice shall be given. Holidays are not excepted provided notice be given. With regard to the place where the judgment is to be pronounced it has been held that the pronouncing of the judgment out of Court is only an irregularity and will not be a good ground of appeal. See *Sri Nilmony Singh Deo* v. *Bhowani Churn Panda* (1). In other words, the section is only directory in its nature and does not absolutely prohibit as illegal the pronouncement of judgment otherwise than in accordance with its provisions. Our attention has not been drawn to any authority in favour of the appellant's contention. In Black on 'Judgments,' Vol. 1, section 182, the learned author says: "In regard to other (than Sundays) legal holidays, the general rule is that unless the statutes recognizing or creating them expressly prohibit the exercise of judicial functions upon them the Courts may validly render judgments and transact their other usual business. And even if they are declared non judicial holidays this will not hinder the performance of ministerial acts. Thus the statute in Georgia, declaring the fourth of July a holiday does not inhibit the Courts from sitting on that day, or make a judgment rendered on that day void, except when the day falls on Sunday. So it is held that a judgment rendered by a Justice of the Peace on Thanksgiving-day is not void." The same learned author in his article on 'Judgments' in the American Cyclopædea of Law and Procedure, Volume 23, page 675, observes "unless authorized by statute or by the consent or agreement of the parties, a valid judgment cannot be rendered in vacation, this being a judicial act which can be performed only when ths Court is in Session:" This passage is not inconsistent with the statement of the author in his book on 'Judgment', for here he is referring to cases where under statute the Court is bound to perform its judicial acts during term time and he points out in a foot-note that 'under a statute authorising the Courts to take cases *under advisement* after trial or hearing at the term, it is held that the judgment may be rendered in vacation.' In Wells on 'Jurisdiction,' page 126, the reason of the American rule that a judgment rendered during vacation is void is pointed out. It is the result of express statutes that the jurisdiction of the Court should be exercised during term time. There is no English authority in support of the appellant's position. In England, no doubt, Sunday is a *dies non* under the common law and all judicial work on the day is prohibited by statute. See Broom's Commentaries, page 15. The Sunday Observances Act of 1676 also provided that no writ, process, warrant, order, judgment *or decree* shall be served or executed or caused to be served or executed upon the Lord's day. The English rule with regard to Sundays, it has been held, has no application to India. See *Paranshook Das* v. *Rood Dowlah Bahadur* (2). In *Bennett* v. *Potter* (3), Lord Lyndhurst held that there was no objection to the doing of judicial work on other holidays. In that case the time for pleading expired on a holiday at six o'clock in the evening of which day the plaintiff opened the office and signed judgment for want of a plea. At 8 o'clock the plea was delivered. Application was made to set aside the judgment for irrgularity, contending that the plaintiff had no right to open the office for the purpose of signing judgment. But the learned Lord observed: "The office may be opened at any time; it is closed on a holiday for the benefit of the officers and that they may attend if they think fit so to do." In *Gobind Koomar Chowdhry* v. *Huro Gopal Nag* (4) and *Ununtoramchatterjee* v. *Protab Chunder Shiromonee* (5) it was held that the registration of a plaint on a Sunday or other holiday was not illegal. In *Bisram Mahton* v. *Sahib-un nissa* (6) it was held that a sale of property in execution on a close holiday was not illegal.

In *Ram Das Chakarbati* v. *The Official*

(1) 1 Marsh 327.

(2) 7 M. H. C. R. 285.
(3) 2 C. and J. 622; 1 L. J. Ex. 258.
(4) 11 W. R. 537; 3 B. L. R. Ap. 72.
(5) 16 W. R. 231.
(6) 3 A. 333.

Liquidator, Cotton Ginning Company, Limited, Cawnpore, (7) the question was considered at length by Sir John Edge, C. J., and Oldfield, J. There objection was raised to proceedings in the winding-up of a company and settling the list of contributories being held during the long vacation, but it was overruled. The learned Judges say with reference to section 17 of the Bengal Civil Courts Act: "This section, it appears to us, was framed in the interests of the Judges and the officials of the Courts and probably also in that of the Hindu and Muhammadan pleaders, suitors and witnesses, whose religious observances might interfere with their attendance in Court on particular days..... The cases which have been decided upon the construction of section 6 of the 29 Ch. II. Cap. 7, commonly known as the Lord's Day Act, do not, in our opinion, afford any assistance to us in the present case; but the difference between the wording of that section and the section in question in this case is striking. That section provides that no person or persons upon the Lord's Day shall serve or execute or cause to be served or executed any writ, process, warrant, order, judgment or decree (except in cases of treason, felony or breach of the peace);and by that section it is specifically enacted that the service of any such writ, process, warrant, order, judgment or decree shall be void to all intents and purposes whatsoever. In the section under consideration there are no such specific words as those above quoted. If it had been intended by the Legislature that a Judge should have no jurisdiction or power to enter upon a judicial proceeding or inquiry on a close holiday and that if the Judge on a close holiday holds a judicial inquiry the proceedings should be void, it would have been easy for the Legislature to have expressed such intention by the use of apt words such as we find in section 6 of the Lord's Day Act." "By the Rules of Hillary Term 6, William IV, it was ordered that certain days shall be observed or kept as holidays in the several offices belonging to the said Court." With reference to the days mentioned in the Rules we find it stated in Note (1) at page 50 of "Peterdorff's" *Abridgment of Common and Statute Law*, Volume V, Second Edition, "These are not *dies non* but periods of vacation for the Courts and offices. The proceedings are not suspended." And, again, in the same note, "* * * They are closed on a holiday for the benefit of the officers, and if they think fit to attend they may, and if open, judgment may be signed * * * * we are of opinion that on such a close holiday as that in question, a Judge might properly decline to proceed with any inquiry, trial, or other matter on the civil side of his Court; and any party to any judicial proceeding, if present, could successfully object to such inquiry being proceeded with and, in the event of any such inquiry having been proceeded with in his absence and without his consent, would be entitled to have the proceedings set aside as irregular, probably in any event, and certainly if his interests had been prejudiced by such irregularity."

It will be observed that in the case of an inquiry a party would almost necessarily be prejudiced if it goes on in his absence, but not so in the case of delivery of a judgment. The learned Judges of the Allahabad Court go on to point out that at best the conduct of judicial proceedings on a holiday can amount only to an irregularity. Reference has been made at the Bar to another case, *Sheoram Tiwari* v. *Thakur Prasad* (8), where it was held that the decision of a case, on a Sunday, would at best be only an irregularity and the Court was inclined to agree with the decision in *Pramshook Das* v. *Rood Dowlah Buhadur* (2) that the Lord's Day Act is not applicable to India at all. Section 15 of Act XII of 1887, the Bengal, N. W. P. and Assam Civil Courts Act, expressly provides that a judicial act done on a close holiday is not invalid by reason only of its having been done on that day. This is only a legislative recognition of what must be held to be the law on general principles.

We are of opinion that the appellant's objection must be overruled.

We dismiss this second appeal with costs.

Appeal dismissed.

(7) 9 A. 366

(8) 30 A. 136; 8 M. L. T. 211; 5 A. L. J. 106; A. W. N. (1908) 43.

BHAGANNAH *v.* CHANDI SINGH.

(s. c 14 O. C. 295.)

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 350 OF 1910.

August 2, 1911.

Present:—Mr. Lindsay, A. J. C., and Mr. Rafique, A. J. C.

Musammat BHAGANNAH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

CHANDI SINGH AND OTHERS—DEFENDANTS—RESPONDENTS

Hindu Law—Joint Hindu family—Mortgage by a co-parcener of his undivided interest—Mortgagee's equitable rights—Bona fide *transferee without notice —Transfer of Property Act (IV of* 1882*)*, *s.* 43.

C. an undivided co-parcener subject to the *Mitakshara* Law made a mortgage of his undivided interest in favour of the plaintiffs-appellants. Subsequently there was a partition and the separated share of *C.* passed by mortgage and sale to the defendants-respondents who where found to have taken the transfers without notice of the prior mortgage in favour of the plaintiffs-appellants.

Held, that the plaintiffs-appellants are not entitled to have it declared that the separate share of *C.* in the hands of the defendants-transferees is subject to a charge in their (appellants') favour.

Although an undivided co-parcener subject to the *Mitakshara* Law cannot make a valid alienation of his undivided interest, yet the Courts acting upon the principle that a person should not be allowed to profit by his wrong have given relief in equity to the alienee by giving him a charge for his money upon the separated interest of the co-parcener from whom he took his transfer. But such equitable right cannot be enforced against persons who have taken *bona fide* for value and without notice.

Mahabir Prasad v. *Ramyad Singh* 12 B. L. R. 90; 20 W. R. 192; *Jamuna Prashad* v. *Ganga Prashad Singh*, 19 C. 401, *Bunwar Lal* v. *Daya Shankar* 13 C. W. N. 815; 1 Ind. Cas. 670; *Mohunt Ram Sunder Das* v. *Barhamdeo Narain* 14 C. W. N. 552; 2 Ind. Cas. 986; *Balgobind* v. *Narain Lal*, 15 A. 339; 20 I. A. 116 and *Madho Prasad* v. *Mehrban Singh* 18 C. 157 at p. 161; 17 I. A. 194, referred to.

Appeal against the decree of the Additional Judge, Hardoi, dated 29th April 1910, modifying that of the Munsif, South Unao, dated 25th January 1910.

Mr. *Mumtaz Husain*, for the Appellants.

Mr. *A. P. Sen*, for the Respondents.

JUDGMENT.—The facts of the case under appeal are set out in Mr. Chamier's remand order dated 22nd March, 1911.

The issues remanded for trial were:—

(1) Had defendant No 2 notice of the mortgage of 1887 when he took the mortgage made in his favour by defendants Nos. 1, 3 and 4?

(2) Had defendants Nos. 5 and 6 notice of the mortgage of 1887 when they purchased part of the property?

The Court below has found that in both instances the transferees took without notice of the mortgage of 1887 executed by the first defendant Chandi Singh and this finding has not been and cannot be contested in second appeal.

The question then which we have to decide is whether in these circumstances the mortgagees in a suit to enforce their rights under a mortgage executed by Chandi Singh, a member of a co-parcenary body, are entitled to have it declared that although the mortgage executed in their favour was invalid under Hindu Law, they are nevertheless entitled to a charge for the mortgage-money on the separate share of Chandi-Singh in the hands of these transferees. In support of the contention that they are so entitled, the learned Counsel for the appellants, as noted in Mr. Chamier's order, relies upon the cases reported in *Mahabir Parshad* v. *Ramyad Singh* (1) and *Jamuna Parshad* v. *Ganga Prashad Singh* (2). He has also referred to two other cases, namely, *Bunwari Lal* v. *Daya Shankar* (3) and *Mohunt Ram Sundar Das* v. *Barhamdeo Narain* (4). The principle laid down in all these cases may be stated shortly to be this, that although an undivided co-parcener subject to the *Mitakshara* Law cannot make a valid alienation of his undivided interest it does not follow that a Court of equity would be bound unconditionally to declare a mortgage or a sale of an undivided co-parcener's interest invalid so as to allow the co-parcener (mortgagor or vendor) to profit by his own wrong. And acting upon this principle the Courts have given relief in equity to the alienee by giving him a charge for his money upon the separated interest of the co-parcener from whom he took his transfer. But, obviously, the claim of such an alienee to this equitable relief may be affected by the intervention of circumstances (such as have arisen in the present case) which render it impossible to grant such relief without prejudice to the interests of the innocent third parties. Since the date of the mortgage in the plaintiffs-appellants' favour it is proved that the

(1) 12 B. L. R. 90; 20 W. R. 192.
(2) 19 C. 401.
(3) 13 C. W. N. 815; 1 Ind. Cas. 670.
(4) 14 C. W N. 552; 2 Ind. Cas. 986.

separate share of their mortgagor Chandi Singh has passed by mortgage and sale to third parties who took without notice of this mortgage: so that, whatever the rights of the mortgagees might have been, had Chandi Singh's interest remained undisposed of, they are at the present time on quite a different footing. In cases like these the right of the alienee to relief is merely an equitable right and no such right can be enforced against persons who have taken *bona fide* for value and without notice. And it was for this reason we take it that their Lordships of the Privy Council in the case of *Balgabind Das* v. *Narain Lal* (5) refused equitable relief to the mortgagee as against a person who had in good faith and without notice of the mortgage purchased at a sale in execution of decree a portion of the mortgagor's share.

In his argument on behalf of the appellants Mr. Mumtaz Husain has relied strongly upon a passage contained in the judgment *Madho Parshad* v. *Mehrban Singh* (6) in which it is said:—

"An agreement by the members of an undivided family to hold the joint property individually in definite shares or the attachment of a member's undivided share in execution of a decree at the instance of his creditor will be regarded as sufficient to support the alienation of a member's interest in the estate or a sale under the execution." He argues that in accordance with this dictum as soon as partition was effected after the date of the mortgage by Chandi Singh, between the members of the family to which Chandi Singh belongs, a charge on Chandi Singh's separate share was *ipso facto* created in favour of the mortgagee and that transferees who took from Chandi Singh subsequent to the date of the partition must be deemed to have taken subject to the mortgagee's lien. We cannot, however, regard this statement of their Lordships as authority for the proposition which is advanced for the appellants. If the true doctrine is as it appears to be that no co-parcener in an undivided family governed by the *Mitakshara* law can make a valid mortgage of his undivided share in the joint family estate without the consent of his co-sharers it seems to be impossible to hold that a charge upon the mortgagor's separate interest after partition can arise out of what was from its inception an invalid transaction. The principle laid down in section 43 of the Transfer of Property Act cannot be applied to the case of a mortgage executed by a person who is disqualified to mortgage [*cf. Radha Bai* v. *Kamod Singh* (7)] and even if it could it is clear from the language of that section that the transferee's option to enforce the transfer with respect to any interest which the transferor may acquire in the property while the contract to transfer subsists cannot impair the right of transferees in good faith for consideration who have no notice of the option.

For the above reasons, we are of opinion that the appellants in this case are not entitled to relief by having it declared that the separate share of their mortgagor Chandi Singh in the hands of the defendants transferees is subject to a charge in their (appellants') favour. The appeal fails and is dismissed with costs.

Appeal dismissed.

(5) 15 A. 339; 20 I. A. 116,

(6) 18 C. 157 at p. 161 (P.C.); 17 I.A. 194.

(7) 30 A. 38; A. W. N (1907) 276; 4 A. L. J. 696.

[S. C. (1912) 1 M. W. N. 68.]

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1283 OF 1910.

November 30, 1911.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

MALLA VEERANNA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MALLA CHELAMAYYA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Adverse possession—Ineffective possession—Assertion of title to the knowledge of the owner.

Where the possession of defendant is of an ineffective nature, supposing its character could be improved by an assertion of title, it is necessary for the party so in possession to prove that the owner had knowledge of such assertion.

An "openly avowed claim" means a claim which may be said to have come to the knowledge of the true owner.

Second appeal against the decree of the District Court of Ganjam, in Appeal Suit No. 53 of 1908, presented against that of the Court of the District Munsif of Sompeta, in Original Suit No. 669 of 1907.

Mr. *V. Ramdoss*, for the Appellants.

JESA RAM *v.* THAKAR DAS.

Mr. *V. Ramesam*, for the Respondents.

JUDGMENT.—The finding is that the title to the property belongs to the plaintiff. The lower Appellate Court has also found that the defendant had not effective possession of the plot for more than 12 years before the suit. He at first had only what may be called fugitive possession by tying his cattle at the place.

Now, so long as the defendant had not taken effective possession, the legal possession of the land remained in the plaintiff, who was the owner.

It is contended that effective possession must be taken to have commenced at least on the date of Exhibit V, that is, in 1894, more than 12 years prior to the suit. Exhibit V is relied on as an admission of the defendant's title to the property by a stranger. But if the defendant's possession was not effective in its character, it is not easy to see how an admission of his title by a stranger would make it effective possession. Reliance is placed on a passage in Mitra on Limitation, 4th Edition, page 146, where it is stated "in the absence of an *openly avowed* claim of right to the land, the acts and circumstances attending the appropriation or user must be such as *imply or denote* such a claim." If the possession is of an ineffective character such as by tying cattle, assuming that its character could be improved by an assertion of title made to the owner's knowledge, we are clearly of opinion that it is necessary for the defendant to show that the owner had knowledge of such assertion, or that it was made under circumstances which would imply that he must have had knowledge. The case is not similar to one where the possession has been effective and adverse, in which case it is true that knowledge of such possession on the part of the owner is not necessary to give the defendant a title after the expiration of the period of prescription. We do not think the learned author intended to lay down anything different from our statement of the law. He speaks of "an openly avowed claim" apparently meaning thereby a claim which may be taken to have come to the knowledge of the owner.

We dismiss the second appeal with costs.

Appeal dismissed.

(S. C. 197 P. W. R. 1911.)

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 2765 OF 1907.

July 10, 1908.

Present:—Mr. Justice Kensington.

Choudri JESA RAM AND OTHERS—PLAINTIFFS—PETITIONERS

versus

THAKAR DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 102—Case and application to restore it dismissed in default in early part of the day—Sufficient cause.

When a case is called on and the parties do not appear the Court should wait a reasonable time before dismissing it. A suit or a petition should not be dismissed owing to the absence of the parties in the early part of the day.

Where a suit or a petition has been dismissed owing to the temporary absence of the plaintiff or his pleader and such absence is satisfactorily explained the suit or petition should be restored.

Petition for revision, under section 70 (*a*) of Act XVIII of 1884 as amended by Act XXV of 1899, of the order of the Additional Divisional Judge, Multan Division, dated the 12th March 1907, affirming that of the Munsiff, 1st Class, Multan, dated 5th December 1906, rejecting the plaintiff's application for review of his order dated 15th July 1905.

Mr. *Harris*, for the Petitioners.

Mr. *Meeran Bux*, for the Respondents.

JUDGMENT.—The orders which really require consideration in this case are those of 23rd June 1905, by which the suit was dismissed under section 102, Civil Procedure Code, and of 15th July 1905, dismissing an application to restore.

Both these orders are hasty and unreasonable. The time of day at which that of the 23rd June was passed is not noted, but it is clear enough that the Court did not wait at all as it should have done, and the fact that a petition for restoration was prepared the very same day indicates that the plaintiff was only temporarily absent.

The order of 15th July was passed at 11 A.M. and here again the temporary absence of plaintiffs' Counsel was satisfactorily explained.

Of all the subsequent proceedings in the lower Courts I can only say that it is not creditable to them that they should allow the very simple question involved to be obscured by all sorts of legal technicalities, with the result that the parties have been put to the trouble and expense of many hearings, all of which could have been avoided if the merits

of plaintiffs' application had been fairly considered.

It is enough to say that plaintiffs' explanations of the failure to appear when the case was called on on the 23rd June and 15th July should have been accepted.

I allow the revision, set aside both those orders and direct that the case shall proceed on the original plaint conditionally on plaintiffs' paying Rs. 50 as costs to the defendants on account of all proceedings from the 23rd June 1905 onward in all Courts including this Court. This sum will be paid into the Munsiff's Court by the 31st July 1908. Failing compliance with order, the suit shall stand dismissed.

Revision allowed.

[s. c. (1912) 1 M. W. N. 72.]

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1003 OF 1910.

November 24, 1911.

Present—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

MADDANIAH—DEFENDANT—APPELLANT

versus.

BHIMAPPA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Sale of goods—Suit against buyer—Strangers in possession—Decree only against buyer—Attachment.

Where the right of the plaintiff to recover the price of goods sold is against his vendee alone, third persons found in possession of such goods cannot be made liable for the price in a suit against them all. After a decree against the vendee, such goods may be attached although in the possession of others.

Second appeal against the decree of the Court of the Subordinate Judge of Bellary in Appeal Suit No. 82 of 1901, presented against that of the Court of the District Munsif of Bellary, in Original Suit No. 545 of 1906.

Mr. *V. Visvanatha Sastri*, for the Appellant.

Mr. *S. Ranganada Iyer*, for the Respondents.

JUDGMENT.—The plaintiff sold certain goods to the 3rd defendant. The 3rd defendant did not pay the price of the goods. Part of the goods subsequently passed into the possession of the 1st and 2nd defendants respectively. In a case of cheating instituted by the plaintiff against defendants Nos. 1 to 3 the goods were taken possession of by the Police and sold, and the price of the goods in the possession of the 2nd defendant was subsequently paid over to him after the termination of the case. The plaintiff instituted the present suit to recover the value of all the goods against all the defendants Nos. 1 to 3. He did not challenge the validity of the sale to the 3rd defendant, and the suit has proceeded on the footing that the property in the goods passed to him.

Both the lower Courts have passed a decree against the 2nd defendant, the appellant before us, for the value of the goods which had passed into his possession and were sold while he was holding them. The plaintiff alleged in his plaint that the 1st and 2nd defendants had made themselves sureties for the payment of the price of the goods by the 3rd defendant. But both the lower Courts have held that the contract of suretyship has not been proved but a decree has been passed against the 2nd defendant on the ground that he was in possession of property belonging to the 3rd defendant, who is bound to pay the price of the goods to the plaintiff. It is impossible to sustain this judgment. The plaintiff's right to the price was only against the 3rd defendant. No relief can be given against other persons simply on the ground that property belonging to the 3rd defendant was in their possession. No doubt, after obtaining a decree against the 3rd defendant the plaintiff would be entitled to attach any property belonging to him in the hands of others. The Subordinate Judge is entirely wrong in holding that any relief could be given against third persons for the price of goods sold to the 3rd defendant.

The Lower Courts did not give the plaintiff a decree against the 3rd defendant for the value of the goods which had passed to the possession of the 2nd defendant. The plaintiff did not ask the lower Appellate Court to make the 3rd defendant a party to the appeal in order that a decree might be passed against him for the whole of the price of the goods sold to him. We are asked to give the respondent time to make the 3rd defendant a party to the second appeal. We might have acceded to this request, if he had been made a party to the appeal in the lower Appellate Court, but as that was not done we are unable to grant this request.

We must set aside the decree as against the 2nd defendant and dismiss the suit as against him with costs throughout.

Decree set aside.

CALCUTTA HIGH COURT.
CIVIL RULE No. 4504 OF 1911.
December 5, 1911.
Present:—Mr. Justice Caspersz and Mr. Justice D. Chatterjee.
KRISHNA DAS ROY—PETITIONER
versus
LAND ACQUISITION COLLECTOR OF PABNA—OPPOSITE PARTY.

Land Acquisition Act (I of 1894), ss. 3, 10, 49—Collector of Land Acquisition, whether subject to High Court's extraordinary jurisdiction—Owner—Under-tenant—Reference, application for, when to be made.

A Land Acquisition Deputy Collector is subject to the extraordinary jurisdiction of the High Court; and where the Deputy Collector commits an error in not making a reference under section 49 of the Land Acquisition Act, the High Court has jurisdiction to set it right.

Administrator General of Bengal v. *The Land Acquisition Deputy Collector*, 12 C. W. N. 241; followed.

An under-tenant is interested in the acquisition of the land and is an "owner" for the purposes of section 49, and, therefore, competent to apply under that section for a reference to the Civil Court.

It is open to him to make a substantive application for a reference at some time before the award is actually made.

Rule against the order of the Land Acquisition Collector of Pabna, dated September 22nd, 1910.

Babus *Surendra Chandra Sen* and *Troilokya Nath Ghose*, for the Petitioner.

Babu *Ram Charan Mitra*, Senior Government Pleader, for the Opposite Party.

JUDGMENT.—This Rule arises out of certain proceedings under the Land Acquisition Act.

The petitioner alleged that he is the owner of a salt godown, for the efficient working of which the land in front is required, and that the Deputy Collector has acquired that frontal land without making a reference, as prayed, to the Civil Court under section 49 of the Land Acquisition Act I of 1894.

We are invited in this Rule to set aside the order of the Deputy Collector dated the 22nd September 1910 and his proceedings up to, and including, an order of the 24th May 1911 wherein he refused to make a reference under section 18 of the Act on the ground that the case had been completed and the award confirmed.

It appears that the 19th September 1910 was the date fixed by the Deputy Collector for claims to be put in. On that day, no claim was preferred nor was any petition for time filed. The order-sheet of the Deputy Collector is exceedingly brief and does not embody the details mentioned in his letter of explanation No. 1977 L. A., dated the 23rd August 1911, upon which the learned Senior Government Pleader showing cause relies. However that may be, orders were reserved on the 29th September 1910, and the award in this connection was not made until the 21st November 1910. The application of the petitioner praying for a reference under section 49 of the Act bears date the 21st September 1910, and, apparently, reached the Deputy Collector through the post. There are two orders on this petition, the first order is "File with the record," the second order which is over a date 22nd September 1910 which has been altered, or inked over, is to the following effect:—"I have seen the land and godown. The godown is now closed and no business is being done there now. The land which is now under acquisition is not in the front of the building and its acquisition will not interfere with the business if the petitioner intends to start business at any future date. The petition is, therefore, rejected. Besides, the time for filing such petition has expired." In this view of the matter, the Deputy Collector proceeded to complete the proceedings and possession was duly given of the land in question to the Eastern Bengal State Railway.

The first question that arises upon this Rule is whether the Land Acquisition Deputy Collector is subject to the extraordinary jurisdiction of this Court.

We have been referred to the cases of the *Administrator-General of Bengal* v. *The Land Acquisition Deputy Collector*, 24-*Pergannahs* (1) and *British Steam Navigation Co.* v. *Secretary of State for India* (2). In the present state of the law, we cannot do otherwise than follow the decision of Henderson and Mitra, JJ., in *Administrator-General of Bengal* v. *The Land Acquisition Deputy Collector*, 24 *Pergannahs* (1). It would, obviously, be unjust

(1) 12 C. W. N. 241.
(2) 8 Ind. 107; 12 C. L. J. 505; 15 C. W. N. 87; 38 C. 230.

that the Deputy Collector should refuse to obey the provisions of the Act, and to provide no remedy for the correction of his mistaken action; where the law gives a right to a party to a certain procedure, it must also be deemed to give a remedy for the rectification of any irregularities committed in that connection. Section 49 of the Act clearly leaves no option to the Collector. It says "he shall refer to the determination of such question (whether any land proposed to be taken under this Act does or does not form part of a house, manufactory or building) to the Civil Court." He appears to have recognised the applicability of section 49 by framing the second order of the 22nd September 1910 which we have already re-produced. We entertain no doubt, therefore, that we have jurisdiction to set right the error committed by the Deputy Collector in not making a reference under section 49.

The second question involved in this Rule is whether the petitioner is an owner of any house, manufactory or building, a part of which house, manufactory or building is being acquired.

The word "owner" is not defined in the Act, but an owner must be declared to be one of the persons interested in the land being acquired [see section 3 (6) of Act I of 1894]. Reading section 10 of the Act we think that the proprietor, sub-proprietor, mortgagee, tenant or sub-tenant are all owners for the purposes of section 49. The petitioner is an under-tenant of some kind. He is, therefore, admittedly, interested in the acquisition of the land, which for the purposes of section 49, until the Civil Court finds otherwise, may be presumed to be part of his salt godown.

The question for inquiry will be whether the piece of land in front of the godown forms the only means of approach to that godown or is reasonably necessary for the proper working of the salt business.

We, therefore, think that the petitioner was competent to apply under section 49 for a reference to the Civil Court.

The third contention of the learned senior Government Pleader is that the application for a reference was not filed in time. The first proviso to section 49, however, says that the owner may, at any time before the Collector has made his award, withdraw his application, and it would follow that it was equally open to the petitioner to make a substantive application for a reference at some time before the award was actually made, that is, before the 21st November 1910. As a matter of fact, he made his application two months earlier, that is, on the 21st September 1910, and the Deputy Collector dealt with it on its merits by recording his second order after a local inquiry.

It is unfortunate that the Deputy Collector overlooked the imperative language of the second proviso to section 49. We have no alternative but to set aside his proceedings from, and after, the 22nd September 1910, and to direct him to proceed in accordance with law under section 49 of the Land Acquisition Act: whether any reference will be necessary under section 13 is a matter contingent upon the decision of the Civil Court as to whether the land does or does not form part of the petitioner's salt godown.

The Rule is made absolute. There will be no costs in this matter.

Rule made absolute.

[S. C. (1912) 1 M. W. N. 87; 11 M. L. T. 87.]

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1351 OF 1910.

January 5, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

GOVINDA NAICKEN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

APATHSAHAYA IYER *alias* AIYAVAIYER—DEFENDANT—RESPONDENT.

Specific Relief Act (I of 1877), ss, 15, 17—Hindu family—Divided brother—Agreement to sell—Part-performance—Court's power—Execution of sale-deed.

In the case of a divided Hindu family specific performance of a part of a contract, affecting some of the properties, cannot be ordered by Courts, as section 17, Specific Relief Act, expressly prohibits it.

In cases falling under section 15, it is open to the Courts to grant a decree for part-performance, the term "may" indicating their discretion.

Ponaka Subbarani Reddi v. *Seshachalam Chetti*, 33 M. 359, 7. M. L. T. 137; 20 M. L. J. 328; 5 Ind. Cas. 79, *Srinivasa* v. *Sivaram*, 32 M. 320, 4 Ind. Cas. 506; *Rama Raju* v. *Ramalingam*, 26 M. 74, explained and distinguished.

A Court cannot compel the defendant to execute a deed of sale for the whole property and, on his failure to do so, issue one in his name under the seal of the Court, as it cannot sanction a transaction devoid of any legal effect.

GOVINDA NAICKEN *v.* APATHSAHAYA IYER.

Barrett v. *King*, 2 Sm. and Gifford, p. 43, distinguished.

A Court cannot ask a party to do an act the effect of which would be to compel a third party to bring a suit.

Second appeal against the decree of the District Court of Tanjore, in Appeal Suit No. 614 of 1909, presented against that of the Court of the District Munsif of Tiruvalur in Original Suit No. 174 of 1908.

Mr. *P. S. Sivaswami Iyer*, for the Appellants.

Mr. *T. R. Ramachandra Iyer*, for the Respondent.

JUDGMENT.—The suit was brought for specific performance of a contract to sell certain lands. Although the agreement to sell was executed by the defendant alone, it was stated in the document that the lands were being enjoyed in equal shares by the defendant and the defendant's divided elder brother, and that they had been purchased out of money belonging to them severally. The defendant agreed to have the proposed sale-deed executed by himself and by his brother on his own account and as guardian of his minor son.

The District Munsif found (1) that both parties knew full well at the time of execution of the agreement to sell (Exhibit A.) that one-half of the land belonged to Ramasamier and his son, and (2) that the agreement fell through owing to the default of both parties. Referring to illustration (*a*) to section 15 of the Specific Relief Act and to section 17, he decided that this was not a case in which specific performance of a part of the contract could be enforced, inasmuch as the defendant was not competent to transfer the half to which he did not possess a title, and as the plaintiff made no offer to purchase the defendant's own half paying the price agreed upon and waiving all right to compensation for deficiency or for loss. The District Judge did not agree with the District Munsif upon this point. He was unable to see that there was anything to debar the plaintiff from asking for a sale-deed for the whole land to be executed in his favour by the defendant as stipulated in Exhibit A, the plaintiff being allowed to take the document for what it was worth. The District Judge further remarked that he found no reason for declaring the agreement unenforceable on general grounds. He declined, however, to give the plaintiff a decree on account of his delay of three years in instituting the suit.

In a case of minors, when a suit was brought for specific performance of a contract of sale and the contract was found to be not binding on the minors, this Court, in *Ponaka Subbarani Reddy* v. *Vadlamudi Seshachalam Chetty* (1), observed:—If the contract is indivisible under section 17 of the Act, what then is the relief to which the plaintiff is entitled? We are asked by the appellant to give him a decree for the whole against the first and fourth defendants on the authority of *Srinivasa Reddi* v. *Sivarama Reddi* (2). This we are unable to do.

In that case the appellant expressed his willingness to take a conveyance from the first and fourth defendants of all their interests in the suit properties for the purchase-money agreed upon without abatement or compensation, and a decree for that relief was granted accordingly. This course is not open in the present case as the appellant does not ask for it.

The cases of *Kosuri Ramaraju* v. *Mury Ramalingam* (3) and *Srinivasa Reddi* v. *Sivarama Reddi* (2) were both cases in which a managing member of an undivided family contracted to sell undivided property without the concurrence of other members. Without determining whether the sale by the manager would bind the other members, it was considered that the plaintiff was entitled to a decree for specific performance. Section 15 of the Specific Relief Act was not applied for the reason given in the latter decision, *viz.*, that an undivided father has an interest in every portion of the undivided property. But when the family is divided as here, section 17 distinctly prohibits a Court from directing the specific performance of a part of a contract except in accordance with the preceding sections. Even in cases where the conditions of section 15 are fulfilled, the use of the word 'may' indicates that the granting of a decree for part-performance is discretionary with the Court, and we should hold that when there has been great delay in attempting to enforce a contract and circumstances have greatly changed either from a rise of prices or other causes in the interval, the Courts

(1) 33 M. 359; 7 M. L T. 137; 20 M. L. J. 328; 5 Ind. Cas. 79.

(2) 32 M. 320; 4 Ind. Cas. 506.

(3) 26 M. 74.

would be justified in refusing to give legal effect to an inequitable arrangement.

Now the plaintiff in the present case wants the Court to compel the defendant to execute a deed of sale for the whole property, and if he refuses to issue one in his name under the seal of the Court, and to allow him to make what he can out of the title thus conveyed. Such a request is quite inadmissible. A sale is a transfer of ownership in exchange for a price (section 54, Transfer of Property Act). The defendant has nothing which he is capable of transferring in the moiety of the property of which he is not the owner and is not in possession. It is impossible to sever the execution of the deed from the transfer to be effected thereby and to treat them as separate acts of the same person.

The Court will not lend its sanction to a transaction devoid of legal effect. See Dart's Vendors and Purchasers, pp, 1072-3; Fry on Specific Performance, paras. 1000, 1001, Bannerjee on Specific Relief, pp. 457 to 467. The case of *Barrett* v. *Ring* (4) referred to for the appellant is not in point as there the vendor was not without any title at all to the property agreed to be conveyed. Moreover, the execution of a sale-deed by the 1st defendant over property which does not belong to him would be an act improper in itself as it is calculated to throw a cloud over the title of his brother which would be sufficient to give him a cause of action for a declaratory suit. The Court will not compel him to do such an act.

The second appeal is, therefore, dismissed with costs.

Appeal dismissed.

(4) 2 Sm. Gifford p. 43.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 27 OF 1911.

June 2, 1911.

Present:—Mr. Evans, J. C.

BANKE BEHARI LAL—PLAINTIFF—APPELLANT

versus

AHLAD SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 74—Explanation—Interest—Penalty.

A mortgage-deed provided that if in any particular year interest was not paid on the date agreed, the mortgagor would pay double rates. Nothing wa paid for 22 years.

Held, (on mortgagee's suit) that the agreement to pay enhanced interest did not amount to a penalty within the meaning of section 74 of the Contract Act.

A stipulation for enhanced interest *may* be a stipulation by way of penalty. The facts of each case must be considered.

Pandit Jai Ram v. *Sheo Shankar Baksh*, 9 Ind. Cas. 406; *Saiyed Zahid Ali* v. *Rudra Singh*, First Civil Appeal No. 26 of 1909, and *Abbakke* v. *Kinhiamma* 29 M. 491, followed.

Appeal against the order of the Officiating Additional Judge, Hardoi, dated the 18th November 1910.

Pandit *Gokaran Nath Misra* and Mirza *Samiullah Beg*, for the Appellant.

Babu *Ishwari Prasad*, for the Respondents.

JUDGMENT.—The appellant instituted a suit upon a mortgage dated the 26th July 1888, for the recovery of Rs. 2,038-9-6. The defendants are the sons of the mortgagor and some subsequent mortgagees.

Two points are to be decided in this appeal. *First*, according to the terms of the mortgage-deed the mortgagor agreed to pay interest at 12 per cent. per annum half yearly and it was further provided that if the interest of any year was not punctually paid as agreed the interest charged would be double (*dochand*) for that year. The learned Additional Judge decided that this provision was a penalty and he only allowed interest at 12 per cent. per annum. The *second* point is that the learned Additional Judge did not allow Rs. 111 out of the consideration-money set forth in the mortgage-deed.

As to the first point, I have been referred on behalf of the appellant to two unreported decisions of this Court in *Pandit Jai Ram* v. *Sheo Shankar Bakhsh* (1) and *Saiyad Zahid Ali* v. *Rudra Singh* (2). In both these cases there were similar provisions in the mortgage-deeds and this Court held that the agreement to pay interest at double rates in case the interest was not paid punctually did not amount to a penalty. For the respondents I have been referred to several rulings in which such agreements have been held to be penalty, one of which *Brij Bhukhan Das* v. *Samiuddin Ahmad Khan* (3) is a typical case. In that case it was stipulated that interest should be paid at 1 per cent. per

(1) 9 Ind. Cas. 406.
(2) First Civil Appeal No. 26 of 1909.
(3) 25 A. 169.

mensem and in case of default the mortgagor agreed to pay interest at the rate of 2 per cent. per mensem from the date of the bond. It was held that under section 74 of the Contract Act, as amended by Act VI of 1899, the stipulation for enhanced interest as from the date of the execution of the bond was by way of penalty against which relief should be granted. In the case of *Abbakke* v. *Kenhiamma* (4) which is one of the cases cited on behalf of the respondents, the learned Judges remarked as below:—"The explanation of the section provides that a stipulation for increased interest from the date of default may be a stipulation by way of penalty. This explanation, as pointed out in *Sankaranarayana Vadhyar* v. *Sankaranarayana Ayyar* (5), appears to have been introduced to meet the decisions to the effect that when the higher rate of interest is payable as from the date of default and not as from the date of the contract, the contract rate is enforceable. The explanation, read by the light of the illustrations, shows that it is for the Court to decide on the facts of the particular case whether the stipulation is or is not a stipulation by way of penalty. We are of opinion that the stipulation in the present case is not a stipulation by way of penalty within the meaning of the section and that it is enforceable. There is nothing unconscionable or unreasonable about the agreement and the enhanced rate of interest which becomes payable on default is quite moderate."

I think that the learned Judges of the Madras High Court took a correct view of the law. The explanation to section 74 merely says that a stipulation for enhanced interest may be a stipulation by way of penalty. No general rule can be laid down. The facts of each case must be considered. In this particular case I do not think that the agreement to pay enhanced interest amounted to a penalty. The agreement merely provided that if in any particular year interest was not paid on the date agreed, the mortgagor would pay at double rates. No contract was broken. The mortgagor elected to pay at double rates and, therefore, did not pay punctually. I am satisfied that the appellant is entitled to recover at this rate, it being admitted that nothing has been paid since the mortgage-deed was executed,

As to the second point, the consideration for the deed is set forth as below:—

	Rs.
On account of a bond, dated the 17th July 1884	25
On account of a bond, dated the 31st January 1885 ...	85
Interest on the above ...	94
On account of a decree, dated the 25th July 1888 ...	116
Cash	6
Total ...	326

When the case was before the learned Additional Judge one of the pleas taken on behalf of the respondents was that there was no decree dated the 25th July 1888 in favour of the appellant. The appellant gave his evidence and admitted that there was a clerical error in the deed. He had instituted a suit against the mortgagor for the recovery of Rs. 115 14 6 and it was dismissed for default under section 98 of the old Code of Civil Procedure on the 26th July 1888, the date on which the mortgage-deed in suit was executed. As the parties agreed to enter Rs. 116 as part of the consideration account of this claim it was unnecessary to prosecute the case, therefore, It was dismissed for default. It is obvious that there was a clerical error in drafting the deed. Instead of Rs. 116 on account of the decree of the 25th July 1888 the correct entry should have been Rs. 116 on account of the claim disposed of on the 26th July 1888. The learned Pleader for the respondents contends that the evidence of the appellant was inadmissible under the provisions of section 92 of the Evidence Act, but I cannot accept his contention. Under the 6th proviso to that section any fact can be proved which shows in what manner the language of a document is related to existing facts. As there was no decree dated the 26th July 1888 the appellant was entitled to give evidence to explain how it arose. No one on behalf of the respondents has given evidence or attempted to show that the appellant's evidence was untrue in this respect. The learned Additional Judge was wrong in reducing the principal of the mortgage-deed by Rs. 111 (a mistake for

(4) 29 M. 491.
(5) 25 M. 343.

Rs. 116). In these circumstances, I must accept the appeal and grant a decree in favour of the appellant for the amount claimed. However, as the appellant has instituted the suit nearly 22 years after the date of the mortgage, I must decline to allow him any interest after the date of suit. The original sum borrowed was Rs. 326. It has now swollen to as much as Rs. 2,038-9-6.

I accept the appeal, and modifying the decree of the lower Court grant a decree in favour of the appellant for Rs. 2,038-9-6 with costs in both Courts. No interest is allowed after the date of suit. Six months are allowed for payment of the above sum from to-day and in case of default the mortgaged property will be sold.

Appeal accepted.

[S. C. (1912) 1 M. W. N. 89; 11 M. L. T. 103.]

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 534 OF 1910.

November 21, 1911.

Present:—Mr. Justice Sundara Aiyer and Mr. Justice Spencer.

PUGALIA VETTORAMMAL AND ANOTHER—1ST AND 3RD DEFENDANTS—APPELLANTS

versus

VETTOR GOUNDAN, MINOR, BY HIS NEXT FRIEND AND MOTHER POOCHAMMAL AND ANOTHER—PLAINTIFF AND 2ND DEFENDANT—RESPONDENTS.

Hindu Law—Gift to undivided brother's daughter—Valid against donor's son.

A daughter cannot claim as of right a share of the property belonging to her father.

The moral obligation to provide for her whenever possible is fully recognized by the Hindu community and will support in law any disposition for the purpose made by the father.

There is no distinction between a gift made to the daughter of the donor and one made by him as managing member to the daughter of any of his co-parceners.

A deed of gift executed by the plaintiff's father in favour of the first defendant, the daughter of the donor's deceased undivided brother, is valid and binding against the plaintiff, the donor's son, according to the Hindu law, provided it be of a reasonable amount.

It must be left to the Court in each case to decide whether the gift is reasonable in all the circumstances under which it is made.

Second appeal against the decree of the District Court of Madura, in Appeal Suit No. 676 of 1909, presented against that of the Court of the District Munsif of Manamadura, in Original Suit No. 65 of 1908.

Mr. *M. D. Devadoss*, for the Appellants.

Mr. *T. R. Ramachandra Iyer*, for the 1st Respondent.

JUDGMENT.—The question of law raised in this second appeal is whether a deed of gift executed by the plaintiff's father in favour of the 1st defendant, the daughter of the donor's deceased undivided brother, is valid and binding as against the plaintiff, the donor's son, according to the Hindu Law. The facts found are that after the death of the 1st defendant's father she and her mother the 2nd defendant were under the protection of the plaintiff's father, who by survivorship became possessed of the whole of the property which formerly belonged to him and the 1st defendant's father. He maintained the 1st defendant and gave her in marriage, and some years afterwards executed the disputed deed of gift, Exhibit I, in 1897. The plaintiff was and still is a minor. The total extent of the family property in the hands of the plaintiff's father and the value of the property comprised in Exhibit I are in dispute. The finding of the lower Courts is that the land given under Exhibit I is worth Rs. 400 and that the aggregate of the family property at the time of the gift was worth Rs. 2,400, so that the gift to the 1st defendant was of one-sixth of the property in the hands of the donor. We must accept that finding. The lower Courts held that Exhibit I was invalid as against the plaintiff, being of opinion that the gift not having been made at the time of the marriage of the 1st defendant, the plaintiff's father had no right to make it under the Hindu Law.

Two contentions have been urged before us at the hearing of this second appeal preferred by the 1st and 3rd defendants:—

(i) that the judgments of the lower Courts are not in accordance with the latest exposition of the law by this Court regarding gift made to a daughter of an undivided member of a family; and

(ii) that the proportion of the family property given to the 1st defendant is not excessive.

Mr. T. R. Ramachandra Aiyar, the learned Vakil for the 1st respondent, while admitting that the recent decisions of this Court have

PUGALIA VETTORAMMAL *v.* VETTOR GOUNDAN.

upheld gifts of family property made to girls born in a Hindu family, contends that there has been no instance where the Court has maintained a gift made by any one other than the father, mother and brother of the donee, and contends that such a gift, if made by an uncle, is invalid. He relies on the text of Yajnavalkya, sloka 113, referred to by Vijnaneshvara in dealing with the separate property of a woman, "What was given to a woman by the father, the mother, the husband or a brother..... is denominated a woman's property" and Vijnaneshvara's commentary on the sloka [see Chapter I, section 11, placitum 2 of Colebrooke's Translation of the *Mitakshara*]; he also contends that even if a gift to the donor's brother's daughter could be valid, the plaintiff's father had no right to give so large a proportion as one-sixth of the total property belonging to himself and his son. Mr. Devadoss, Counsel for the appellants, strongly relies on a note of Krishnaswami Aiyar, J., which that learned Judge had prepared as his judgment in Second Appeal No. 572 of 1909 before he ceased to be a Judge of this Court. The judgment, in that case, of Munro and Sankaran Nair, JJ., is reported in *Anivilla Sundararamayya* v. *Cherla Sitamma* (1), and Krishnaswami Aiyar, J.'s note is appended to the report of the judgment. Mr. Devadoss contends, that according to the opinion of that learned Judge, any gift by the manager in favour of a girl born in the family would be valid as against the donor's son provided it is made so as not to reduce the donor's family to want by giving away everything belonging to the family, and that the gift made in this case cannot be regarded as excessive. We do not think that the authority of Krishnaswami Aiyer, J.'s note will carry the appellants' case so far. As a matter of fact, the question what portion of the family property may be validly given away to a girl did not arise for decision in the case. It was not contended that the proportion was excessive in that case, and the only question was whether the father could make a gift at all of ancestral lands in favour of his daughter. Krishnaswami Aiyar, J.'s conclusion was merely that there is abundant textual authority for the view that gifts of property, moveable or immoveable and common to the father and the son, to the daughter are treated as obligatory and if they do not exceed a small portion, having regard to the provisions that the gift should not cause detriment to the family, such gifts would be valid and must be upheld. No doubt the learned Judge, referring to certain passages of the *Mitakshara*, does observe, "These passages, which have remained untranslated, are a strong indication that, so far as the son is concerned, it is only when a father makes a gift of everything belonging to the family that a son (being himself, according to the archaic law, the property of the father) has a right of interdiction." And again, "The general rule as to what is common not being capable of gift does not appear to me to prohibit a gift by the father as against the son when the gift is made without detriment to the family * * * * * * The statement in the *Mitakshara*, Chapter I, section 5, placita 9 and 10, that the son has the right of interdiction against the father's donation must be reconciled with the statement of the *Mitakshara* in the commentary on sloka 175 of Yajnavalkya already referred to in the light of the explanation suggested by the *Subodhini* that is probably intended to prevent dissipation of the property by the father." Mr. Devadoss, apart from relying on the authority of Krishnaswami Aiyer, J., contends the text of Yajnavalkya referred to by the learned Judge, sloka 175, is strong authority in favour of his client that a gift even of a considerable portion of a family property by a father is valid as against his son provided it does not seriously prejudice the son by depriving him of the means of comfortable living.

It must be admitted that some portions of the language used by the learned Judge support this argument. And his view does appear to be that sloka 175 of Yajnavalkya authorizes a father to dispose of ancestral property in favour of a daughter, provided he does so without detriment to the family. Mr. T. R. Ramachandra Aiyar strongly urges that the sloka does not support the view that a father can make any gift of ancestral immoveable property, but lays down the very contrary as, according to it, he can dispose of only his own separate or self-acquired property. As the appellants strongly rely on the text in support of their contention that the gift even of a large fraction of ancestral property must be

(1) 2 M. W. N. 422; 10 Ind. Cas. 56; 9 M. L. T. 469; 21 M. L. J. 695.

upheld, we have to consider whether that sloka really supports the appellants' contention, especially as there is no decided case of this Court, so far as we are aware, laying down any rule as to the proportion of family property that the father may make a gift of to female members of the family. After the best consideration we are able to give to the true meaning of the sloka, we have been constrained to conclude with all deference to Krishnaswami Aiyar, J., that it does not support the appellants' contention at all. As the sloka has not been translated in Colebrooke's *Mitakshara* it may be desirable to set out the necessary portion with a translation in English. (*Svam Kutumbavirodhena deyam*). *Svam* may be given without detriment to the family. Now what is the meaning of the expression '*svam*'. Vijnaneshvara says, it means *atmeeyam i e.*, one's own. The word *svam* according to *Amara* has two meanings, *dhanam* or property and (2) *atmeeyam* or one's own. Vijnaneshvara adopts for the context not the first meaning of 'property' but the second meaning of one's own. The word *atmeeyam* means *svakeeyam* or one's own. See *Sabdakalpadruma* of Radhakontdeb. His commentary on the sloka seems to make this perfectly clear because he says commenting on *Kutumbavirodhena* or without detriment to the family that by that expression Yajnavalkya points out one kind of what may not be given and he then sets out the other kind of what may not be given as denoted by the word *syam* namely, *Anavahitavachitakadhisadharnanikshepanam panchanamapyadeyatyam*, that is, what is deposited to be passed on to another, obtained as a present, a pledge, *sadharana* (that is common property) and a deposit, these five which are not *svam* should not be given. The author, therefore, clearly states that *sadharana* or common property should not be given. The word *sadharana* is stated in the *Sabdakalpadruma* to be synonymous with *samanya* and to mean according to *Amara anekasambandhi eka vastu* one property belonging to more than one, and the author of the work quotes a sloka from the *Dayabhaga* as an illustration. Vijnaneshvara in his commentary on the sloka proceeds to quote Narada, who says there are eight kinds of things which are not subjects of gift, *viz.*, the five enumerated by the author already, and son, wife and what has been promised to another. The author then points out that the reason why son, wife and what has been promised to another cannot be given, is not that they are not *svam*. A difference is thus made in the reasons for five kinds of property not being givable [namely, that they are not *svam*] and three other kinds also that are not givable, *sadharahna* or common property being one of the five kinds. The *Mitakshara* also says, quoting Yajnavalkya, that the whole property should not be given though it is *svam*, because it has been said, "One should beget sons and daughters, perform their *samskaras* and create a living for them." It also quotes, in commenting on the expression 'without detriment to the family, a text from *Manu* to the effect that 'aged father and mother and an infant son should be maintained even by doing hundred acts which ought not to be done.' It seems to be perfectly clear from the above that, according to Vijnaneshvara, what is common property should not be given, but only one's own, and that it is an additional restriction on the power of giving that it should be without detriment to the family, and that the author does not mean that common property may be given without detriment to the family. Colebrooke in his Translation of the text of Narada renders the expression '*sadharana*' as 'joint property.' See Colebrooke's Digest, 4th Edition, Vol. I, page 401. At page 402, it is stated that 'joint property' is explained in the *Ratnakara* and *Chintamani* as what belongs to more than one owner. And, again, at page 405, "Joint property is wealth belonging to more than one owner. Misra says, 'the gift is invalid because a man has not full dominion over joint property, a wife or a son and the want of dominion in the other instance is deduced from the same reasoning which proves it in the cases of joint property.' Misra says, in regard to a son or wife, that the gift is void for want of full dominion." See page 406. Apararka in his commentary on Yajnavalkya Smrithi also takes the same view of the meaning of the sloka, namely, that joint property cannot be given. He interprets *svam* as meaning *svakeeyam* which evidently means one's own. He quotes a text of Brihaspati that (*samanya*) which, as already pointed out, is the same as *sadharana* should not be given. And

Apararka explains *samanya* as meaning having several owners. He also says that property descended from grandfather, &c., should not be given while there are sons. Apararka also cites Narada's text already referred to. It may be noted that Apararka confines the injunction against giving away 'the whole during the existence of progeny' as preventing such giving only before partition of the inheritance, and says that "when the sons have divided the inheritance, a gift of the entire property is not forbidden." A text from Daksha is also cited in Colebrooke's Digest forbidding the gift of joint property, see page 406, Vol. 1. We must, for the reasons mentioned above, hold that sloka 175 of Yajnavalkya does not support the appellant's contention and cannot be relied on to throw any light on the question as to what proportion of the property may be given by a father to a girl of the family. We have, however, no doubt that a gift made by a father to his own daughter or the daughter of an undivided brother, provided it be of a reasonable amount, is valid as against his son and that the question is really covered by authority. We cannot accept Mr. T. R. Ramachandra Aiyar's argument that only a gift by the father, mother, or brother of the donee is valid. Property given by other relations is clearly recognized as *stridhanam* property though sloka 118 of Yajnavalkya expressly refers only to gifts made by the relations specified above:—"That which has been given to her by her kindred: as well as her fee or gratuity or anything bestowed after marriage." See *Mitakshara*, Chapter II, section 11, placitum 6. In a divided family the manager is in the position of parent and guardian to the daughters of all the deceased members. It is his duty to give them in marriage as much as it is to give his own daughters in marriage. Section 7 of Chapter I of the *Mitakshara*, providing for portions to sisters when a partition is made between brothers after the death of the father is only illustrative and does not exclude the rights, of the daughters of the deceased co-parceners. All girls born to any of the co-parceners stand on the same footing. The allotment of a share to the daughters in the family is regarded as obligatory by Vijnaneshvara. In Chapter I, section 7, placita 10 and 11, he says, "The allotment of such a share appears to be indispensably requisite since the refusal of it is pronounced to be sin." And he cites the text of Manui 'they, who refuse to give it, shall be degraded'—Manu, Chapter IX, section 118. The author repeats in placitum 11 that withholding of a portion is pronounced to be a sin. In the *Madhaviya*, pages 41 and 42, (Burnell's Translation), a text of Katyayana is cited authorizing the gift of immoveable property by a father to his daughters besides a gift of moveables up to the amount of 2,000 pannas a year. The commentator says, "But, this (that is, 2,000 pannas a year) is not a rule of limitation in the case of a payment made once for all on account of subsistence for several years; nor is there a prohibition regarding immoveable property (in that case)." See also *Vyavahara Mayukha*, page 93 (Mandlik's Translation). A text of Brihaspati is also cited by the author of the *Madhaviya* to the same effect:—"Let him give adequate wealth and a share of land also if he desires." See page 344, Part I, Hindu Law Books on Inheritance, Messrs. V. Kalyanarama Iyer & Co's Edition. Devala says—"To maidens should be given a nuptial portion of the father's estate"—Colebrooke's Digest, Volume I, page 185. Manu's well-known text may also be referred to—"To the unmarried daughters by the same mother let their brothers give portions out of their allotments respectively according to the class of their several mothers. Let each give one-fourth part of his own distinct share and those who refuse to give it shall be degraded."

It has been pointed out in *Ramasami Ayyar* v. *Vengidusami Ayyar* (2) and *Churaman Sahu* v. *Gopi Sahu* (3) that the interpretation accepted by the principal writers of the *Mitakshara* School of the text relating to portions to daughters rejects the view propounded by some authors that the text authorizes only the defraying of the marriage expenses of the daughters. Besides, as pointed out by Vijnaneshvara, "what has been given out of affection to daughters should not be taken back"—see commentator on verse 176. *Mitakshara*, Chapter I, section 1, verse 29, also lays down that while the sons and grandsons are minors, a person may make gifts for necessary and lawful

(2) 22 M. 113
(3) 37 C. 1; 13 C. W. N. 994; 10 C. L. J. 545; 1 Ind. Cas. 945.

purpose. The placitum has been explained by Krishnaswami Aiyar, J., in *Devalapallia Kameswara Sastry* v. *Viracharlu* (4), to justify gifts for lawful purposes ordained in accordance with *dharma*. See also Bhattachariya's Tagore Law Lectures, Joint Hindu Family, page 483.

It is also important to bear in mind, as pointed out in *Ramasami Ayyar* v. *Vengidusami Ayyar* (2), the usage obtaining in the community which by itself would be sufficient to justify such gifts. Nothing is more common than gifts of a small portion of the family property in favour of daughters, and they are generally acquiesced in by the members of the family, though of late there has been a disposition to question them in consequence of the decisions of the Courts. No doubt a daughter can no longer claim as of right a share of the property belonging to her father, but the moral obligation to provide for her wherever possible is fully recognized by the Hindu community and will support in law any disposition for the purpose made by the father.

Turning now to the decided cases on the subject, the Judicial Committee of the Privy Council held in *Bachoo* v. *Mankorebai* (5), that a gift by a father, possessing large property, of a sum of Rs 20,000 to his daughter was valid. Their Lordships confirmed the decision of the Bombay High Court in *Bachoo* v. *Mankorebai* (6), in which Jenkins, C. J., and Russell, J., reversing the judgment of Tyabji, J., upheld the gift. The learned Judges relied on placitum 27, section 1, Chapter I of the *Mitakshara* authorizing the father to dispose of moveables at his pleasure even where they are ancestral. They also referred to a text in the *Viramitrodaya*, Chapter VII, section 5, 'Gifts by the parents out of favour or affection should be guided by propriety, but not by caprice,' as well as a text in the Mayukha, Chapter IV, section 7, placita 11 to 13, referring to gifts through affection made by a father. The plaintiff in the suit who objected to the gift was not the son of the donor but the adopted son of his brother, but the learned Judges held that the texts were applicable to such a case. In *Ramasami Ayyar* v. *Vengidusami Ayyar* (2) the mother of a deceased infant proprietor succeeding to his property as heir made a gift of lands to her daughter at marriage. Subramania Ayyar and Moore, JJ., upheld the gift both on the authority of the text of the *Mitakshara* relating to the right of girls to marriage portions and on custom. In *Kudutamma* v. *Narasimha Charyulu* (7), Wallis and Miller, JJ., maintained a gift by a brother, the managing member of the family, though it was not made at the time of the marriage, following the judgment in *Ramasami Ayyar* v. *Vengidusami Ayyar* (2). Wallis, J., regards the power to give as residing in every managing member of the family with respect to a girl belonging to the family. Munro and Sankaran Nair, JJ., in the case already mentioned, *Anivillah Sundararamaya* v. *Cherla Seethammah* (1), supported a gift by the father made to the daughter long after the marriage; the learned Judges overruled the contention that the Hindu Law texts support only gifts to the daughter's husband as bridegroom and not to the daughter herself. They also pointed out that no distinction could be drawn in the present day between gifts of moveable and of immoveable property.

We are of opinion that no distinction can be drawn between a gift made to the daughter of the donor and one made by him as managing member to the daughter of any of his co-parceners. In *Churaman Sahu* v. *Gopi Sahu* (3) Mookerjee and Carnduff, JJ., maintained the validity of a gift by a Hindu widow to her daughter on the occasion of her *dwiragaman* ceremony, that is, the occasion of the second entrance of the bride into the house of her husband from that of her father after the celebration of the marriage. The texts of Manu, Devala and Yajnavalkya already referred to are cited by the learned Judges, and the prior decisions of this Court are approved and followed. In *Hanmantapa* v. *Jivabai*, (8) a gift of moveables by a father to his daughter-in-law was held binding as against his sons. The decision was partly based on the father's special right over moveable property but reliance is also

(4) (1910) 1 M. W. N. 649; 8 Ind. Cas. 195; 20 M. L. J. 855; 9 M. L. T. 26; 34 M. 422.

(5) 31 B. 373; 11 C. W. N. 769; 6 C. L. J. 1; 9 Bom. L. R. 646; 17 M. L. J. 343; 2 M. L. T. 295.

(6) 29 B. 51.

(7) 17 M. L. J. 528.

(8) 24 B. 547.

PUGALIA VETTORAMMAL v. VETTOR GOUNDAN.

placed on the text of the *Mitakshara* permitting gifts out of affection and pious and charitable gifts and on the decision in *Raghunath Prasad* v. *Gobind Prasad* (9), which upheld a provision made out of joint ancestral property by the father for a family idol.

We are, for the reasons mentioned above, of opinion that the plaintiff's father was competent to make a gift of ancestral property to the first defendant, his brother's daughter.

The question whether the gift should be set aside on the ground of its being excessive, presents a more practical difficulty. The text to Yajnavalkya in Chapter I, section 7, placitum 5, of the *Mitakshara* as interpreted by Vijnaneshvara defines the share of a daughter as one-fourth of what she would be entitled to if she were a son. The *Smrithi Chandrika* in Chapter IV cites a text of Katyayana which says, "For the unmarried daughters a quarter is allowed and three parts for the sons but where the property is small, the portion is considered to be equal." The author of the *Smrithi Chandrika* says (placitum 25), "The meaning of the fourth or last portion of the above text (para. 26) is that where the estate is small, the share of *each* sister is considered by Vishnu and others as being equal to that of a son." Reference has already been made to the observation of Vijnaneshvara in his commentary on slokas 175 and 176 of Yajnavalkya that it is the duty of a father to provide for his daughters as well as for his sons. The text of Yajnavalkya defining the share of the daughters is no longer legally in force though it would afford a guide in determining whether any particular gift which is impeached is reasonable or not. As observed in the *Viramitrodaya*, in the text cited in *Bachoo* v. *Mankorebai* (6), the gift should be guided by propriety not by caprice. It would be hardly right to lay down the hard and fast rule that nothing more than a fourth share of what the daughter would get if she were a son can be given in any case as apparently attempted to be done in *Damoodur Missar* v. *Senabutty Misrain* (10). The social condition existing at the time of the gift would be a proper matter to be taken into account; and where the property is very small and the expenses of marriage heavy in the community of the parties, it may not be improper to allot a share equal to that of the son for the expenses of marriage and for dowry together. At the same time, where the property is very large, worth, say, several *lakhs* of rupees, the Courts may not be prepared to uphold a gift of the share permissible according to the text of Yajnavalkya. The right of the daughter not being confined as pointed out in *Ramasami Ayyar* v. *Vengidusami Ayyar* (2), *Churaman Sahu* v. *Gopi Sahu* (3) to have the expenses of her marriage defrayed, it might be reasonable to allot something more than such expenses even where they are comparatively heavy. At the same time, it would not be fair to the sons that the father, after spending a large amount on the marriage of his daughter, should make a gift of any considerable property to her. It must also be borne in mind that it should be unfair to the daughter that she would be told that her claim has been absorbed by excessive expenditure on marriage contracted by the members of the family not for her benefit but to enable the co-parceners to maintain their social prestige. In *Churaman Sahu* v. *Gopi Sahu* (3), the Calcutta High Court upheld the gift of one-third of the family property on the occasion of the *dwirgaman* ceremony. The learned Judges observe that the question must be determined with regard to the circumstances of each particular disposition. They refer to a case reported in 2 Morley's Digest, 198, and cite the observation of Lord Gifford in that case that it was absolutely impossible to define the extent and limit of her power of disposing it, because it must depend upon the circumstances of the disposition whenever such disposition shall be made and must be consistent with the law regulating such dispositions. In *Anivillah, Sundaramaya* v. *Cherla Seethamma* (1) another principle is indicated. The learned Judges say, "Here, if the father had enforced a partition he would have admittedly got not less than one hundred acres and it is impossible to say that a gift of eight acres is unreasonable." We are unwilling to adopt this text based upon the father's right to dispose of what he gets for his own share on partition

(9) 8 A. 76.
(10) 8 C. 537.

for deciding the question what disposition he might make while remaining a member of an undivided family. We think it must be left to the Court in each case to decide whether the gift is reasonable in all the circumstances under which it is made. In this case, the donor at the time of the gift had only one son, and he was an infant. The share given to the 1st defendant was one-sixth of the whole. It was apparently considered by the donor that the property still left to the family would have time to increase before his son would have to support a family. He died undivided from his son, and apparently never wished to be divided from him. One-eighth share of the property would be a suitable portion for the 1st defendant under such circumstances according to Yajnavalkya's text. What was given was one-sixth, or one-twenty-fourth more, worth Rs. 100. We are not prepared to say that an excessive portion of the property was given.

The result is that we must reverse the decrees of the Courts below and dismiss the suit, but, in the circumstances, the parties will bear their own costs throughout.

Decree reversed.

(S. C. 16 C. W. N. 225.)

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 935 OF 1909.

November 29, 1911.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice N. Chatterjea.

SOMARUDDI MOLLAH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

THE PORT CANNING AND LAND—IMPROVEMENT CO., LTD.—DEFENDANTS—RESPONDENTS.

Lease—Construction—Absence of fraud or common mistake.

Where with due regard to the boundaries named in a lease, a certain plot is included in the lease, the lessee is entitled to the possession of the plot, in the absence of fraud or common mistake to vitiate the document.

Appeal from the decree of the District Judge of 24-Pergunnahs, dated March 31st, 1909, reversing that of the Sub-Judge of Alipur, dated July 27th, 1908.

Dr. *Rash Behary Ghosh*, Babus *Mohendra Nath Roy* and *Chandra Kanta Ghosh*, for the Appellants.

Mr. *S. P. Sinha*, Babus *Dwarka Nath Chakravarti* and *Debendra Nath Ghosh*, for the Respondents.

JUDGMENT.

JENKINS, C. J.—This second appeal arises out of a suit for *khas* possession. The plaintiffs rest their claim to possession on a *mourasi mokarari* lease of the 2nd October 1901. By that lease the defendant Company leased to Somaruddi Mollah "1601 one thousand six hundred and one standard *bighas* more or less of waste land in the Sunderbund Lot No. 130 belonging to the Company and known as Ram Chandra Khal. . . .," the said piece or parcel of land being designated Somaruddi's chak and bounded as follows:—"West by Simultala khal belonging to the Company." The other boundaries are given in the document, but we have no immediate concern with them.

By clause 12 of the lease it is provided, "that after the Bengali year 1307 the Company as well as the lessee shall have power to cause a survey of the land contained within the boundaries aforesaid, and if the quantity of land is found to be more than 1601 *bighas* the lessee shall be bound to pay for the excess land at the rate of 12 annas per *bigha* for ever, and if, on the other hand, the quantity of land be found to be less than 1601 *bighas*, the lessee shall have remission of rent for ever for the quantity found less at the rate mentioned above, namely, 12 annas per *bigha*."

The map in the case depicts the land admittedly included in the lease, and thereon marked A, as well as the land in dispute, marked B, which lies to the west of it.

The western boundary mentioned in the lease, the Simultala khal, is also shown on the map, and it will be seen that it lies immediately to the west not of A but of B.

If, therefore, regard be had to the boundaries named in the document, B is included in the lease, and this is what the Subordinate Judge decided. His decision has been reversed by the District Judge.

It has been conceded before us by Counsel for the defendant Company that as a pure matter of construction B would be included in the lease, having regard to the terms of the

lease and the character of the property, and no argument has accordingly been addressed us on this point. But it is urged that there are findings of fact by the lower Appellate Court which preclude us from giving effect to the document according to its natural construction.

Now this must mean that the document does not give expression to the common agreement of the parties or that it is otherwise vitiated. To the lower Appellate Court it seemed that the question was "whether the defendants intended to lease both A and B or only A to the plaintiffs."

But this cannot be accepted as correct.

Either it must be shown that the document should be rectified, or that it is inoperative as a title to the land in suit. But rectification requires common mistake, and a failure to give correct expression to the common intention of the parties: but no such case was made nor is there a finding of fact to that effect.

To render the lease otherwise inoperative as a basis of the plaintiff's title in the circumstances of this case fraud would have to be established, but no case of fraud has been raised or found. We, in second appeal, are not entitled to come to findings of fact and the case must, therefore, be determined on the construction of the lease. But, as I have already indicated, it is not disputed that as a pure matter of construction the Simultala khal as depicted on the map must be taken to be the western boundary and we hold this to be the true view. And if that be so, the plaintiff's title to the land in suit is made out.

We must, therefore, reverse the decree of the lower Appellate Court and restore that of the first Court with costs throughout.

N. CHATTERJEA, J.—I agree.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1139 OF 1909.

January 19, 1912.

Present:—Mr. Justice Johnstone and Mr. Justice Rattigan.

Bawa TEK CHAND—PLAINTIFF—APPELLANT

versus

Musammat GOPAL DEVI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Hindu Law—Adoption—Second adoption invalid—Simultaneous adoption of two persons invalid—Adopted son's position in the natural family—Widow—Alienation—Necessity—Sale of property to get money for child's marriage not likely to take place for years—Future maintenance—Consent of near reversioners—*Locus standi *of remoter reversioners to contest alienation—Estoppel—Evidence Act (I of 1872), s. 115—"Thing"—Mere opinion as to legal effect of adoption—Essentials of estoppel—Division of property by two adopted sons.*

Under Hindu Law, the adoption of a second son during the life-time of a previously adopted son is invalid.

If a person adopts two persons simultaneously both the adoptions are invalid.

A person whose adoption is legally invalid remains in the family of his natural father.

It is not open to a widow governed by Hindu Law to sell immoveable property inherited from her husband in order that she may retain a sum of money for the marriage of her child, which marriage is not likely to take place for many years to come. Nor can she alienate property to provide for her future maintenance.

Ganapa v. *Subhi*, 32 B. 577; 10 Bom. L. R. 927; *Nihal Singh* v. *Musammat Rajan*, 11 P. R. 1885, relied upon.

Where the nearest reversioners of a widow's husband, acting in good faith and with due regard to the interest of the family, give their consent to an alienation by the widow, a more distant reversioner has no *locus standi* to contest the alienation.

Musammat Fatteh Bibi v. *Allah Bakhsh*, 84 P. R. 1900; P. L. R. 1900 p. 536; *Labbu* v. *Musammat Nihali*, 7 P. R. 1905; 66 P. L. R. 1905; *Bhutta* v. *Khuda Bakhsh*, 97 P. R. 1906; *Devi Dial* v. *Uttam Devi*, 37 P. R. 1907; 120 P. L. R. 1907; *Dharam Das Pandey* v. *Musammat Shama Soondri*, 3 M. I. A. 229; 6 W. R. 43; *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*, 30 A. 1; 6 C. L. J. 766; 12 C. W. N. 74; 9 Bom. L. R. 1348, relied upon.

A mere view or opinion on the legal effect of an adoption is not a "thing" within the meaning of section 115 of the Evidence Act.

In order to give rise to an estoppel it is necessary that the representation should be the actual cause of a new belief in the mind of the other party and of his action following on that belief.

Estoppel does not arise where both parties have equal means of knowledge both of the facts and of the law.

A. first adopted *B.* and subsequently adopted *C.* After the death of *A.*, *B.* and *C.* divided his property equally as the result of a law suit between them:

Held, that *C.* or his representatives were not thereby estopped from subsequently denying the validity of the adoption of *C.* and that section 115 of the Evidence Act did not apply to the case.

Sarat Chandra Dey v. *Gopal Chunder Laha*, 19 I. A. 203; 20 C. 296; *Eranjoli Illath Vishnu* v. *Eranjoli Illath Krishnan*, 7 M. 3, explained and distinguished.

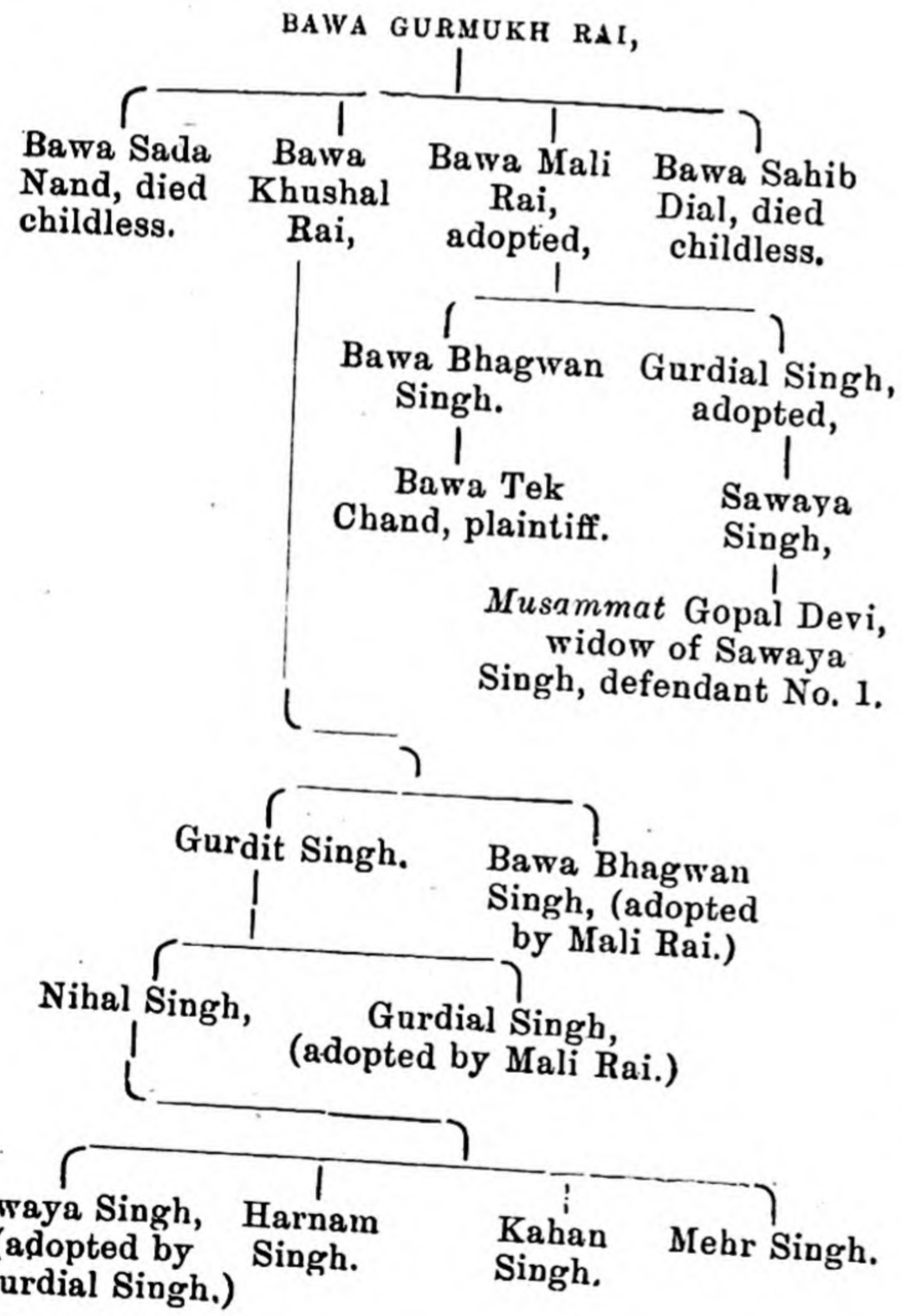
Carr v. *London and North Western Railway Company*, 10 C. P. 307; 44 L. J. C. P. 109; 31 L. T. 785; 23 W. R. 747, referred to.

Second appeal from the order of the Divisional Judge, Amritsar Division, dated the 28th July 1909, confirming that of the Sub-Judge, 1st class, Amritsar, dated the 6th January 1909, dismissing the claim.

Rai Bahadur Lala *Sukh Dial*, and Lala *Tirath Ram*, for the Appellant.

Lala *Dwarka Das*, for the Respondents.

JUDGMENT.—The pedigree-table which includes the plaintiff and defendant No. 1 is as follows:—



It will be seen from it that Bawa Gurmukh Rai had 4 sons, 2 of whom died childless, while we are concerned in this case with the descendants, adopted and natural, of the other 2 sons, whose names are Khushal Rai and Mali Rai. Mali Rai first adopted his nephew Bhagwan Singh, and then, Bhagwan Singh, being still alive, he adopted Bhagwan Singh's nephew, Gurdial Singh. Bhagwan Singh's son is the plaintiff Tek Chand. But Gurdial Singh, who apparently had no sons, adopted Sawaya Singh, his own nephew. After the death of Mali Rai, Bhagwan Singh and Gurdial Singh divided his property equally as the result of a law-suit between them in 1860. Sawaya Singh succeeded to the property of Gurdial Singh, and on Sawaya Singh's death, his widow Gopal Devi, defendant No. 1, took that estate, and, on 2nd November 1905, sold a house which formed part of it to defendants Nos. 3 to 10 for Rs. 2,500. Plaintiff sues for a declaration against this sale. He claims to do so as being the nearest reversioner. This allegation is denied by the defendants, who also plead that the sale was for necessary purposes, and that the plaintiff acquiesced in it. The first Court held that according to Hindu Law the simultaneous adoption of two sons was invalid.

As a matter of fact, the two adoptions by Mali Rai were not simultaneous, and the finding of the Court really was that the adoption of Gurdial Singh was invalid. But the Court went on to hold that, inasmuch as Bhagwan Singh and Gurdial Singh in 1860 recognized each the adoption of the other, the defendants, as representing Gurdial Singh, could not now be allowed to raise any objection to the validity of these adoptions. It then went on to hold that plaintiff was not shown to have acquiesced in, or to have ratified, the sale; and so far the findings are all in favour of the plaintiff. But when the Court came to consider the question of consideration and necessity, it took the other side. It held that the widow Gopal Devi had acted in a prudent and sensible manner and that the sale was for valuable consideration and legal necessity and so the plaintiff's suit was dismissed with costs.

The learned Divisional Judge, when the case came before him on appeal, agreed with the first Court virtually on all points and dismissed the appeal. He held that the second adoption, *i. e*, the adoption of Gurdial Singh, was void, but that the defendants were estopped from raising the plea, and then, after an exhaustive consideration of the financial aspect of the question, he came to the conclusion that, though a widow must not ordinarily anticipate her needs, yet in the present case the sale was made *bona fide*

and was an act of good management and was in fact for necessity.

The plaintiff now comes up to this Court on appeal. There can be no doubt (Mayne's Hindu Law, 7th Edition, page 137) that under Hindu Law the adoption of Gurdial Singh was invalid. We think we may take it that Bhagwan Singh's adoption was first in point of time and Gurdial Singh's adoption later. But even if the two were simultaneous, the result is much the same, for if the two were adopted simultaneously then both the adoptions were invalid and Bhagwan Singh and Gurdial Singh each remained in the eye of the law in his natural family. From this point, however, we part company with the Courts below.

It seems to us that the widow and her alienees have not succeeded in showing that the alienation was for "necessity" according to the most approved principles laid down in rulings of high authority. It seems that when her husband died she was possessed at least of Rs. 7,000 in cash, equity of redemption of certain jewels mortgaged for Rs. 1,286 and possibly some shops in addition to this house now in suit. Instead of paying off her husband's debt of Rs. 4,165 to the vendees and some Rs. 200 or Rs. 300 to coolies for work, what she did was to spend Rs. 1,286 in redeeming the ornaments aforesaid, to pay Rs. 1,665 only to the vendees in cash, and to sell them two-fifths of the house in dispute for Rs. 2,500, thus keeping some Rs. 3,000 odd in cash, out of which she seems to have spent some Rs. 300 on repairs of that portion of the house which remained unsold. The reason given for her keeping back this sum of Rs. 3,000 is said to be that she looked forward to the necessity for paying the marriage expenses of her own daughter and was also providing for her own future maintenance. But, in our opinion, this is just the kind of thing which the rulings aforesaid denounce. [Mayne, page 853, last sentence; *Ganapa Sanna* v. *Subbi Sanna* (1); *Nihal Singh* v. *Musammat Rajan* (2) (custom case)]. According to the principles laid down by the Courts she ought to have paid the debt of Rs. 4,165 in full out of the cash in hand; and she ought also to have paid off the coolies, as she did, and the Rs. 300 for house repairs, with the result that she would have found herself with some Rs. 2,190 in hand, the jewels aforesaid remaining still in pawn. It would then have been open to her to redeem those ornaments if she pleased, or to leave them in pledge. Her daughter is said by one witness to have been at that time two or three years old, and by another seven or eight. It is clear that her marriage was not an urgent pressing matter and, as a matter of fact, though this girl lived for two years afterwards, she was not even betrothed up to the time of her death. No further argument is required to show that it is not open to a widow governed by Hindu Law to sell immoveable property inherited from her husband in order that she may keep by her a sum of money for the marriage of her child, which marriage is not likely to take place for many years to come; and a similar remark applies to the need for future maintenance.

However, we need not pursue this matter any further; because we are inclined to think that plaintiff's suit and appeal must fail on the ground of want of *locus standi*. As already stated, there is no doubt whatever about the invalidity of the adoption of Gurdial Singh, who, therefore, remained in the family of Gurdit Singh. Looking at it in this way, Sawaya Singh's nearest reversioners are Harnam Singh, Kahan Singh and Mehr Singh; and of these three, the first two approved the sale and actually signed the deed in token of their approval. Now, although we have said that a widow according to Hindu Law is not entitled to anticipate future "necessity," yet we see no reason to suppose that Harnam Singh and Kahan Singh, in consenting to the sale, acted otherwise than in good faith and with due regard to the interests of the family. So far as we can tell from our examination of the facts, the widow's action was prudent and sensible, and the only way in which she was in error was that she misconceived the extent of her own powers. Harnam Singh and Kahan Singh, however, by giving their free consent, cured that defect; and in this way it seems to us that according to the authorities Tek Chand, the more distant reversioner, has no *locus standi* in this dispute.

In custom cases *Musammat Fateh Bibi* v. *Allah Bakhsh* (3); *Labhu* v. *Musammat Nihali* (4);

(1) 32 B. 577; 10 Bom. L. R. 927.
(2) 11 P. R. 1885.
(3) 84 P. R. 1900; P. L. R. 1900 p. 536.
(4) 7 P. R. 1905; 66 P. L. R. 1905.

Bhutta v. *Khuda Bakhsh* (5) and *Devi Dial* v. *Utam Devi* (6), among other rulings, make this principle clear, and, notwithstanding the conflict of opinion between the High Courts noticed in Chapter XX of Mayne's Book already cited, we think that a similar rule applied here. Thus in *Dhurm Das Pandey* v. *Musammat Shama Soondri Debiah* (7) their Lordships of the Privy Council ruled that the persons whose consent is required are those "likely to be interested in disputing the transaction" and here we have between the property and plaintiff, Harnam Singh and Kahan Singh, who are without denial said to have male issue. The chances of Tek Chand's succeeding to the property in suit by inheritance, supposing the adoption of Gurdial Singh is taken as no adoption at all, are very remote and are insufficient to support a suit under section 42, Specific Relief Act. We would also refer to *Bajrangi Singh* v. *Manokarnika Bakhash Singh*, (8) in which their Lordships laid down that *bona fide* consent by the first set of reversioners bound all the remoter reversioners under *Mitakshara* Law.

The Courts below, as already stated, have held defendants-vendees estopped from pleading that Gurdial Sidgh's adoption by Mali Rai was invalid, but we are unable to agree that the natural recognition in 1860 by Bhagwan Singh and Gurdial Singh of each other's adoption does in law operate as an estoppel. As this is a point of some difficulty, we must deal with it in some detail.

Bhagwan Singh was first adopted by Mali Rai and Gurdial Singh was adopted later. There seems no reason to doubt the *factum* of adoption in either case, though, as a matter of law, the later adoption was invalid. Gurdial Singh, after the death of Mali Rai, sued Bhagwan Singh for half of the property of Mali Rai, thus alleging in effect two things (*a*) that Mali Rai had gone through the ceremony of adopting him; (*b*) that such an adoption was valid in law. Bhagwan Singh was unable to deny (*a*) and indeed it is not denied now. He admitted Gurdial Singh's claim and the two took Mali Rai's property half and half. The vendees in the present case and their vendor *Mussammat* Gopal Devi are, it may be conceded, "representatives" of Gurdial Singh within the meaning of section 115, Indian Evidence Act, and, therefore, if Gurdial Singh would have been estopped from denying that he was the son of Mali Rai, we think the said vendees and vendor would also be estopped, but, upon the wording of the aforesaid section and on the authorities we have had the advantage of consulting, we are unable to hold that even Gurdial Singh would have been so estopped.

In that section the word "thing" is significant. We concede that defendants in the present case would not be permitted to deny the *factum* of Gurdial Singh's adoption; but it is otherwise when we come to the legal question, which is always a mere matter of opinion, of the validity of that adoption. All that can be said is that Gurdial Singh asserted—"I was adopted by Mali Rai as well as you and I claim half his estate," to which Bhagwan Singh replied,—"Yes, you were adopted in fact and I think you have an equal right with me." The mere view or opinion that upon the later adoption Gurdial Singh was entitled to half the property, is not a "thing" within the meaning of the section. In this connection we adopt the remarks made at pages 764, 780, 781, 5th Edition of Ameer Ali and Woodroffe's Book on the Law of Evidence in India, which remarks appear to be based on ample authority; and it thus appears that section 115 aforesaid has no application to such a case as the present.

At first sight, the observations of their Lordships of the Privy Council in *Sarat Chandra Dey* v. *Gopal Chunder Laha* (9), criticising at page 218 the views of the Madras High Court in *Eranjoli Illath Vishnu* v. *Eranjoli Illath Krishnan* (10), might seem to be somewhat at variance with the above remarks of ours; but on further examination this is seen not to be so. The matters dealt with in the Madras judgment were in reality largely, if not entirely, matters of fact, and denial of those matters was what section 115 of the Indian Evidence Act, rightly interpreted, prohibited the party from making. The Privy Council did not in any way hold that section 115 covered estoppel in connection with representation not only of

(5) 97 P. R. 1906.
(6) 37 P. R. 1907; 120 P. L. R. 1907.
(7) 3. M. I. A. 229; 6 W. R. 43.
(8) 30 A. 1; 6 C. L. J. 766; 12 C. W. N. 74; 9 Bom. L. R. 1348.
(9) 19 I. A. 203; 20 C. 296.
(10) 7 M. 3.

"things," that is, facts, but also representations in law: their Lordships merely expressed the opinion that "a series of acts by which an adoption is professedly made and subsequently recognised" cannot be taken as constituting "a representation in law only and not of fact."

Perhaps, it is unnecessary to labour the point, but we would like also to refer to the leading case of *Carr* v. *London and North Western Railway Company* (11), in which an attempt was made to lay down comprehensive propositions as to the circumstances and modes in which an estoppel *in pais* may arise. The propositions formulated are four in number, dealing with fraudulent representations, representations without fraud, representations by conduct and representations by omission respectively, and in all four it is clear that the learned Court intended to limit the *dicta* to matters of *fact*.

Lastly, we would like to point out that the whole tenor of the section is against the contention that defendants are estopped in this case from denying the validity of the adoption. Gurdial Singh and Bhagwan Singh had equal means of knowledge both of the facts and of the law. Of the facts both had full knowledge, and probably neither formulated to himself any very precise propositions of law. There is no reason to suppose that Gurdial Singh, knowing he was not validly adopted, led Bhagwan Singh to believe the adoption to be valid. We are, of course, aware that, in order to give rise to an estoppel, it is not necessary that "representation" should be fraudulent, [Ameer Ali, p. 757 and *Sarat Chunder Dey's case* (9) already cited at p. 215 of the report] but it is necessary that that representation should be the actual cause of a new belief in the mind of the other party and of his action following on that belief. Now there is no reason to suppose that Bhagwan Singh at first thought Gurdial Singh's adoption invalid, but was induced to change his opinion by anything said or done by Gurdial Singh. We must hold, therefore, that plaintiff is not entitled to question the act of *Musammat* Gopal Devi and we dismiss the appeal, but without costs. The reason for not giving costs is that the plaintiff may well be excused for his misconception of the law; which is shared by both the Courts below.

Appeal dismissed.

(11) 10 C. P. 307; 44 L. J. C. P. 109; 31 L. T. 785; 23 W. R. 747.

[s. c. (1912) 1 M. W. N. 49.]

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 78 OF 1910, November 30, 1911.

Present:—Sir Ralph Benson, Judge.

TADIKONDA VENKAYYA AND OTHERS—PLAINTIFFS—PETITIONERS

versus

KODALI VENKATASUBBAMMA—DEFENDANT—RESPONDENT.

Widow, suit against—Evidence necessary as to nature of debt.

In a suit against a widow, evidence should be taken as to whether the debt was incurred by her as representing her husband's estate.

Regulla Jogayya v. *N. Vencatarathnamma*, 33 M. 492; 5 Ind. Cas. 271; 7 M. L. T. 112; 20 M. L. J. 412; followed.

Petition under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Subordinate Judge's Court of Kistna, at Ellore, dated the 25th September 1909 in S. C. S. No. 347 of 1909.

Mr. *P. Nagabhushanam*, for the Petitioners.

Mr. *P. Narayanamurthi*, for the Respondent.

JUDGMENT.—The Subordinate Judge was in error in refusing to admit evidence and to consider whether the debt was incurred by the widow as representing her late husband's estate and was, therefore, binding on the estate in her hands. *Regulla Jogayya* v. *N. Vencatarathnamma* (1).

I must set aside the decree of the Subordinate Judge and direct him to restore the suit to his file and dispose of it afresh in accordance with law. Costs will abide the result.

Decree set aside.

(1) 33 M. 492; 5 Ind. Cas. 271; 7 M. L. T. 112; 20 M. L. J. 412.

NALINI BEHARI ROY *v.* FULMANI DASI.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 609 OF 1910 WITH CIVIL RULE No. 5346 OF 1910.

January 22, 1912.

Present:—Mr. Justice Stephen and Mr. Justice Coxe.

NALINI BEHARI ROY—DECREE-HOLDER—APPELLANT AND PETITIONER

versus

FULMANI DASI AND ANOTHER—RESPONDENTS.—OPPOSITE PARTY.

Bengal Tenancy Act (VIII of 1885), *s.* 170 (3)—*Right to deposit to avoid sale under rent-decree—Transferee of non-transferable occupancy-holding.*

The transferee of a non-transferable occupancy-holding does not acquire any interest in the holding by his purchase, and has no right to make a deposit under section 170 (3) of the Bengal Tenancy Act to defeat the landlord's right to bring the holding to sale in execution of a rent-decree.

Appeal from the order of the District Judge of Midnapore, dated September 10th, 1910, affirming that of the third Munsif of that place, dated May 21st, 1910.

Babu *Tarakeswar Pal Chowdhury*, for the Appellant and Petitioner.

Babus *Sarat Chandra Rai Chowdhury* and *Gobinda Chandra Chakravarti*, for the Respondents and Opposite Party.

JUDGMENT.

STEPHEN, J.—This matter comes before us on a second appeal and on a Rule. The appellant who is also the petitioner in the Rule is a landlord who is seeking to sell a tenant's holding in execution of a rent-decree. The respondent purchased the holding from an occupancy-*raiyat* and seeks to defeat the landlord's right by depositing the decretal money in Court under section 170 (3) of the Bengal Tenancy Act. The appellant contests his right to do this on the ground that the holding is not transferable, as it has now been found it is not, and that the respondent has not, therefore, any interest in the holding voidable on the sale. Both the lower Courts have found in the respondent's favour, and have allowed the deposit to be made. The appellant now appeals from the decision in the lower Appellate Court, and in case it should be held that no appeal lies has also obtained a Rule calling on the respondent to show cause why the order accepting the deposit should not be set aside.

Leaving aside for the moment the question whether any appeal lies, we have to consider whether the respondent, that is, the applicant, has any interest in the land, and if he has, whether that interest is voidable on the sale.

On the authorities before us, I hold that the complainant has no interest in the land. This result, in my opinion, follows from the decisions of this Court in *Srimati Nissa Bibi* v. *Radha Kishore Manikya* (1) and *Prosunno Kumar Middar* v. *Bama Charan Mondal* (2). The two cases together are certainly an authority for the statement that the transferee of a non-transferable holding is not a representative of the transferor under section 244 of the old Code or the owner of immoveable property under section 311, and in both cases the point is considered as depending on the question whether he had an interest in the property. It is possible, of course, that the phrase "having any interest" in section 170 (3) of the Bengal Tenancy Act might be construed as having a wider application than the "representative" of a party to a suit under section 244, or the owner of immoveable property under section 311. But in *Ishan Chunder Sirkar* v. *Beni Madhub Sirkar* (3) the authority on which *Srimati Nissa Bibi* v. *Radha Kishore Manikya* (1) was decided it seems as if the classes of persons described in the three sections were all the same, as indeed there is no reason why they should not be.

I should feel no difficulty in following these decisions were it not for the decision of this Court in *Hari Das Bairagi* v. *Udoy Chandra Das* (4), where it was held that the sale of a non-transferable holding is not void but merely voidable by the landlord, a rule that has frequently been followed by this Court in holding that where the landlord is not a party to proceedings arising out of the transfer the question of transferability does not arise. I doubt, however, whether the distinction between void and voidable contracts has not been pushed too far in the case in question. The landlord's rights were not directly concerned in the case in question and on the facts before it, in order to support the conclusion arrived at, the Court need not have decided more than that the contract was void only. If the landlord recognises a transfer of a non-transferable holding it is probably open to him to recognise it on the footing

(1) 11 C. W. N. 312.
(2) 13 C. W. N. 652; 3 Ind. Cas. 461.
(3) 24 C. 62; 1 C. W. N. 36.
(4) 8 C. L. J. 261; 12 C. W. N. 1086.

NALINI BEHARI ROY v. FULMANI DASI.

that it is or is not the subject of an occupancy-right; or at least there does not appear to be any authority that it is not. If the "interest" in section 170 (3), Bengal Tenancy Act, is read as interest against the landlord, a sense which would bring the section into line with sections 244 and 311 of the old Code, this would put an end to the distinctions between void and voidable contracts as far as the present case is concerned. That it should be so read I do not say, but the possibility of the reading inclines us to follow the two decisions we have followed.

We have also been referred to the case of *Omar Ali Majhi* v. *Bassiruddin Ahmad* (5), where it was held that the transferee of a portion of a holding had a right to pay the amount of a decree in a rent suit under section 310 A of the old Code. I cannot say that this is consistent with the principles on which *Srimati Nissa Bibi* v. *Radha Kishore Manikya* (1) and *Prosanna Kumar Middar* v. *Bama Charan Mondal* (2) were decided; but the difference between the views expressed does not seem to me to justify a reference.

Under these circumstances, I need not consider the further question whether the applicant had an interest voidable on the sale.

If the applicant had no interest he had no right of appeal from the first decision, and consequently the present appellant had no such right. But on our findings it appears that the Courts below have prevented the landlord from proceeding with the execution of his decree, at the instance of one who, on the Courts' own finding, was a stranger and had no *locus standi* in the matter. It must be held, therefore, that there has been an irregular exercise of jurisdiction. The appeal is, therefore, dismissed, but the Rule is made absolute, the orders of both the lower Courts are set aside, and the money deposited by the applicant must be returned to him, and the execution case must proceed according to law.

The petitioner is entitled to the costs of the Rule which we assess two gold *mohurs*, and to his costs in the Courts below.

COXE, J.—Considering the importance of the point and the conflict of judicial opinion upon it I should have preferred to have the case referred to a Full Bench, but as my learned colleague does not think that this course is rendered necessary by the decision in *Omar Ali Majhi* v. *Bassiruddeen Ahmad* (5), and as I agree with the view that the purchaser in this case is not entitled to deposit, I do not press for a reference.

To the cases cited by my learned colleague I may add that of *Thomas Barclay* v. *Syed Hossein Ali Khan* (6). In that case it was held that if the landlord does not dispute the title of the depositor and withdraws the money, he cannot afterwards refuse to recognise the transfer. It is argued that that case has no bearing on the present case, because it does not lay down that the mere drawing of the money would debar the landlord from denying the title of the depositor, and in this case the landlord has contested the depositor's right to make the deposit. This argument, however, is hardly in accordance with the explanation of the decision given in *Jugal Mohini Dasi* v. *Srinath Chatteree* (7). Moreover, both these decisions imply that the landlord can attack successfully the right of a purchaser to make the deposit. If a purchaser of a holding that is not transferable is entitled to deposit the money, what will be the use of the landlord's resisting him, and why should the landlord be estopped from contesting his title because he has refrained from taking action that is bound to be fruitless? On the other hand, if drawing the money estops the landlord in future, what is he to do, if he desires to exercise his undoubted right of refusing to recognise the transfer? If he draws the money he is bound to recognise the transfer. If he does not, the sale is stopped and he has to go without his rent. It appears to me to follow necessarily from these rulings that the landlord is entitled to resist the deposit, and that if he resists it, the purchaser cannot be allowed to make it and save the holding from sale.

Appeal dismissed; Rule made absolute.

(5) 7 C. L. J. 282.

(6) 6. C L. J. 601

(7) 12 C. L. J. 609; 7 Ind. Cas. 477.

SUNKARA RAMIAH *v.* SUNKARA SUBBAMMAH.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1322 OF 1910.

November 30, 1911.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

SUNKARA RAMIAH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SUNKARA SUBBAMMAH—DEFENDANT—RESPONDENT.

Hindu Law—Alienation by widow—Alienation as guardian of daughter—Act prejudicial to reversioners—Declaratory suit by reversioners—Specific Relief Act (I of 1877), s. 42.

Section 42 of the Specific Relief Act does not restrict the right to declaratory relief by reversioners to cases of alienation by the widow herself. It confers a right of action on reversioners to have their reversionary right declared whenever any act done by the widow jeopardises that right.

Where a Hindu widow who had a widow's estate alienated the property as guardian of her daughter:

Held, that the widow must be deemed to have concurred in the alienation and to have prejudiced the reversioners who were, therefore, entitled to institute a suit to have their reversionary rights declared.

Sheoraji v. *Ramjas Pandey*, 33 A. 430; 9 Ind. Cas. 501; 8 A. L. J. 454, referred to.

Ganga Gulam v. *Tapeshari*, 26 A. 606, distinguished.

Second appeal against the decree of the Subordinate Judge of Ellore, in A. S. No. 193 of 1909, presented against that of the District Munsif of Ellore, in O. S. No. 318 of 1907.

Mr. *Narayanamurthi*, for the Appellants.

Mr. *T. Prakasam*, for the Respondent.

JUDGMENT.—The plaintiffs are the reversionary heirs entitled to the estate of one Ramiah after the death of the 1st defendant who is his widow. The 2nd defendant is Ramiah's daughter's daughter. On the 6th May 1906, the second defendant, who was a minor, through her guardian the 1st defendant executed a mortgage-deed of certain property, alleged to form part of Ramiah's estate in favour of the 3rd and 4th defendants. The plaintiffs ask for a declaration which may substantially be stated to be of their reversionary right to the property unaffected by the mortgage in favour of the 3rd and 4th defendants. The defendants contended that the 1st defendant had orally transferred the property to the 2nd defendant's father long before 1906 and that the alienation by the 2nd defendant in 1906 could give no cause of action to the plaintiff for a declaratory suit. This plea has been upheld by the lower Courts and the suit has been dismissed. The plaintiff prefers this second appeal. We are of opinion that the view of the lower Courts cannot be upheld. For the purpose of this second appeal, we must take the facts stated in the plaint to be true, and the case as laid in the plaint is that the 1st defendant, while she was entitled to hold the estate as a Hindu widow, indirectly alienated the suit mortgage lands by executing the mortgage deed as guardian of the 2nd defendant. According to section 42 of the Specific Relief Act, a reversioner is entitled to institute a suit to have his reversionary right to the property held by a Hindu widow declared in certain cases It is contended that such right exists only when the widow herself has made an alienation. We cannot agree. The section does not restrict the right to declaratory relief to cases of alienation by the widow. It must be taken to confer a right of action on reversioners to have their reversionary right declared whenever any act done by the widow jeopardises their right. In this case the widow has by acting as the guardian of the 2nd defendant in executing the mortgage actively concurred in the alienation. She has done an act which might prejudicially affect the right of the reversioners. It might affect it quite as much as a formal alienation made by her. It is argued that her concurrence in the alienation does not amount to any denial by her of the plaintiff's right or any act which would jeopardise their rights. We cannot appreciate this argument. Her act amounts to an affirmation that the property was not part of Ramiah's estate at the date of the alienation, but belonged to the 2nd defendant and to an active participation in alienating it as the 2nd defendant's property. The 3rd and 4th defendants by taking the mortgage and asserting its validity deny the right of the plaintiffs and the 2nd defendant does so by adopting the act of the 1st defendant and thereby asserting that the property belongs to her. The case in *Sheoraji* v. *Ramjas Pandey* (1) shows that the right to declaratory relief exists where any act prejudicial to the estate is done by the widow. The case in *Ganga Ghulam* v. *Tapeshri Prasad* (2) does not help the respondent as it merely decided that reversioners are not bound to institute a suit under section 42

(1) 33 A. 430; 9 Ind. Cas. 501; 8 A. L. J. 454.
(2) 26 A. 606.

PANCHAM SINGH *v.* GANGA BAKHSH SINGH.

when a document affecting their rights is executed by a stranger and that they may do so when any further steps are taken which would also amount to a denial of their rights.

It is unnecessary to consider whether if the plea that the 1st defendant had transferred her right long before the mortgage is made good by evidence, that would be an answer to the plaintiffs' suit for a declaration that the mortgage will not affect their rights.

The decrees of the lower Courts are reversed and the suit remanded to the Court of first instance for disposal on the merits.

Costs up to date will abide the result.

Suit remanded.

OUDH JUDICIAL COMMISSIONER'S COURT.

July 25, 1911.

Present:—Mr. Evans, J. C.

PANCHAM SINGH—PLAINTIFF—APPELLANT

versus

GANGA BAKHSH SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Oudh Laws Act (XVIII of 1876), s. 9, cl. (1)—Pre-emption—"Sub-division," meaning of.

The word "sub-division" in section 9, clause 1 of Act XVIII of 1876, has no special technical meaning, nor is it confined to a portion only of a village which is described as *thok* or *patti* in the Revenue Records.

Where separate villages are the component parts of a *mahal*, each village is a "sub-division" of the *mahal* within the meaning of the said section.

Appeal against the order of the District Judge, Fyzabad, dated the 25th February 1910, confirming the order of the Subordinate Judge, Fyzabad, dated the 4th December 1909.

Mr. *Jivan Krishna Banerji*, for the Appellant.

Pandit *Gokaran Nath Misra*, Mirza *Samiullah Beg*, and Mr. *Mohammad Ismail*, for the Respondents.

JUDGMENT.—This is an appeal against an order of the District Judge of Fyzabad dismissing the plaintiff's claim for pre-emption of a certain share.

The admitted facts are that there is a *mahal* known as the Tula Patti Sant Bakhsh Singh. This *mahal* has a peculiar constitution. It consists of portions of six villages with respect to each of which there is a separate specification of revenue and separate *khewats*. But there is also a *kabuliyat* signed by Sant Bakhsh Singh in 1897 under which he agreed to be responsible for the revenue of all six villages. It is admitted that these villages have not been put into one *mahal* on account of the proximity of the village lands, but for some other reason which cannot be specially stated. It seems probable that in 1897 there was the same set of share-holders in each village under the *lambardarship* of Sant Bakhsh Singh and, therefore, they thought it convenient to have one engagement to pay revenue for all the villages. The present appellant is admittedly a share-holder in the village of Nandouli, one of the villages in the *mahal*, and the eighth defendant, who is contesting this appeal, is a share-holder of two annas in the village of Mohommadpur, another of the villages of the same *mahal*. The land in dispute is a 14 annas share in Mohommadpur with respect to which defendant No. 1 has obtained a foreclosure decree and defendant No. 8 instituted a separate suit for pre-emption and obtained a decree.

The sole point for decision in this case is, whether the appellant has a preferential right as against the defendant No. 8. The learned Judge held that the village of Mohommadpur was a sub-division of the *mahal* within the meaning of section 9, clause 1, Act XVIII of 1876. He was of opinion that, as a separate *khewat* and record of rights were prepared for each village constituting the *mahal*, a share-holder in the village in which the property in dispute is situate would be a share-holder of the sub-division of the tenure and, therefore, had a preferential right as against the share-holder in any other village in the *mahal*.

Pleader for the appellant referred to page 343 of Agarwala's Law of Pre-emption where it is stated that according to certain rulings the word "sub-division" in section 9 means recognised sub-division, and he argues that a sub-division in a *mahal* of this kind only means a *thok* or *patti*. He relies upon *Raja Tasadduq Rasul Khan* v. *Janki Saran* (1), but in my judgment the ruling in that case does not support this contention. In that case a

(1) 9 O. C. 211.

certain village was divided into four parts called *tarafs* and these *tarafs* were entered in the *khewat* in the column headed "name of *thok* or *patti*". Separate lands were assigned to each *taraf* and the revenue of each *taraf* was known and specified. It was held that each *taraf* was a sub-division of the *mahal*. I can find no difference between these *tarafs* and the separate villages which are the component parts of the *mahal* in this case. There is no particular magic in the words *thok* or *patti*. They are merely words which are usually used to signify divisions of a village. It often happens that shareholders in a village by mutual arrangement separate their lands, certain portions of the village being assigned to certain sets of share-holders, and the usual names given to these portions in the revenue registers are *thoks* and *pattis*. In the present case, owing to the peculiar constitution of the *mahal* there has been *from the very first* separation of the lands held by the separate sets of the share-holders in the *mahal* and these lands have simply been placed in one *mahal* for mutual convenience of the share holders It is true that they are not called *thoks* and *pattis* in the revenue registers, but according to a common sense view of the meaning of the word "sub-division" they must be considered sub-divisions of the village whatever name may be assigned to them in the revenue registers. I further find that it is admitted that the village of Nandouli, in which appellant's share is, is some two miles from the village where the land in suit is situate and to all intents and purposes the appellant is a stranger in that village. He has no kind of equitable right to thrust himself into the village in which he has no concern. The other cases referred to on behalf of the appellant are *Thakar Sheo Narain* v. *Sheo Dat Singh* (2); *Mannu Lall* v. *Mohammed Ismail* (3) and *Aulad Husain* v. *Zainab-un nissa* (4). The decision in *Thakar Sheo Narain* v. *Sheo Dat Singh* (2), so far as it affects this case, is merely a decision that where a village is divided into two *mahals* and the *mahals* are divided into *pattis*, the *patti* is a sub-division of the *mahal* within the meaning of clause 1, section 9. That is a point which no one disputes.

In *Mannu Lall* v. *Mohammad Ismail* (3), the plaintiff was the owner of a *chak* in the village and it was held that he was a co-sharer in the whole *mahal* in the sense of section 9 of the Oudh Laws Act, 1876. This case does not affect the question for decision here.

Similarly, it was held in *Aulad Husain* v. *Zainab-un-nissa* (4) that a person who is an owner of a specific plot of land in the village is for the purposes of pre-emption a co-sharer in the village. In the present case there is no doubt that the appellant is a co-sharer in the whole *mahal*. But the question to be decided is whether defendant No. 8 is a co-sharer of a sub division of the tenure in which the land in dispute is situate and has, therefore, a preferential right as against the appellant. I must decline to hold that the word "sub-division" has any special technical meaning or is confined only to a portion of a village which is described as a *thok* or *patti* in the Revenue Records. No general rule can be laid down as to the meaning of the word "sub-division," but looking at the constitution of this particular *mahal* I do not hesitate to hold that the appellant cannot claim an equal right to pre-empt with defendant No. 8 under the provisions of section 9 of the Oudh Laws Act. I dismiss this apeal with costs.

Appeal dismissed.

(2) 7 O. C. 129.
(3) 7 O. C. 284.
(4) 10 O. C. 225.

(s. c. 38 C. 907.)

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL No 2 OF 1911.

January 31, 1911.

Present:—Mr. Justice Woodroffe and Mr. Justice Carnduff.

ARNOLD—APPELLANT

versus

ARNOLD—RESPONDENT.

Divorce—Petition of wife—Admission by husband—Corroborative evidence—Absence of collusion—Duty of Court to act on admission.

In a divorce suit, where there is no collusion, it is the duty of the Court to act on the admissions of a party, especially when there is evidence to support and corroborate such admissions.

Robinson v. *Robinson*, (1859) 1 Sw. & Tr. 362; 27 L. J. Mat. 91; 5 Jur. (N s.) 392, relied on.

Appeal from the following judgment of Mr. Justice Harington, dated January 3rd, 1911, by which the petition of the wife for the dissolution of her marriage with the

respondent on the grounds of adultery and cruelty, was dismissed.

HARINGTON, J.—This is a petition by the wife for dissolution of marriage on the ground of cruelty and adultery of her husband. To enable her to succeed in this Court it is necessary to prove some specific act of adultery committed in India. Now, the lady has given her evidence and she is the only witness who has spoken to facts from which it is said that particular acts of adultery ought to be inferred. It was argued by her learned Counsel that the question whether the adultery was established depended on whether she was believed or not. I don't agree with that proposition. Her evidence was given in a frank and straightforward manner, and I have no doubt that each fact to which she spoke was truly stated by her, but the question is, are the facts she has proved sufficient to justify the inference that on any of the occasions she has spoken to adultery was committed? In the first instance, she found her husband in the room of a Miss Kneller, who was in bed, but the door of the room was unfastened and the husband was in his ordinary dress and I don't think that the fact that a man in ordinary clothes is in the bed-room of a woman with the door open, without any further evidence that something took place, would justify the inference that he had committed adultery with the lady in whose room he was. A different inference might be drawn if the door had been fastened and there were evidence of any fact which would justify one in supposing that he had been sharing her bed. Then the other instance is an occasion when she left him in the drawing room, and on going there later found he was not there. Afterwards, when she saw him she charged him with having been in the lady's room and he told her to mind her own business. That circumstance is not sufficient. There is nothing to show whether he really went to the lady's room on that occasion, or, if so, how long he was there, whether he was alone with the lady or whether the door was shut or open. The next fact she proved was an act of familiarity with the lady in the Albany Hotel which took place in her presence, and another witness has spoken to another act of familiarity which took place at the back of the stage. In my view, these are not sufficient to establish a charge of adultery. If, when acts of familiarity have been proved, it had been shown that the husband had been in this lady's bed-room after taking steps to prevent any interruption by a third party, it is possible that an inference might have been drawn that he had committed adultery. This has not been shown and I have no course, therefore, but to hold that the petitioner has not established the acts of adultery charged. I must, therefore, dismiss the petition.

The petitioner appealed.

Messrs. *Eardley Norton* and *Pearson*, for the Appellant.

JUDGMENT.

WOODROFFE, J.—In this case the petitioner asks for the dissolution of her marriage with the respondent on the grounds of adultery and cruelty. He has been served with a notice by the petitioner. But he has entered no defence on either of the charges and he does not appear in this appeal. Adultery has been sought to be proved in this case both by admissions oral and documentary and other acts from which it is contended adultery should be inferred. In particular in a letter of 23rd April 1910, which the respondent wrote to the petitioner, he writes as follows:—"I believe that you are charging me with adultery with a certain lady in the Company and cruelty in Calcutta, both of these charges I am bound to admit as you have probably secured substantial proofs as to the cruelty which has occurred during passion I sincerely regret. I shall not defend the case under the circumstances." I have no doubt that "the lady in the Company" is Miss Kneller. There has been no question of any other.

Another letter has been proved dated the 30th November 1910 in which with other things he states: "I can't go away without writing and wishing you good-bye. I would have said good-bye personally, only I suppose my presence would have been distasteful to you. I am sorry we have finished up like this. I know I am losing a good woman, for I believe you to be good and trust you will always try and be so."

From the evidence of McGarth it appears that the respondent was very fond of Miss Kneller, a member of the Company, and on one or two occasions he asked McGarth not to speak to his wife about it.

Mr. Smith, the Manager of the Bandmann Opera Company, states that he himself had

charged both the respondent and Miss Kneller with the intimacy alleged to exist between them and that neither denied it. Subsequently, both of them left the Company. The evidence of Mr. Bury, Manager of the Empire Theatre, is that in consequence of the relationship existing between the parties the petitioner asked him for a separate room. Mr. Justice Harington in his judgment states that "the petitioner gave her evidence in a frank and straight forward manner and I have no doubt that each fact to which she spoke was truly stated by her." One of such facts was that there was no collusion. Nor is there any ground for suspecting collusion in this case. The learned Judge, however, adds, "but the question is, are the facts she has proved sufficient to justify the inference that on any of the occasions she has spoken to adultery was committed?" If the learned Judge was not satisfied as regards the evidence tendered, I think that, under the circumstances of this case, the petitioner might have been given an opportunity to produce such further evidence as the Court thought was necessary, as I have stated no collusion is proved or suggested. In the present case admissions have been proved. Doubtless, caution is required in cases of divorce to see that there is no collusion and an admission must be examined from this point of view. But if, as here, there is no reason to suspect collusion an admission may be as cogent evidence in these as in any other cases. In *Robinson* v. *Robinson* (1), Sir Alexander Cockburn says:—"The Divorce Court is at liberty to act and is bound to act on any evidence legally admissible by which the fact of adultery is established. If, there is evidence not open to exception of admissions of adultery by the principal respondent, it would be the duty of the Court to act on these admissions although there might be a total absence of all other evidence to support them. The admission of a party charged with a criminal or wrongful act has at all times and in all systems of jurisprudence been considered as most cogent and conclusive proof; and if all doubt of its genuineness and sincerity be removed, we see no reason why such a confession should not, as against the party making it, have full effect given to it." It is to be observed that the learned Chief Justice says that it is the duty of the Court to act on admissions although there might be a total absence of all other evidence to support them. The present case is stronger. Not only is there no reason to suspect collusion but the evidence which has been given supports and corroborates the written admission of the respondent. Evidence has also been given of acts from which the Court was asked to draw the inference of adultery. It is unnecessary to consider whether these facts, if they stood alone, would be sufficient to prove the alleged adultery. However they may be, and guarding myself from being supposed to say that they are insufficient, it is sufficient to say that I have no doubt that the admissions contained in the letters of the respondent are truthful admissions of facts. In my opinion, the acts of adultery and cruelty charged have been proved. I would, therefore, reverse the judgment of Mr. Justice Harington and pass a decree *nisi* for dissolution of marriage with costs.

CARNDUFF, J.—I agree, and have nothing to add to the judgment which has been delivered by my learned brother.

Appeal allowed.

(1) (1859) 1 Sw. & Tr. 362; 27 L. J. Mat. 91; 5 Jur. (N. S.) 392.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 409 OF 1910.

July 4, 1911.

Present:—Mr. Lindsay, J. C.

JAGAN NATH—DEFENDANT—APPELLANT

versus

Lala DEBI SAHAY—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 102—Second appeal—Suit as originally framed to be looked to—Trespasser—Damages.

For the purpose of deciding whether or not a second appeal lies, the form of the suit as originally brought must be looked at.

If in an ejectment suit against a trespasser the Court awards damages only, a second appeal will not be barred simply because the decree was for money.

Exemplary damages may be awarded against a trespasser.

Appeal against the order of the District Judge, Lucknow, dated 1st June 1910, up-

JAGAN NATH v. DEBI SAHAY.

holding that of the Additional Munsif, Lucknow, dated 21st March 1910.

Pandit *Gokaran Nath Misra*, for the Appellant.

Mr. *A. P. Sen*, for the Respondent.

JUDGMENT.—The only question for determination in this appeal is one in connection with the amount of damages which were awarded to the plaintiff-respondent in a suit which was brought by him to eject the defendant-appellant from a piece of land situated in the Lucknow city. Briefly stated, the case for the plaintiff was that the defendant, who is a liquor contractor, had without his consent taken possession of a piece of land with the intention of establishing a liquor shop thereon. The plaintiff stated that the defendant had ousted another tenant of his from possession and had forcibly taken possession himself.

The defence set up was that the plaintiff had given his consent to the defendant's occupation and that there was no trespass which rendered the defendant liable to ejectment. There was some evidence to show that before the defendant took possession of the land he had approached the plaintiff with a view to getting a lease of it. The plaintiff, it appears, demanded a rent of Rs. 30 a month which the defendant thought excessive. The defendant, it is said, made some representation to the Excise Officer who gave his opinion that Rs. 5 a month was an adequate rent for the land in question. It was not stated, however, that the Excise Officer in any way settled the rent between the parties. The evidence goes to show that he told them to settle the rent between themselves. The Court of first instance came to a rather peculiar finding. The learned Munsif was of opinion that the plaintiff had not consented to let the land to the defendant for Rs. 5 a month, but he thought the plaintiff did permit the defendant to take possession thinking or hoping that the defendant would pay him Rs. 30 a month. He added that it was only after the defendant had taken possession with this consent that the plaintiff found out that the defendant meant to pay only Rs. 5 a month. The Munsif, therefore, refused to eject the defendant but gave a decree declaring him liable to pay Rs. 30 for the month of occupation which had expired at the time the suit was brought.

In appeal the learned District Judge found that there was no agreement between the parties for letting the land at Rs. 5 per month. The learned Judge was also of opinion that the view of the law taken by the first Court was erroneous. He held that the defendant was a trespasser and that the Court of first instance was wrong in holding that possession had been taken with the plaintiff's consent. In this Court the point raised on the defendant-appellant's behalf is that damages allowed by the Court below were excessive and it is claimed that the lower Court's order can be interfered with in second appeal on the ground that the Judge applied a wrong principle of law in assessing the damages.

The principle, it is said, is wrong because the lower Court was in error in treating the defendant as a trespasser. A preliminary objection is raised on behalf of the respondent to the effect that the appeal does not lie inasmuch as the matter in dispute is one which was within the cognizance of a Court of Small Causes. Section 102 of the Code of Civil Procedure is relied upon. I do not think this objection can be sustained because the suit as framed was one for ejectment from immoveable property and a case of that nature is outside the jurisdiction of a Court of Small Causes. It is true that at the present time the matter in dispute is the amount of damages payable but for the purpose of deciding whether or not a second appeal lies, the frame of the suit as originally brought is the thing that must be looked to. The suit as framed was not cognizable by the Court of a Small Causes and, therefore, section 102 of the Civil Procedure Code does not stand in the way of this appeal. As for the contention of the appellant I am satisfied that it is not well-founded and that the decree of the District Judge should be affirmed. In my opinion, the District Judge was perfectly correct in holding that the defendant was a trespasser. Even on the facts as found by the Munsif, it seems to me to be clear that the defendant committed a trespass. It was found that the plaintiff did not consent to allow the defendant to occupy on promise of payment of rent of Rs. 5 a month. The defendant admits that he never agreed to

accept possession on payment of Rs. 30 a month which was first asked from him by the plaintiff. There was thus no tenancy created between the parties as the plaintiff's proposal was not accepted by the defendant. I have no doubt whatever that the defendant took possession of the land without the plaintiff's consent, and even if the plaintiff did give his consent on the understanding that defendant was prepared to pay a rent of Rs. 30 a month, such consent cannot be put forward by the defendant in defence of his trespass when it is found that the defendant had no intention of ever paying more than Rs. 5 a month. The Rs. 30 awarded by the District Judge was awarded as exemplary damages against a trespasser and, as I agree that the defendant was a trespasser, there is no ground upon which I can interfere with the amount of damages awarded. The appeal fails and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 877 OF 1909.

December 5, 1911.

Present:—Mr. Justice Coxe and Mr. Justice N. Chatterjea.

DIBAKAR NAG—PLAINTIFF—APPELLANT

versus

MRITTUNJOY BHATTACHARYA—DEFENDANT—RESPONDENT.

Second appeal—Omission to consider evidence—Misreading or misconstruing evidence—Omission to make specific mention of document—Civil Procedure Code (Act V of 1908), s. 100—Conflict of decisions.

There is considerable conflict of judicial opinion on the point whether a second appeal will lie where the lower Appellate Court omits to consider evidence, or misreads, or misconstrues evidence.

But the omission of the Court to make specific mention of a particular document and the statement in it, does not amount to a substantial error or defect in procedure within the meaning of section 100 of the Code of Civil Procedure.

Appeal from the decree of the Sub-Judge of Burdwan, dated March 31st, 1909, reversing that of the Munsif of that place, dated December 2nd, 1907.

Babu *Charu Chandra Biswas*, for Babu *Narendra Chandra Bose*, for the Appellant.

Babus *Shib Chandra Palit* and *Jadu Nath Mondal*, for the Respondent.

JUDGMENT.—This was a suit upon a mortgage. The lower Court found that no

consideration passed, and accordingly dismissed the suit.

In appeal it is argued that the learned Subordinate Judge omitted to consider a certain document marked Exhibit E, which was a mortgage executed about four years later and contained an admission by the defendant that he had borrowed Rs. 400 under the mortgage in suit. No reference is made to this document in either of the judgments of the Courts below. The learned Sub-Judge says:—" I think what the defendant says in his deposition is true." In order to see what the defendant says we have looked at the deposition; and we find that this admission was never put to the defendant himself.

There is considerable conflict of judicial opinion on the point whether a second appeal will lie when the lower Appellate Court omits to consider evidence, or misreads, or misconstrues evidence. In the present case all we think it necessary to say is that, in our opinion, the omission of the learned Subordinate Judge to make specific mention in his judgment of this particular Exhibit and the statement contained in it does not amount to a substantial error or defect in procedure within the meaning of section 100 of the Code of Civil Procedure.

The result is that the appeal will be dismissed with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 446 OF 1910.

July 13, 1911.

Present:—Mr. Lindsay, A. J. C.

BHAGAN—PLAINTIFF—APPELLANT

versus

MUNNU—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 6 (a)—Reversioner—Transfer of expectancy, validity of.

A Hindu widow mortgaged certain property in which she had only a life-interest. A reversioner sued for a declaration that the mortgage would not affect his rights in respect of the property after the widow's death.

This suit was withdrawn in consequence of a compromise whereby it was agreed that during her life-time the widow would get from the mortgagee a certain sum as her maintenance, while the rest of the profits of the property would be divided between the reversioner and the mortgagee and that after the death of the

BHAGAN *v.* MUNNU.

widow the reversioner and the mortgagee would divide the property in equal shares:

Held, that the effect of the agreement was to transfer to the mortgagee one half of the mortgaged property on the widow's death, and that this amounted to a transfer of an expectancy by the reversioner and was, therefore, invalid under the provisions of section 6 (*a*) of the Transfer of Property Act.

Bajrangi Singh v. *Bhagwan Bakhsh Singh*, 11 O. C. 301; *Sums-ud-din* v. *Abdul Husain*, 31 B. 165; 8 Bom. L. R. 781, followed.

Appeal against the order of the District Judge, Fyzabad, dated the 18th July 1910, upholding that of the Subordinate Judge, Bara Banki, dated the 30th April 1910.

Mr. *E. Manuel*, for the Appellant.

Pandit *Gokaran Nath Misra*, for the Respondent.

JUDGMENT.—The real question for determination in this second appeal is the legal effect of a contract which was entered into between the father of the plaintiff-appellant Bhagan and the defendant-respondent Munnu under the following circumstances:—

Bhagan's father was Ram Din and Ram Din had a cousin twice removed named Bhagwant who died about 20 years before institution of the suit. Bhagwant left no issue but his widow *Musammat* Hansa survived him. It would appear that after Bhagwant's death Ram Din seized Bhagwant's property as being his nearest male collateral relation. *Musammat* Hansa was obliged to bring a suit for recovery of the property—a suit in which she was eventually successful. After getting possession of the property *Musammat* Hansa executed a mortgage in favour of the defendant Munnu. Ram Din before his death brought a suit for a declaration that the mortgage in question would not affect his right of the property after the death of Bhagwant's widow. The mortgagee Munnu in that suit set up a defence to the effect that the mortgage had been executed for legal necessity and would, therefore, be binding on Ram Din as reversioner. The suit was compromised. Ram Din and Munnu executed a registered agreement by which it was arranged between them that the suit filed by Ram Din should be withdrawn and that during the life-time of the widow a certain sum should be paid to her by the mortgagee in lieu of maintenance, the rest of the profits of the property (which was in possession of the mortgagee) being divided between him and Ram Din. It was further agreed that after the decease of the widow Ram Din and the mortgagee should divide the property in equal shares. In pursuance of this agreement Ram Din applied to have the suit dismissed and it was dismissed accordingly. The terms of the agreement were not embodied in the decree. Ram Din survived the widow. He died some time ago and was succeeded by his son, the present plaintiff. The present suit was brought by the plaintiff for recovery of the entire property left by Bhagwant and which had been mortgaged by Bhagwant's widow to the defendant. In defence the plea was raised that the agreement entered into between the defendant and the plaintiff's father was a bar to the suit.

The Court of first instance (the Subordinate Judge) found in favour of this plea and held that the parties were bound by the contract and that the plaintiff was entitled under the terms of the contract to only a moiety of the property. This decision was upheld by the District Judge in appeal although on different grounds. The learned Judge thought that the effect of the agreement entered in between Ram Din and the defendant mortgagee was a consent by Ram Din as reversioner to the mortgage executed by *Musammat* Hansa and he, therefore, held on the authority of the case reported as *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (1) that the only right left to the plaintiff was that of redeeming the mortgage.

In appeal the principal ground taken is that as the contract relied upon by the defendant purported to convey an interest in expectancy it was invalid and the defendant could not rely upon it as conferring any title in the property upon him. In my opinion, this is a good ground of appeal and the appellant is entitled to succeed. Counsel on both sides are agreed that the judgment of the lower Appellate Court cannot be supported The Judge is clearly in error in treating the case as being one of consent given by a reversioner to a mortgage of the property made by the widow. The terms of the agreement show that there was no such consent. All that was provided was that while the widow remained alive she was to receive a certain sum from the

(1) 11 O. C. 78; 3 M. L. T. 1; 12 C. W. N. 74; 9 Bom. L. R. 1348; 6 C. L. J. 766; 5 A. L. J. 1.

profits of the mortgaged property by way of maintenance while the rest of the profits were to be divided between Ram Din and the mortgagee. Whether Ram Din as reversioner gave his consent or not the mortgage by the widow was undoubtedly valid for her life-time and the agreement does not purport to express any consent on the part of Ram Din to the continuance of the mortgage after the widow's decease. But what the agreement does do is to provide for a transfer to the mortgagee of one-half of the mortgaged property after the widow's decease and this, amounting to the transfer of an expectancy, is not a valid alienation under the provision of section 6 (*a*) of the Transfer of Property Act. The case reported in *Bajrang Singh* v. *Bhagwan Bakhsh Singh* (2) is clear authority for the proposition that a reversioner cannot transfer his chance of succeeding to an estate. In that case the facts were similar to those of the present case to this extent that the person who transferred was a Hindu reversioner whose interest was expectant on the death of the life-tenant a widow. In the course of the judgment reference is made to the ruling of the Bombay High Court which appears in *Sums-ud-din* v. *Abdul Husain* (3). In that case the whole history of the law relating to transfers of expectant interests was reviewed by Jenkins, C. J., who pointed out the results of the enactment of sections 5 and 6 of the Transfer of Property Act. He showed that in section 5 the term 'transfer' means a conveyance of property not only in present but also in future. The learned Judge went on to point out that future property in general is not expressly excepted from the operation of the Act, but only that class of future property which is described in clause (*a*) of section 6 and he goes on to say: "Looking at the whole scope of the Act I see no reason to suppose that it was intended to establish or perpetuate the distinction between that which according to the phraseology of English lawyers is assignable in law and that which is assignable in equity." Further on he says: "Having regard then to the fact that the chance of an heir-apparent is thus specially excepted from the category of transferable properties, I am of opinion that the principle that equity considers that done which ought to be done has no application." He, therefore, refused to treat an agreement executed between a Muhammadan lady and her father by which she renounced her chances of succeeding to a portion of her father's property in consideration of the payment of a sum of money as having extinguished her right of succession. It follows, therefore, that the contract now under discussion which purports to transfer property which the law declares to be incapable of transfer is not enforcible on the ground that its enforcement would constitute a violation of the law.

Two cases have been cited on behalf of the respondent, namely, *Ram Nirunjun Singh* v. *Prayag Singh* (4) and *Brahmadeo Narayan* v. *Harjan Singh* (5). In the former case it was held that though agreements to assign expectancies were void in English Law they might nevertheless be enforced in equity. This judgment, however, it may be noted, was delivered before the passing of the Transfer of Property Act and can no longer be considered a correct statement of the law for the reasons given by Jenkins, C.J., in the Bombay case above referred to. The other Calcutta case lays down the proposition that the interest of a Hindu reversioner can be assigned because it does not come within the purview of section 6, clause (*a*) of the Transfer of Property Act. The reason for this opinion appears to be that the term "heir apparent" is said not to be an accurate description of a reversioner in Hindu Law whose estate is expectant upon the death of the widow in possession. I am not prepared to follow this decision which, so far as I am aware, has not been followed in any other Court: and it may be noted that in a more recent case of the same Court, namely, *Nund Kishore Lal* v. *Kanee Ram Tewary* (6) this view of the law has been repudiated. Neither of these rulings can help the case of the respondent. In my opinion, the correct view of the law applicable to this case is that the contract was void and that there is no question of its being binding on the plaintiff so as to stop him

(2) 11 O. C. 301.
(3) 31 B. 165; 8 Bom. L. R. 781.
(4) 8 C. 138; 10 C. L. R. 66.
(5) 25 C. 778.
(6) 29. C. 355.

RAZIUDDIN HUSSAIN v. TAHARAT HUSSAIN.

from asserting his claim to the entire property in suit.

I allow the appeal, set aside the decree of the Court below and direct that the plaintiff's claim be decreed in full with costs in all three Courts.

Appeal allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1543 OF 1909.

July 12, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

Syed RAZIUDDIN HUSSAIN AND OTHERS —DEFENDANTS—APPELLANTS

versus

DR. TAHARAT HUSSAIN—PLAINTIFF—RESPONDENT.

Bengal Estates Partition Act (VIII B. C. of 1876), s. 89—Land of dwelling-house of one proprietor allotted to another—Mistake in fixing rent—Trespasser—Suit in ejectment—Remedy—Assessment of rent—Decree for rent—Limitation, no question of, as no rent had been yet assessed.

In a partition proceeding, the land on which the dwelling-house of one proprietor stood was allotted to another proprietor and the statutory duty cast upon the Revenue authorities to fix the rent was not performed by reason of the mutual mistake of the Court and the parties:

Held, that the proprietor to whom the land was allotted could not treat the proprietor of the dwelling-house as a trespasser, nor would a suit for ejectment lie against the latter:

Held, also, that upon the rent being assessed—a direction to assess the rent in this case having been given—the plaintiff was entitled to a decree for rent, and that no question of limitation could arise as rent had not yet been assessed.

Appeal from the decree of the District Judge of Gaya, dated July 1st, 1909, modifying that of the third Munsif of that place, dated March 31st, 1909.

Babus *Mahendra Nath Roy*, *Lachmi Narain Singh* and *Kulwant Sahay*, for the Appellants.

Moulvis *Shamsul Huda* and *Mustafa Khan*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the defendants in an action in ejectment. The plaintiff and the predecessor-in-interest of the defendants were proprietors of a *Mouzah* Mukhdumpur Kazi Chak. In 1893 a partition of the *Mouzah* was completed under the Bengal Estates Partition Act, 1876. The result of the partition was that plot No. 82, upon which the dwelling-house of the defendants stands, was allotted to the plaintiff. The partition was completed and possession delivered on the basis thereof on the 6th March 1898. On the 17th September 1908, the plaintiff commenced this action for recovery of possession on the ground that upon completion of partition and delivery of possession, the defendants became trespassers and were not entitled to continue in occupation of their dwelling-house which had fallen into the share allotted to the plaintiff.

The Court of first instance dismissed the suit. Upon appeal the District Judge has made a decree for ejectment. In the present appeal the defendants have assailed that decree on the ground that in view of certain orders of the Revenue authorities to which we shall presently refer, no decree for ejectment ought to have been made against them.

It appears that, during the progress of the partition proceedings, the present plaintiff took objection to the proposed allotment on the ground that plot No. 82, which contained the dwelling-house of the predecessors of the defendants, had fallen in his share. This objection was overruled by the Deputy Collector, who stated in his order that section 89 of Act VIII of 1876 would apply. The plaintiff was not satisfied with this order. When the papers were submitted to the Collector for confirmation of the allotment made by the Deputy Collector, the objection was repeated and overruled. It has been stated to us that the objection was reiterated also before the Commissioner and met with the same fate. No rent, however, was assessed in accordance with section 89, and after possession had been delivered to the parties on the 6th March 1898, the predecessors of the defendant on the 1st April following invited the attention of the Deputy Collector to the fact that no rent had been assessed and prayed that rent might be assessed as contemplated by section 89. This application was refused on the ground that it had been made too late. The question, which now arises for consideration, is what are the rights of the parties in view of the circumstances stated? The District Judge has held, upon the authority of the decisions in *Musammat Nawab Begum* v. *Rustum Khan* (1); *Laikhram* v. *Ghumnee* (2) and *Wazihuddin* v. *Syed Mozhar Hossain* (S. A. No. 522 of 1902, un-

(1) 2 Agr. H. C. R. 149.
(2) 3 Agr. H. C. R. 298.

reported), that the defendants are in the position of trespassers and are liable to be ejected. In our opinion, the cases relied upon are distinguishable and do not assist us in the solution of the question raised. The two cases before the Agra High Court merely recognise the doctrine that upon the completion of partition proceedings, the owners become the proprietors of the land separately allotted to them and cease to be joint owners of the entire land. The necessary inference from this proposition is that they cease to be joint proprietors of all the lands and become the sole proprietors of the lands specifically allotted to them; in other words, after partition no proprietor can claim to continue in occupation of any land not specifically allotted to him. The decision of this Court in the case mentioned has no application to the circumstances of the present litigation. It related to a *peelkhana* (stable for elephants) which could not in any sense be described as a dwelling house within the meaning of section 89 of the Bengal Estates Partition Act, 1876. In the case before us there is no room for controversy that the intention of the Revenue authorities was that the particular plot now in dispute should be dealt with under section 89 of the Bengal Estates Partition Act. The present plaintiff started with the objection that the land had been allotted to him although thereupon stood the dwelling-house of the predecessors of the defendants, at that stage he was evidently anxious that the land should not be allotted to his share. The order thereupon passed was that his objection was not tenable in view of section 89 of the Estates Partition Act. It has been contended by the learned Vakil for the respondent that it thereafter became the duty of the predecessor of the defendants to invite the Revenue authorities to assess the rent mentioned in section 89 and as they failed to have the rent assessed, they are liable to be ejected. We are not prepared to accept this contention as well founded. What obviously happened was that a mistake was made by both the parties as also by the Deputy Collector. In 1895 when the Deputy Collector decided that section 89 would apply to the land now in dispute the parties must have understood that in due course the rent mentioned in that section would be assessed. Section 89 provides that if a dwelling-house belonging to one proprietor is situated on any land which it may be necessary to include in the separate estate of another proprietor, the owner of such house may retain that with the offices, buildings and grounds immediately attached thereto upon agreement to pay rent for the land occupied by such dwelling-house, offices, buildings and grounds to the proprietor of the separate estate in which such land is included, the limits of the land so occupied and the rent to be paid for it in perpetuity shall be fixed by the Deputy Collector and shall be stated in the paper of partition. The reasonable interpretation of the order of the Deputy Collector is that the plaintiff who took the objection which proved unsuccessful should invite the Deputy Collector to assess the rent which he was to receive in view of the fact that section 89 was held applicable to the case. But whether this was so or not, the defendants or their predecessors might very well have expected that rent would be assessed in ordinary course by the Deputy Collector pursuant to the order which he had made. The result of the mistake by the parties and the Deputy Collector is that rent has not been assessed. The learned Vakil for the respondent has contended that the inference is that the defendants are trespassers and that it is not open to a Civil Court to afford any relief to the defendants. We are not prepared to accept this contention as well founded. The statutory duty which was cast upon the Revenue authorities has not been performed, and, as already explained, it was not performed by reason of the mutual mistake of the Court and the parties. Under these circumstances, we are of opinion that we are not powerless to do justice and afford complete relief to the parties.

The proper course to pursue now is to have the rent assessed and that rent ought to be assessed in conformity with the provisions of section 89. We shall, therefore, direct the District Judge to request the Deputy Collector to assess the rent payable in perpetuity in respect of this land under section 89 of the Bengal Estates Partition Act, 1876. When the Deputy Collector has assessed the rent, subject to the result of any possible appeal to the superior Revenue authorities as mentioned hereafter, that will

be declared to be the rent payable by the defendants to the plaintiff. The learned Vakil for the respondents has further argued with considerable force that the defendants have hitherto enjoyed this land without any payment to the plaintiff, and they cannot justly escape payment of rent for all these years. We are of opinion that this contention is well founded, and that to prevent injustice it is necessary to direct that the defendants should pay the rent which would have accrued due, had it been duly assessed by the Deputy Collector. We, therefore, direct further that when the rent has been assessed by the Deputy Collector, the District Judge will make a decree in favour of the plaintiff for all arrears of rent at that rate from the date of the delivery of possession, that is the 6th March 1898, up to the date of the commencement of this suit, namely, the 17th September 1908. The net result of this litigation, therefore, is that although the plaintiff is not allowed a decree for ejectment, he will have a decree declaring his title to receive the rent which may hereafter be determined by the Deputy Collector from the defendants; and he will also have a decree for all arrears of rent.

We may add that as the rent will be assessed by the Deputy Collector under section 89, before his decision is accepted and acted upon by the District Judge, it will be open to the parties to proceed by way of appeal to the Collector and the Commissioner under the provisions of sections 142 and 143 of the Bengal Estates Partition Act; in other words, under our directions in 1911 proceedings will be taken which might and ought to have been taken in 1898.

As we have made a decree for rent from the 6th March 1898 up to the 17th September 1908, it is desirable to point out that no question of limitation arises, in view of the fact that rent has not up to the present time been assessed.

The result is that this appeal is allowed, the decree of the District Judge discharged and the case remanded to him in order that the directions given in this judgment may be carried out. Each party will bear his own costs throughout the litigation.

Appeal allowed; Case remanded.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 123 OF 1910.

June 7, 1911.

Present:—Mr. Evans, J. C., and Mr. Lindsay, A. J. C.

Chaudhri RAGHUBIR SINGH—PLAINTIFF—APPELLANT.

versus

Chaudhri UMRAO SINGH—DEFENDANT—RESPONDENT

Registration Act (XVI of 1908), s. 17 (b)—Agreement to refer to arbitration—Registration—Partition of estate settled by written agreement to refer to arbitration—Admissibility of agreement in evidence without registration—Agreement complete before formally written—Terms as a rule settled before writing—Pleader's fee—Costs—Practice.

In every case where an agreement is reduced to writing, the writing is a record of terms which have already been settled between the parties. Their minds are made up before they advance to the stage of writing, the terms are not settled between them as the writing proceeds, and, therefore, strictly speaking written agreements in all cases are subsequent in point of time to the settlement of the terms which they purport to record. But the two operations of mental agreement and of putting down the terms of the agreement on paper constitute only one transaction.

An agreement to refer to arbitration recited *inter alia* "the executants have agreed and consented to divide the estate in dispute and accordingly they appoint .....arbitrators and an umpire and agree that the arbitrators shall partition the estate and thereupon each executant shall obtain proprietary possession of his respective share as declared by the arbitrators." It was found on evidence that this agreement was the only record of matters which had been settled before it was executed and there was no evidence of any agreement, independent of the instrument, to partition the estate:

Held, that the agreement was inadmissible in evidence for want of registration.

Sakharam Krishnaji v. *Madan Krishnaji*, 5 B. 232 and *Chamanbu Javji Mahomed Ali* v. *Multan Chand Siva Ram*, 20 B. 562, referred to.

Where a certificate by a Pleader of the amount received by him as his fee was lodged in Court after arguments had commenced the amount of fee was not allowed as costs.

Appeal against the order of the Subordinate Judge, Unao, dated the 3rd September 1910.

Babu *Bisheshar Nath Srivastava*, for the Appellant.

Pandit *Gokaran Nath Misra*, for the Respondent.

JUDGMENT.—This appeal arises out of proceedings taken under clause 17 of the second Schedule to the Code of Civil Procedure to have filed in Court a certain agreement alleged to have been executed on the 13th December 1907, by which the parties,

RAGHUBIR SINGH v. UMRAO SINGH.

Raghubir Singh and Umrao Singh, undertook to refer certain matters to arbitration.

The property affected by the agreement is the Saraosi Taluqa in the Unao District. The last male owner of this property, *Chaudhri* Feteh Bahadur Singh, died without issue on the 25th December 1905. He was succeeded in possession by his widow *Musammat* Mithan Kuar who, in turn, died on the 17th April 1907. The estate was then seized by one *Musammat* Bitan Kuar who was the widow of a deceased brother of Fateh Bahadur. Her possession was disputed both by Umrao Singh and Raghubir Singh, the parties to the agreement now in suit, and eventually, as the result of criminal proceedings taken under Chapter XII of the Code of Criminal Procedure, Raghubir Singh and a son of Umrao Singh named Chandan or Chandrika Singh were bound over to keep the peace. Mutation of names was made in favour of *Musammat* Bitan Kuar.

With regard to the relationship between the parties it may be noted that Umrao Singh was the nearest male reversioner alive at the date of Mithan Kuar's death: Raghubir Singh the other claimant is one degree farther removed. He is the son of a brother of Umrao Singh. According to Raghubir Singh's case his right to the estate is based upon a custom in the family by which uncles and nephews succeed together.

After mutation had been made in favour of Bitan Kuar, Umrao Singh brought a suit for recovery of the Taluqa and got a decree against Bitan Kuar on the 29th June 1908. This decree has become final. While this suit was pending, it is alleged that a written agreeement was executed by Raghubir Singh and Umrao Singh on ths 13th December 1907 by which it was agreed to appoint arbitrators to divide the Taluqa between the parties. It is alleged that this document was drawn up in pursuance of certain negotiations between the parties resulting in an understanding that Raghubir Singh was to assist in the prosecution of Umrao Singh's suit by giving evidence for him and helping him in other ways as well as by abstaining himself from instituting a suit to enforce his own claim.

Raghubir Singh in his application to have the agreement filed in Court set out that he had duly performed his part of the contract. He alleged that Umrao Singh had refused to perform his part and he, therefore, asked that the agreement to refer should be executed through the Court. Various pleas were raised in defence. Umrao Singh denied execution of the agreement. He also pleaded that it was void for want of consideration, that it was invalid for want of compliance with the provisions of the Oudh Estates Act (I of 1869) and that as the deed embodying the agreement was unregistered it could not be enforced. The Subordinate Judge dismissed the claim, finding (1) that it was not proved that Umrao Singh was a party to the deed, and (2) that in any case the written instrument was bad for want of registration.

The other issues in the case were not decided.

The first ground taken in appeal is that the first of these findings is wrong and that it was proved that Umrao Singh did execute the agreement in question. We are of opinion, after a careful consideration of the evidence, that this contention must be upheld. We think that the Subordinate Judge has given no adequate reasons for refusing to believe the evidence produced by the plaintiff in support of his story that Umrao Singh did execute the agreement. He has attached undue importance to certain discrepancies in the statements of the witnesses which, in our opinion, are attributable rather to lapse of memory on their part than to a conspiracy between them to give false evidence in support of the plaintiff's case. The original agreement was brought into Court by Shanker Singh, the person who had been appointed umpire between the parties, and no reason can be given for supposing that he has laid himself out to assist the cause of Raghubir Singh by procuring a false instrument. Shanker Singh brought the document into Court on the 15th March 1910. No questions were asked of him as to how he came to have possession of it, but there is evidence on the record to show that it was made over to him directly after it was written and presumably he had custody of it ever since it was prepared in December 1907. The document bears what purport to be the signatures of the parties and of no less than five attesting witnesses. It also bears a signature said to be that of Chandan Singh, the son of Umrao Singh, who signed as an executant, although he was not a party to the deed. This latter fact has been strongly relied upon as proof that the document is a forgery, but a very clear and reasonable

RAGHUBIR SINGH v. UMRAO SINGH.

explanation of this fact has been given which, in our opinion, ought to be accepted. It is admitted that Chandan Singh has been acting as his father's attorney for a long time. Umrao is an old man and unable to look after his own business properly. When the deed was prepared Chandan at once signed on behalf of his father, but Raghubir refused to accept execution by him and insisted upon execution by Umrao Singh who was himself present at the time. Accordingly, Umrao Singh put his name to the deed though not at the particular spot which the scribe had designated for the signatures of the executants. The scribe of the deed, Shiam Manohar Lal, was examined and he swore that he wrote the deed and that it was signed by Umrao in the Cutcherry compound at Unao. Bishambhar Dayal, a petition-writer who attested execution, also swore that Umrao Singh signed the document.

Jodha Singh, an attesting witness, also deposed to execution of the deed by Umrao. This witness was unable to identify his own signature on the document, saying that his sight had failed since the time he signed. Bhop Singh, another attesting witness, is dead but his son Laiq Singh who signed for him swears that the deed was duly executed. He explains that he signed for his father as the latter was suffering from a boil on his hand at the time.

Subai Singh, another attesting witness, also deposed to execution of the deed. The only attesting witness not produced was one Girand Singh whose signature was made for him by one Ram Charan. It is proved that the plaintiff tried to secure the attendance of these two persons by having summonses issued to them. The summonses could not be served and their evidence was accordingly not taken. As against this mass of evidence, there is particularly nothing but the interested statements of Chandan and Umrao. We find ourselves unable to believe either of these witnesses. The former in particular appears to be a man who would stick at nothing in way of giving false evidence. It was stated that Chandan is the man who actually purchased the stamp-paper upon which the agreement was drawn up and we have every reason to believe that this statement is true. The other evidence for the defendant consisted of the statements of certain witnesses who tried to make out that Umrao Singh was not and could not have been present at the date when the deed was executed. We can attach no value to evidence of this description.

We are satisfied that Umrao Singh did, as a matter of fact, execute the agreement and we find accordingly. The second and third grounds of appeal relate to the validity of the written agreement and in this connection the question is whether the Court below was right in holding that the deed was invalid for want of registration. This question must be answered with reference to the provisions of section 17 (*b*) of the Registration Act which render compulsory the registration of non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards to or in immoveable property.

According to the view of the Court below it was this document which created the title asserted by the plaintiff to get the estate partitioned. For the appellant it is argued that the deed was not registrable as it did not bring about any new legal relation between the parties, but merely recites as a fact a particular state of things which had already come into existence by agreement between the parties and provided by a reference to arbitration means for giving effect to what had already been arranged before the deed was written. Reliance was placed upon the rulings reported in *Sakharam Krishnaji* v. *Madan Krishnaji* (1) and *Chamanbu Javji Mahomed Ali* v. *Multan Chand Siva Ram* (2).

In order to estimate the force of this contention it is necessary to refer to the terms of the instrument itself as also to the circumstances attending its execution. The deed begins with a recital of the history of the Taluqa from the time of the decease of Fateh Bahadur Singh, showing that both parties had advanced claims to the estate. It refers to the suit filed by Umrao Singh against Bitan Kuar and states that Raghubir Singh had been hitherto prevented by want of funds from bringing a suit on his own account, but was ready to do so at the date of the instrument. Then we have a recital of the nature of the defence set

(1) 5 B. 232.
(2) 20 B. 562.

up against Umrao Singh by *Musammat* Bitan Kuar and after this we come to the terms of the agreement. It is recorded that in consequence of the facts previously stated the executants "have agreed" (*tai paya hai*) that Raghubir shall refrain from instituting a suit on his own account, that he shall give evidence and procure evidence in support of Umrao's case and shall abstain from helping the defendant. In consideration of these promises it is then stated that Umrao Singh has agreed and consented to divide the estate in dispute with Raghubir Singh (*ilaqua mutnazia taqsim kar lena manzur o qubul kar liya hai*). Accordingly, the executants appoint arbitrators and an umpire and agree (and put the agreement in writing), (1) that the arbitrators shall partition the estate in such shares as they may deem fit (acting in accordance with the custom obtaining among the Prahar Thakurs) and (2) that each executant shall obtain proprietary possession of his respective share as declared by the arbitrators, and that Raghubir Singh shall be entitled to get possession either by taking directly from Umrao, or by seeking the aid of the Courts. The learned Counsel for the appellants lays stress upon certain words "*tai paya hai*", "*qubul kar liya hai*" as showing that the document is referring to an agreement already consummated. The above words, he says, are in the past tense and must be taken to relate to an antecedent transaction. Where the parties are recording what is taking place at the moment they use the present tense, *e.g.*, "*iqrar karte hain o likh dete hain*". We do not think there is much force in this contention. In every case where an agreement is reduced to writing, the writing is a record of terms which have already been settled between the parties. Their minds are made up before they advance to the stage of writing, the terms are not settled between them as the writing proceeds, and, therefore, strictly speaking written agreements in all cases are subsequent in point of time to the settlement of the terms which they purport to record. But the two operations, that of mental agreement and that of putting down the terms of the agreement on paper, constitute only one transaction. It cannot, therefore, be argued that the language of the past tense in a document necessarily imports that an agreement to which it relates came into existence long before and independently of the transaction of which the writing is the record. Ordinarily, the presumption should be the other way. On the face of it, the document now in suit does purport to bring into existence a right on the part of Raghubir Singh to have a share in the estate and provides for his getting proprietary possession of the share once its extent had been determined by the award of the arbitrators. It was, therefore, for the plaintiff to make out the existence of circumstances which rendered section 17 (*b*) of the Registration Act inapplicable to the transaction. He might have done so by proving that a valid agreement for division of the property had been made before and independently of the document in question, but he failed to do so. His evidence in this respect is hopelessly vague and unconvincing. He refers to previous talks with Chandan Singh, (not Umrao) in which he was promised a share of the property. He produced a retired Tehsildar whose evidence, though we have no reason whatever to doubt it, does not support the case of a previous agreement to divide. This witness refers to two conversations which took place some months before the date of the agreement at one of which he thinks Umrao was also present. He says there was some talk of giving Raghubir a share if he kept quiet. But the plaintiff himself did not say that any agreement upon which he relied was come to at the dates when these conversations took place. On the contrary, he stated that the negotiations which ended in the agreement to divide the property took place only 5 or 6 days before the deed was written, *i. e*, in December 1907. Not a single witness was produced who took part in these so-called negotiations and the only possible conclusion is that whatever passed between the parties was settled in a few days and was recorded in the agreement now before us. There seems to be no doubt whatever that this agreement is the record of matters which had just been settled before it was written, and that there never was any agreement between the parties independent of the instrument. We hold, therefore, with the Subordinate Judge, that the plaintiff's title was declared by the instrument, that registration was compulsory and that the want of registration renders the agreement incapable of enforcement.

On the merits, therefore, the appeal cannot

JAFRI BEGAM v. GHASU KHAN.

succeed. The only other point raised for the appellant relates to certain items of costs.

During the course of the trial the case was adjourned for several days as there was some talk of compromise between the parties. On the 3rd June the plaintiff informed the Court that he was unwilling to come to terms. The case had to proceed and a fresh date had to be fixed. On a motion made on behalf of the defendant for the award of costs the Subordinate Judge directed the plaintiff to pay Rs. 235 to the defendant, *viz*, Rs. 210 on account of fees of three Pleaders for three days and Rs. 25 on account of costs of witnesses. It has been pointed out that there is nothing on record to show that the three Pleaders were in attendance on the three days for which their fees were allowed. All that appears is that one Pleader was present on the 1st June. The case does not appear to have been up for hearing at all on the 2nd June, and on the 3rd June no Pleader is mentioned by name as having been present though there is a note to the effect that the defendant's "Pleader" made some representation as to the awarding of costs.

Be that as it may, we do not think the order of the Subordinate Judge mulcting the plaintiff in these costs was a proper one. It is clear that both sides asked for adjournment with a view to compromise and the fact that the plaintiff in the end told the Court taht he was unable to come to terms was no reason whatever for obliging him to pay three days' costs to the other side. It almost looks as if the Subordinate Judge thought the plaintiff was in fault and responsible for the failure of the negotiations, but there could be no reason for making any such assumption. Both sides asked for adjournment and each side should have been made to bear its own costs, when the negotiations for the compromise fell through. The appellant is, in our opinion, entitled to have this sum of Rs. 235 back from the other side.

The next point relates to a sum of Rs. 1,405 awarded to the defendant on account of Pleaders' fees. It is shown that the certificates of payment of these fees were lodged in Court after arguments had commenced and, this being so, the fees should not have been allowed in taxing costs between the parties. The present rule came into force in March 1910 and was applicable to this case. It is necessary that the rule should be rigidly enforced.

Another matter referred to by the appellant's learned Counsel is an item of Rs. 30-12 for miscellaneous costs inserted in the decree. It is said that this includes the item of Rs. 25 awarded to the defendant on account of costs of witnesses under the order of the 3rd June 1910 above referred to by which Rs. 235 were ordered to be paid as costs of adjournment, and that as this latter amount was paid at the time the plaintiff has been charged twice over. We have had the record examined and find that the sum of Rs 25 is not included in the item of Rs. 30-12. The appellant cannot, therefore, succeed so far as this sum of Rs. 25 is concerned.

We allow the appeal so far as to declare that the appellant is entitled to have a refund of Rs. 235 from the respondent and to be relieved of the payment of Rs 1,405. Pleaders' fees, allowed in the lower Court's decree. In other respects, the appeal is dismissed and costs in this Court will be apportioned according to the measure of the success and failure of the parties respectively.

Appeal partly allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 14, 15 and 16 OF 1911.

August 17, 1911.

Present:—Mr. Evans, J. C., and Mr. Lindsay, A. J. C.

Musammat JAFRI BEGAM—PLAINTIFF—APPELLANT

versus

GHASU KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), *s.* 31—*Foreclosure of mortgage of* 1869—*Limitation.*

A mortgage by conditional sale was executed on 26th March 1869, it being provided that interest on the mortgage-debt should be paid annually and that the mortgagor would be bound to deliver possession to the mortgagee in case of default in payment of the interest. The term of the mortgage was six years, the condition being that if the mortgage was not redeemed by that time the transaction would be deemed a sale. The mortgagee brought a foreclosure suit in May 1910.

Held, that the suit was within time.

Surnomoyee Dasi v. *Sri Nath Das*, 12 C. 614; *Sri Nath Das* v. *Khetter Mohun, Singh*, 16 C. 693; I. A. 16 85, referred to.

Appeal against the order of the Additional Judge, Hardoi, dated the 18th November 1910.

JAFRI BEGAM *v.* GHASU KHAN.

Mr. *Samiullah Beg*, for the Appellant.

Messrs. *A. P. Sen* and *Basdeo Lal*, for the Respondents Nos. 1 and 2.

JUDGMENT.—These appeals arise out of three suits for foreclosure brought by the appellant, *Musammat* Jafri Begam. The suits have been dismissed as barred by limitation and the only point to be decided here is whether the decision of the Court below on the point of limitation is correct. The three mortgages in suit are mortgages by conditional sale and were all executed on the same date, namely, the 26th March 1869. In all three deeds it was provided that the interest on the debt should be paid annually and there was in each case a covenant by which the mortgagors bound themselves to deliver possession to the mortgagees in case of default in payment of the interest. In each case the period of the mortgage was six years, the condition being that if the mortgage was not redeemed by that time the transaction was to be deemed a sale. The lower Court held that the suits were governed by the rule of limitation laid down in Article 135 of the First Schedule to the Limitation Act, which provides a period of twelve years for suits by a mortgagee for possession of immoveable property mortgaged. This decision was based on the authority of the case reported in *Surnomoyee Dasi* v. *Sri Nath Das* (1), the decision in which was affirmed in appeal by their Lordships of the Privy Council in *Srinath Das* v. *Khetter Mohun Singh* (2). In those cases the decision was that a mortgagee seeking foreclosure under the provisions of Bengal Regulation XVII of 1806 was, if he were not already in possession of the property, bound to bring his suit for possession within twelve years from the date of default. In the case just mentioned the mortgage was executed in November 1865 and the period expired on the 17th February 1866 on which date the mortgagor's rights to possession determined. It was held, therefore, that the mortgagee's right to sue for possession by foreclosure became extinct after the lapse of twelve years from that date and that his suit for foreclosure, brought on the 6th September 1882, after the Transfer of Property Act had come into force, was barred. It had been contended that the mortgagee could avail himself of the new remedy provided by the Transfer of Property Act by bringing a suit for foreclosure which he could not have brought under the Regulation, and that the limitation for such a suit was sixty years (Article 147, Schedule II of Act XV of 1877), but their Lordships of the Privy Council pointed out that the right of foreclosure having already been extinguished by limitation before the Transfer of Property Act could not be revived under the provisions of that Act.

In the cases now before us the facts are different. The mortgagees under these three mortgages had dual rights. They had a right to sue for possession when any default was made in the yearly payments of interest: and they had a further, and a distant right of suing for possession by foreclosure as soon as the mortgage periods expired without the mortgages being redeemed. It is the latter and not the former right which *Musammat* Jafri Begam, who is now the sole mortgagee, is trying to enforce in these suits and in considering the question of limitation we are not concerned with anything relating to the other right of suing for possession on account of default in payment of interest only. According to the rule of limitation laid down by the Privy Council, the mortgagee here had a right to sue for possession by foreclosure within twelve years from the 26th March 1875, the date on which the period for redemption came to an end in each case. Obviously, therefore, this right had not been lost (as it had in the case before their Lordships) by the time the Transfer of Property Act came into force in 1882. The right to foreclose being still in existence when that Act was passed, the only remedy for enforcing it was that provided by the Act, namely, a suit for foreclosure. The Act did away with the old procedure laid down in the Regulation and the mortgagee was no longer at liberty to get foreclosure by giving the year's notice provided by the Regulation and by making application to the Court, or suing for possession after the expiry of the year of grace.

This new remedy was governed by the rule of limitation contained in Article 147 of the Limitation Act (XV of 1877) which

(1) 12 C. 614.
(2) 16 C. 693; 16 I. A. 85.

gave the mortgagee sixty years to bring his suit for foreclosure. Such, at any rate, was the view of the law adopted in these Provinces up till the date of the decision of their Lordships of the Privy Council in *Vasudeva Mudaliar* v. *Srinivasa Pillai* (3). Their Lordships held in that case that Article 147 applied only to suits brought upon mortgages executed in the English form. This judgment led to an alteration in the law of limitation and under the new Limitation Act (IX of 1908) suits for foreclosure like the present are subject to a twelve years' rule. The new Act, however, in section 31 makes a special provision for foreclosure suits in these Provinces in order to avoid the effect of the Privy Council ruling referred to. The section enables a mortgagee here to bring his suit for foreclosure within two years of the date of the passing of the Act or within sixty years from the date when the mortgage-money became due, whichever period expires first. Under this section, therefore, the plaintiff in these three suits was entitled to come to Court up till the 7th August 1910, the Act having been passed on the 7th August 1908. She filed the plaints in May 1910 and the result is that all three suits are within time.

We are of opinion that the decision of the Court below is wrong. We allow these appeals, set aside the decrees of the Court below and remand the suits for decision upon the merits.

The appellant will get her costs from the respondents in this Court. Costs in the Court below will abide the result.

Appeal allowed; Cases remanded.

(3) 30 M. 426; 17 M. L. J. 444; 11 C. W. N. 1005; 4 A. L. J. 625; 6 C. L. J. 255; 2 M. L. T. 333; 9 Bom. L. R. 1104.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 458 OF 1911.

January 20, 1912.

Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.

BIRJNATH SARIN—PLAINTIFF—APPELLANT.

versus

SERGEANT F. M. BYRNE—DEFENDANT—RESPONDENT.

Defamation—Words "most insolent upstart," whether defamatory.

The plaintiff, a respectable Indian gentleman, obtained a money-decree against one Tulsi *chamar* who worked in a grass farm managed by the defendant. The plaintiff took out execution of the decree, and the process issued by the Court somehow came into the hands of the defendant upon which he wrote the following words:—

"The amount Rs. 41-2 has been lying in my office since the date of my judgment. It appears to me that this is a case of malicious prosecution and so it is a Government case and does not concern Tulsi whatsoever. The decree-holder is a most insolent upstart....."

Held, (*per Chamier J.*)—That the words 'most insolent upstart' were not defamatory.

Held, (*per Karamat Husain, J.*)—That the defendant was liable in damages to the plaintiff.

Second appeal from the decision of the District Judge of Agra, dated the 24th February 1911.

Mr. *Gulzari Lal* (with him Messrs. *Benode Behari* and *S. K. Dar*), for the Appellant.

JUDGMENT.

CHAMIER, J.—This is a second appeal in a suit for damages for defamation.

The Subordinate Judge gave the plaintiff a decree for Rs. 400 but his decision was reversed by the District Judge who held that the expressions used by the defendant, though intemperate, were not defamatory. The facts are that the plaintiff obtained a decree for a small sum against Tulsi, a *Chamar* employed in a grass farm managed by the defendant. He took out execution and a process was issued to Tulsi which somehow or other came into the hands of the defendant who wrote on it:—"The amount Rs. 41 2 0 has been lying in my office since the date of my judgment (*sic*). It appears to me that this is a case of malicious prosecution and so it is a Government case and does not concern Tulsi whatsoever. The decree-holder is a most insolent upstart. He came to my bungalow on a Sunday and I told him my office hours and then he would not grant a stamped receipt. The next time he came he was most insolent and was told to wait but would not and went away without the amount in question."

The plaintiff's case is that the words "the decree-holder is a most insolent upstart" are defamatory. He does not complain of the rest of the words used. The Subordinate Judge says that the plaintiff is a very respectable man who mixes in the society of the leading *kasies* of Muttra and that "the tendency and

effect of the words used were to defame and degrade him and render him odious and contemptible". The District Judge says that the words "insolent upstart" might, in certain circumstances, be defamatory, but that they must be read with the context in which they appear and that they were not defamatory in the present case. I agree with the learned District Judge that the endorsement on the process taken as a whole means no more than that the plaintiff had behaved rudely and had declined to wait to be paid or to give a stamped receipt. It seems to me quite clear that the words complained of were not intended to throw any reflection on the birth, reputation or general character of the plaintiff nor would it be understood by any reasonable person acquainted with the English language as throwing any such reflection upon him. It was suggested that they would be regarded as holding the plaintiff up to ridicule. I cannot accept this suggestion. As the learned Judge held that the words complained of might, in certain circumstances, be defamatory but in this particular case were not, I doubt whether a second appeal is admissible at all. In England the question would have been left to the Jury. If, however, a second appeal lies, I hold that it should be dismissed.

KARAMAT HUSAIN, J.—An action was brought by the plaintiff for damages for a libel. The Court of first instance decreed the claim. The Court of first appeal found that the words "a most insolent upstart" contained in the endorsement made by the defendant on the process issued to Tulsi were not defamatory and reversed the decree of the first Court. The learned District Judge, however, said in his judgment:—"Now it is easy to conceive cases in which the use of the words 'insolent upstart' might be distinctly defamatory; for instance, if they are used towards a servant seeking employment."

In second appeal it is contended that the written words "a most insolent upstart" are libellous. My learned colleague is of opinion that they are not, but I am unable to agree with him.

To publish any words in writing without justification which bring a person into contempt or ridicule is a libel.

Lord Holt, C. J. in *Crop* v. *Tilney* (1), (Mich. 5, Will 3 B. R.), said:—"Scandalous matter is not necessary to make a libel, it is enough if the defendant induces an ill opinion to be had of the plaintiff, or to make him contemptible and ridiculous." Best, C. J., in *Tuam (Archbishop)* v. *Robeson* (2) said:—"It is not easy to perceive why any distinction should be made between written and oral slander; but the case referred to, *Thorley* v. *Lord Kerry* (3), has established it too firmly to be shaken. According to that case, in order to support an action for oral slander, something criminal must have been imputed; but in a libel any tendency to bring a party into contempt or ridicule is actionable, and, in general, any charge of immoral conduct, although in matters not punishable by law."

Descending to the particular words which may be libellous, I find that to write that a person "Stunk of brimstone and had the itch" was held to be a libel; see *Villiers* v. *Mousley* (4) (Eastern Term 9 Geo. III 1769). In the same case Gauld, J., said: "for speaking the words rogue and rascal of any one, an action will not lie, but if those words were written and published of any one I doubt not an action would *lie*." The head-note in *J'Anson* v. *Stuart* (5) contains what follows:—"To print of any person that he is swindler is a libel....." and the head-note in *Cox* v. *Lee* (6) contains what follows:—"To charge a man with ingratitude is libellous." "An untrue statement that a person was at a past time in pecuniary difficulties may be libellous." On the basis of the last four mentioned cases N. C. Falkord in the 7th Edition of his work the Law of Slander and Libel on page 70 says: "Scandalous matter is not necessary to make a libel. It is enough if the defendant induces an ill opinion to be had of the plaintiff as make him contemptible and ridiculous [*Crop* v. *Tilney* (1)]." And accordingly it is libellous to publish and charge a man (by writing) with want of honesty, civility, humanity, veracity or gratitude [*Villiers* v. *Mousley* (4); *J'Anson* v. *Stuart* (5); *Cox* v. *Lee* (6)]. In the Digest of the Law of Libel and Slander by W. Blake Odgers, 4th Edition, on page 18 I find: "It is libellous to state

(1) 3 Salk. 226.

(2) 5 Bing. 17; 2 M. & P. 32; 6 L. J. (o. s.) C. P. 199; 30 R. R. 530.

(3) 4 Taunt. 355; 13 R. R, 626.

(4) 2 Wils. 403.

(5) (1787) 1 T. R. 748; 1 R. R. 392

(6) L. R. 4 Ex. 284; 21 L. T. 178; 38 L. J. Ex. 219.

MAHARANI v. RAM ADHAR.

in a newspaper of a young nobleman that he drove a lady and killed her and yet attended a public ball that very evening (although this only amounts to a charge of unfeeling conduct). *Churchil* v. *Hunt* (7)." Taking into account the sentiments and ideas of the Indian gentry, I have no doubt that if a person writes of another who is a member of a very respectable family that he is a most insolent upstart, these words bring him into contempt and ridicule in the eyes of the persons of his class. The cases of *Jogeswar Sarma* v. *Dinaram Sarma* (8) and *Shoobhagee Koeri* v. *Bakhori Ram* (9) support me.

For the above reasons, I would set aside the decree of the lower Appellate Court and decree the plaintiff's claim for damages with costs including fees in this Court on the higher scale. I would reduce the amount of damages to a nominal one, namely, one pie.

BY THE COURT.—That the appeal be dismissed.

Appeal dismissed.

(7) (1819) 1 Chit. 480; 2 B. & A. 685; 22 R. R. 807.
(8) 3 C. L. J. 140.
(9) 4 C. L. J. 390.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 296 OF 1910.

August 8, 1911.

Present:—Mr. Evans, J. C.

Musammat MAHARANI—PLAINTIFF—APPELLANT

versus

RAM ADHAR—DEFENDANT—RESPONDENT.

Pre-emption—Pre-emptor not suing bona fide *for herself—Maintainability of suit.*

A pre-emption suit not instituted *bona fide* with the object of excluding a stranger from the village is not maintainable.

Abdul Wahid Khan v. *Shaluka Bibi*, 21 C. 496; 21 I. A. 26; *Khurshad Ali* v. *Rashid Hussain*, 9 O. C 331, referred to.

Appeal against the order of the Additional Judge, Lucknow, dated 23rd June 1910, reversing that of the Sub Judge, Hardoi, dated the 6th December 1909.

Babu *Ishwari Dayal* and *Hari Kishen Dhon*, for the Appellant.

Pandit *Gokaran Nath Misra*, for the Respondent.

JUDGMENT.—This is an appeal in a pre-emption case. The facts of the case are set forth in the order of this Court dated the 13th March 1911. The case was remanded for findings on certain issues. These findings have now been received. They show that it is not proved that the appellant was an interloper, but she was in legal possession of her husband's estate when she executed the mortgage-deed in favour of Reotiram Objections have been taken to these findings on behalf of the respondent. I do not propose to consider them as in my view of the case the appeal, even assuming that these findings are correct, should be dismissed.

In order to make the judgment complete in itself, I propose shortly to state the facts a second time. Certain *sir* land belonged to three brothers Basant, Ujagar and Rama, Rama and his son disappeared. Ujagar is dead and is represented by his son Bhola. defendant No 2. The appellant is the widow of Basant. In June 1902 she, purporting to act for herself and as guardian of the minor Bhola, mortgaged the property for Rs. 1,000 to Reotiram placing him in possession for 50 years. In 1907 Bhola, who had then apparently come of age, executed a deed transferring half of his interest in the property to the respondent. There is a recital in the deed that Reotiram had no right to hold possession under the mortgage executed by the appellant in 1902 and he, therefore, sold his share in order to eject Reotiram and recover his share of profits from him. The appellant seeks to pre-empt the property on the allegation that she is the owner of one-third share in this *sir* land and that as Bhola, the vendor, is her co-sharer and nephew she has a right to pre-empt the property as against the respondent who is a complete stranger.

The learned Additional Judge held that this deed only conveyed a right to sue for, and recover possession of, the property by setting aside the mortgage-deed and I understand him also to find that the suit is not really a *bona fide* suit instituted by the appellant, who, as a childless Hindu widow, could have no interest in the property because in any case she could not recover possession of it until 1952, or so long as the mortgage executed by her in favour of Reotiram was not set aside.

This decision is attacked on the ground that the appellant admits the title of Bhola

to the share in the property which he sold to the respondent, and the question whether the share is subject to a valid mortgage or not does not affect this case. The right of the appellant as a co-sharer to pre-empt the share sold by Bhola cannot be denied and although Reotiram might resist Bhola's vendee, the respondent, if he attempted to get possession of the share sold to him, yet the fact that a dispute might arise between the respondent and Reotiram does not and cannot affect the right of the appellant to pre-empt this property. For this reason it is urged that the rulings of the Calcutta High Court in *Abdul Wahid Khan* v. *Shaluka Bibi* (1) and of this Court in *Khurshed* v. *Rashid Husain* (2) (relied on by the respondent) do not apply. In the Calcutta case it was held that pre-emption under the Oudh Laws Act, 1876, is not applicable where the co-sharer claiming it denies the title of the co-sharer proposing to sell. In *Khurshed Ali* v. *Rashid Husain* (2) the facts were that the vendors purported to sell to the vendees a right to prosecute a law suit on their behalf in order to recover actual possession of the share inherited by them from their mother. A portion of the consideration-money was in cash, but the greater portion was left with the vendees to carry on litigation. It was held that this being the case of a sale of property not in actual possession of the vendors, it was not such a sale of immoveable property which could be the subject of pre-emption as contemplated in Chapter II of the Oudh Laws Act.

The sale-deed executed in the present case in favour of the respondent is of a nature very nearly approaching in its conditions to the sale deed which is referred to in *Khurshed Ali* v. *Rashid Husain* (1), but it may be conceded that this ruling does not strictly apply to the present case because there is no complete denial by the appellant of Bhola's title to a share in the property which he purported to sell to the respondent. But I would decide this case on much broader grounds. It has been contended in appeal, though this point was not taken in the respondent's written statement, that it is not a *bona fide* claim for pre-emption. The right of pre-emption, in its inception, is a special privilege granted to co-sharers to purchase the property which has been sold to a stranger, the reason being that a share-holder has an equitable right to purchase property from his co-sharer in order to enable him to keep it in the hands of the relations of co-sharers of the vendor thereby excluding strangers from the village. What has happened in this case? The appellant has, so far as her interest is concerned, practically parted with it for ever. According to the plaint her age is now 40. She can have no possible personal object in purchasing the share which belongs to her husband's nephew Bhola. The only person who is interested in preventing the sale-deed executed by Bhola from having effect is her mortgagee Reotiram and this suit is merely a device by Reotiram to get the better of the respondent. It is impossible to say that it is a *bona fide* suit by the appellant to get possession by pre-emption of the property sold by a co-sharer. It is, to all intents and purposes, a suit instituted by Reotiram to defeat the sale-deed executed in favour of the respondent. In other words, Reotiram is making use of the law of pre emption, as laid down in the Oudh Laws Act, as a means to settle his dispute with the respondent.

I think this contention has force. I cannot possibly find that the appellant really wishes on her own behalf to purchase the share sold by Bhola to the respondent, and on this ground alone I am not prepared to interfere with the order of the lower Court. I hold that the claim was rightly dismissed and this appeal is dismissed with costs.

Appeal dismissed.

(1) 21 C. 496; 21 I. A. 26.
(2) 9 O. C. 331.

CALCUTTA HIGH COURT

SECOND CIVIL APPEAL No. 983 of 1909.

January 19, 1912.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice N. Chatterjea.

JANKI DAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

THE BENGAL NAGPUR RAILWAY COMPANY—DEFENDANTS—RESPONDENTS.

Railways Act (IX of 1890), ss. 77, 140—Non-delivery of goods—Consignee imposing conditions wrongfully—Liability of Railway Company—Notice of claim—Service of notice—Sale of goods without observing provisions of law—Damages.

Where the non-delivery of certain goods was due to the fact that the consignees would only take de-

JANKI DAS v. BENGAL NAGPUR RAILWAY COMPANY.

livery on a condition they were not entitled to impose:

Held, that the goods remained at the Railway Company's shed at the risk of the consignees by reason of their failure to take delivery and the Company was not liable for their loss.

Where a suit was instituted against a Railway Company for compensation for loss of goods, but the method of serving the notice of claim required by section 77 of the Railways Act was not followed, nor was it shown that the claim was otherwise preferred to the Railway Administration so as to satisfy the requirements of section 77:

Held, that the suit must fail.

Where certain goods were sold by a Railway Company owing to the consignees' failure to take delivery, but in so selling the Railway Company omitted to observe the provisions prescribed by the Railways Act:

Held, that the sale was not in accordance with law, and the consignees were entitled to damages, if any.

Appeal from the decree of the District Judge of 24-Pergannahs, dated February 10th, 1909, affirming that of the Sub-Judge of Alipur, dated August 10th, 1905.

Mr. *Hyam*, Counsel, and Babu *Probodh Chandra Roy*, for the Appellant.

Mr. *S. P. Sinha* and Babu *Manmatha Nath Mukherjee*, for the Respondents.

JUDGMENT.

JENKINS, C. J.—On the 11th January 1907 the plaintiffs delivered to the defendant Company 290 bags of rice, weighing 580 maunds, for carriage from Raigarh to Shalimar. The goods have not been delivered, and the plaintiffs now claim either delivery of the goods or Rs. 2,280-10 by way of damages.

The Subordinate Judge dismissed the suit and his decree was confirmed by the District Court. From this confirming decree the present appeal has been preferred.

As the case comes before us by way of appeal from an appellate decree it is necessary to see what the facts are as found by the lower Appellate Court, for by its findings we are bound.

It is common ground that of the 290 bags all but 2 reached Shalimar, and these two were lost.

The plaintiff's case is that the 288 bags that arrived were partly empty and according to the District Judge, "The only real complaint is that the Goods Clerk refused to re-weigh the goods and issue a short certificate." And the learned Judge goes on to say: "On this we must find that the facts were that when the appellant went to take delivery of the goods demurrage was due and that they refused to take delivery without re-weighment and also refused to pay demurrage. Clearly, on such a finding the Railway Company were not bound to deliver the goods." Later in his judgment the District Judge says of the plaintiffs: "They refused to take delivery of the goods which were consigned to them except on certain conditions with which the Railway were not required by law to comply. They demanded a re-weighment and a certificate of shortage. The Railway is not required by law either to re-weigh or to certify shortage."

The result then is that of the 290 bags 2 were not delivered because they were lost, and non-delivery of the rest was due to the fact that the plaintiffs would only take delivery on a condition they were not entitled to impose.

I will first deal with the two lost bags.

Where a Railway Administration fails to deliver goods entrusted to it for carriage it may be shown that the goods were lost and then the provisions of Chapter VII of the Indian Railways Act, 1890, apply. Among these provisions is that contained in section 77 which enacts that "a person shall not be entitled to compensation for the loss ... .of goods delivered to be so carried unless his claim to the compensation has been preferred in writing by him or on his behalf to the Railway Administration within 6 months from the date of the delivery of the.....goods for carriage by Railway." By section 140 it is provided: "Any notice or other document required or authorised by this Act to be served on a Railway Administration may be served, in the case of a Railway administered by the Government or a Native State, on the Manager and, in the case of a Railway administered by a Railway Company, on the Agent in India of the Railway Company:—

(*a*) by delivering the notice or other document to the Manager or Agent; or

(*b*) by leaving it at his office; or

(*c*) by forwarding it by post in prepaid letter addressed to the Manager or Agent at his office and registered under Part III of the Indian Post Office Act, 1866."

The method of service permitted by this section has not been followed; nor has it

been shown that the claim has been otherwise preferred to the Railway Administration so as to satisfy the requirements of section 77.

The correspondence with the Goods Superintendent was manifestly insufficient for that purpose and on this point I accept the view of the Subordinate Judge in preference to that of the District Judge.

The suit, therefore, as to the 2 lost bags must fail on this ground.

The position as to the 288 bags is different. The inference suggested by receipt Exhibit 1 is that each bag at the time of delivery to the Railway Administration contained 2 maunds and the discussion before us has proceeded on that footing.

Now, it is no one's case that these 288 bags were lost: On the contrary they have been sold by the Railway Company. But though they were sold the weight of rice sold was only 427 maunds and not 576 maunds, as it should have been. How there was this difference in weight has not been clearly explained, nor is there any definite finding by the lower Appellate Court on the point. There is, however, no suggestion that the Railway Administration is in possession of the goods or that it has been guilty of wilful misfeasance in regard to them, and the only inference appears to be that the difference in weight represents goods which have been lost or destroyed.

The position then would seem to be that the suit must fail either for failure to comply with the provisions of section 77 of the Indian Railways Act, or because the goods were at the plaintiffs' risk by reason of their failure to take delivery.

As to the rest of the goods, that is to say, the 427 maunds, the position is this: The goods were sold by the Railway Company as the plaintiffs failed to take delivery, but in so selling the Railway Company failed to observe the provisions prescribed by the Indian Railways Act. The sale was, therefore, not in accordance with law.

But even if it be treated as a conversion, what is the consequence ? The plaintiffs would be entitled to damages. But, according to the findings of the lower Appellate Court, no damages have been suffered.

Then it is objected by the plaintiffs that the Railway Company was not entitled to deduct wharfage. This rests on their contention that the notification of the 3rd July 1902 was of no legal effect. But the plaintiffs cannot be allowed to advance this argument at this stage for the first time seeing that it depends on proof of facts. It clearly was not taken before the Subordinate Judge ; it is not to be found in the grounds of appeal to the District Court : and there is no reference to it in the judgment of that Court.

The result then is that the decree of the lower Appellate Court must be confirmed with costs.

N. CHATTERJEA, J.—I agree.

Decree confirmed.

PUNJAB CHIEF COURT.

CIVIL REFERENCE No. 47 OF 1911.

January 12, 1912.

Present:—Mr. Justice Chevis.

GANPAT RAI—PLAINTIFF

versus

SARDARA AND OTHERS—DEFENDANTS.

Jurisdiction of Civil or Revenue Court– Suit for recovery of arrears of rent sold to plaintiff by landlord—Punjab Tenancy Act (XVI of 1887), s 4.

A suit to recover arrears of rent in respect of agricultural land by a person to whom the landlord has sold the right to recover the arrears is cognizable by a Civil Court.

Case referred by the Divisional Judge, Gujranwala Division, at Lahore, with his letter No. 532, dated the 20th July 1911, for the orders of the Chief Court of the Punjab.

ORDER.—This is a case which has been referred by the Civil Court under section 99, Tenancy Act. The plaint was returned by the Revenue Court for presentation to a Civil Court, but the Civil Court thinks that the suit is cognizable by a Revenue Court ; hence this reference, which has been made through the Divisional Judge.

The plaint recites that defendant No. 1 is the tenant and defendant No. 2 the landlord, and that defendant No. 2 has sold to the plaintiff the right to recover three *manis* of wheat, which the defendant No. 1 owes to defendant No. 2 as rent. The mere fact that the right to recover certain arrears of rent has been sold to the plaintiff does not make him the landlord. The landlord is the person under whom the tenant holds the land—See definition of landlord in section 4, Tenancy Act. The defendant No. 1 is still

holding the land under defendant No. 2, so defendant No. 2 is still landlord and not the plaintiff. Thus this is not a suit between landlord and tenant at all, and I consider that it is cognizable by the Civil Courts.

I direct the Civil Court to proceed with the suit.

CALCUTTA HIGH COURT.
CIVIL RULE No 3676 OF 1911.
November 24, 1911.

Present: —Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice N. Chatterjea.

DUKHIMONI DASI—PLAINTIFF—PETITIONER

versus

TULSI CHARAN—DEFENDANT—OPPOSITE PARTY.

Evidence Act (I of 1872), s. 116 - Estoppel—Licensee and Licensor—Suit for use and occupation—No relationship during period in suit.

A licensee cannot be permitted under section 116 of the Evidence Act to deny that the licensor had a title to the possession of the property at the time when the license was given to him to enter, though there was no relationship of licensor and licensee subsisting between the parties during the period sued for.

Rule against the judgment and decree of the Small Cause Court of Sealdah, dated April 26th, 1911.

FACTS.—This was a suit for damages for use and occupation of a house. A previous suit for damages for use and occupation of the same house by the plaintiff against the defendant who was the plaintiff's deceased husband's brother was dismissed on the ground that the defendant's occupation of the house was permissive. The plaintiff then served a notice upon the defendant to quit or pay rent or damages. As the defendant continued in possession, this suit was brought for damages for use and occupation for a period subsequent to the notice, on the allegation that even if the defendant had originally entered the premises under the plaintiff's leave and license, they were revoked by the filing of the plaint in the previous suit, as also by the notice mentioned above. The defendant pleaded want of title of the plaintiff as her deceased husband had sold away the house to a third person long before his occupation. The Small Cause Court Judge upheld the defendant's contention and dismissed the suit on the ground that the plaintiff was not competent to bring the suit. The plaintiff obtained this Rule under section 25 of the Provincial Small Cause Courts Act.

Babus *Jnanendra Nath Bose* and *Joy Gopal Ghosha* (with Babu *Sitaram Banerjee*) for the Petitioner :—As the alleged sale by the plaintiff's husband to a third person took place long before the defendant's occupation, and as there was no other event alleged subsequent to the defendant's occupation which caused a defect in her title, the defendant cannot plead *jus tertii* under section 116 of the Evidence Act.

Babu *Mohini Mohan Chatterjee* (with him Babu *Peari Mohan Chatterjee*) for the Opposite Party :—There is no estoppel in this case. The relationship of licensor and licensee had been determined by notice as well as by the plaint in the previous suit. The licensee is estopped only during the continuance of the license, as a tenant is during the continuance of the tenancy.

[N. R. CHATTERJEA, J.—But in section 116 of the Evidence Act, there is no such expression as "during the continuance of the license" as there is in the same section in the case of a tenant].

Upon principle there is no difference in this respect between the cases of a tenant's and a licensee's estoppel. See Ameer Ali and Woodroffe's Evidence Act, 4th Edn., page 787, para. 2, and page 794, para. 2, where authorities are referred to in support of the proposition. See also *Clark* v. *Adie* (1).

JUDGMENT.—The judgment of the Court was delivered by

JENKINS, C. J.—Having regard to section 116 of the Evidence Act the defendant cannot be permitted to deny that the plaintiff had a title to the possession of the land at a time when the license was given to enter into possession. In the circumstances a suit for use and occupation would lie. There is no question as to the amount due on that basis ; it is Rs. 40 and there will be a decree for that amount with costs. The plaintiff will have the costs of the Rule which is made absolute. We assess the hearing fee at one gold *mohur*.

Rule made absolute

(1) 2 A. C. 423; 46 L. J. Ch. 598; 37 L. T. 1; 25 W. R. 45.

BIRENDRA KISHORE *v.* AKRAM ALI.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1270 OF 1910.

January 4, 1912.

Present:—Mr. Justice Caspersz and Mr. Justice D. Chatterjee.

Maharaja BIRENDRA KISHORE MANIKYA BAHADUR—PLAINTIFF—APPELLANT

versus

AKRAM ALI—DEFENDANT—RESPONDENT.

Landlord and Tenant—Sanad Chiti—*Grant to tenant by Hindu Raja to re-excavate unclaimed tank—No mention of rent—Tank in possession of tenant's family as rent-free for more than sixty years—Liability to resumption or assessment of rent—Improvement—Estoppel—Limitation—Tank, excavation of—Duty of* zemindar *—Limitation Act (IX of* 1908*), Sch. I, Art.* 130.

In 1850, *sanad* was granted by a Hindu Raja for the re-excavation of an unclaimed and silted up tank within his *zemindari* to a tenant who re-excavated it at considerable expense, and ever since it has been in the exclusive possession of the tenant's family rent-free and it still supplies good drinking water. In the *sanad*, there was no provision for the payment of any rent, and nothing was said as to the duration of the grant. In a suit for *khas*-possession of the tank or assessment of rent in respect of it, by the present Raja:

Held, that the *sanad*, being a license to effect improvements, could not be revoked after the improvement had been carried out, that as the tank was still being used as a tank, the particular purpose which the parties had in view when it was re excavated was not exhausted, and therefore the time had not arrived for the plaintiff to re-enter or to insist upon the payment of rent and that consequently the suit was premature, but that it was not barred by limitation as that question did not arise.

Held, also, that as the grantor of the *sanad* had encouraged and created an expectation in the grantee that he would be allowed to enjoy the improved tank without let or hindrance, the plaintiff was estopped from bringing the suit.

Ahmad Yar Khan v. *The Secretary of State*, 28 C. 693 28 I. A. 211 (P. C.) applied.

Appeal from the decree of the District Judge of Tipperah, dated January 3, 1910, confirming that of the Munsif of Commilla dated December 1, 1908.

Dr. *Rash Behary Ghose*, Babus *Dwarka Nath Chakravarti*, *Gobinda Chandra Deo Roy*, and *Birendra Chandra Das*, for the Appellant.

Babus *Mohendra Nath Roy* and *Sasadhar Roy*, for the Respondent.

JUDGMENT.

CASPERSZ, J.—The plaintiff is the Maharaja of Hill Tipperah. He also owns what the plaint describes as "a vast *zemindari*," that is Chakla Roshanabad in the British District of Tipperah. The suit giving rise to this second appeal was brought by the Maharaja to have his *zemindari* title declared in respect of a tank and its banks and for *khas*-possession and mesne profits. In the alternative, plaintiff claimed to have the lands assessed with fair rent. The defence was that the tank had been *niskar* (rent-free) since the time of the defendant's ancestor in virtue of a *sanad chiti* dated the 14th *Magh* 1259 (26th January 1850), granted by the predecessor of the plaintiff.

The first Court dismissed the suit on the ground of limitation; and, on appeal, the District Judge has arrived at the same conclusion.

The plaintiff appeals. This is one of many appeals involving the same question, the right to assess the *niskar* tanks in the Chakla. We have heard the arguments in this appeal and in *Maharaja Birendra Kishore Manikya Bahadur* v. *Dilwar Ali* (1): *Asalat Khan* v. *Maharaja Birendra Kishere Manikya Bahadur* (2); *Maharaja Birendra Kishore Manikya Bahadur* v. *Roshon Khan* (3), which may be regarded as test cases, the result of which, it is said, will govern both the other connected appeals pending in this Court as also the thousands of suits and appeals that are awaiting disposal in the lower Courts in the district of Tipperah and Noakhali.

It is argued for the plaintiff-appellant that the *sanad chiti* amounted to a mere license to re-excavate the silted up tank, and it was revocable by the grantor or at all events by his successor-in-interest; that the tenant never set up any hostile title to, or adversely possessed, the land of the tank, and that the suit was instituted within 12 years from the 25th May 1896, the date of the final publication of the Record of Rights prepared under Chapter X of the Bengal Tenancy Act.

The duty of *zemindars* to maintain the tanks on their *zemindaris* was plainly pronounced by their Lordships of the Privy Council in the *Madras Railway Company* v. *The Zemindar of Carvetinagaram* (4):—"The tanks are ancient, and formed part of what may be termed a national system of irrigation, recognised by Hindu and Muhammadan Law, by Regulations of the East India Company, and by experience older than history, as essential to the welfare, and, indeed, to the existence of

(1) 13 Ind. Cas. 517.
(2) 13 Ind. Cas. 519.
(3) 13 Ind. Cas. 518.
(4) 1 I. A. 364; 14 B. L. R. 209; 22 W. R. 279.

BIRENDRA KISHORE v. AKRAM ALI.

the large portion of the population of India. The public duty of maintaining existing tanks, and of constructing new ones in many places, was originally undertaken by the Government of India, and upon the settlement of the country has, in many instances, devolved on *zemindars*, of whom the defendant is one. The *zemindars* have no power to do away with these tanks, in the maintenance of which large numbers of people are interested, but are charged, under Indian Law, by reason of their tenure, with the duty of preserving and repairing them."

The facts of the case from which these remarks are quoted are different from those now under consideration, but the relative rights and obligations of the present parties are similar. The plaintiff, a Hindu Raja, should be slow to depart from the ancient laws and customs regulating the supply of water for the necessary purposes of his tenants. The Maharaja did not maintain the tanks in the Chakla; consequently, they silted up, and were re excavated by the tenants concerned under *sanad chitis* one of which has been produced by the defendant respondent. This *sanad* provides that the tenant having applied for re excavating the ancient and unclaimed tank called Nasir Muhammad, an *Amin* was appointed to ascertain the area and boundaries thereof; that the area was ascertained (2 *kanis* 2 *gands* 2 *kiras* 2 *krant*) of the four banks; that this *chiti* was granted in order that the tenant should construct embankments on the former sites of the embankments of the tank lying within the boundaries so ascertained and specified, and that the tenant should re-excavate the tank by means of *motials* (earth-cutters). Nothing was said in the *sanad* about rent being payable either for the watery portion or the area of the four banks of the tank.

The case is clearly not one within the ancient prohibition, which, we are told, was in force in the early days of last century, that a rent-free grant was not valid against the heir or purchaser of the grantor. The *sanad* did not confer any rent-free title; admittedly, it was valid to allow a tenant to spend money and re-excavate an old tank, no contrary view is possible. It is likewise clear that a license to do a thing, to effect improvements, cannot be revoked after the improvements have been carried out, for, in such a case the parties cannot be relegated to their former positions. The *sanad* is merely a piece of evidence showing the intentions of the parties and the nature of the subject-matter. If it had been intended to assess the tank at some future, date some apt and necessary provision would have been made among the terms of the document. If any rent had been previously paid for the tank, or any part of it, that fact, also, would have been mentioned. The grantor is, in the circumstances, estopped from asserting that the subject-matter of his grant should come under a new liability of which there is no indication whatever in the previous history of the tank. I take it as beyond controversy that the word "tank" includes the banks which are necessary for the enjoyment of the water.

The rule of estoppel stated in *Ramsden* v. *Dyson* (5) was applied by the Judicial Committee in *Ahmad Yar Khan* v. *The Secretary of State for India in Council* (6), where the persons undertaking to construct a canal were deemed to have "acquired a proprietary interest in so much of the Government lands taken for the purpose of the canal as was required for its construction and maintenance and also a right to have the waters of the Sutlej admitted into the canal so long as the canal was used for the purpose for which it was originally designed." The case of *Ramsden* v. *Dyson* (5) was also approved in *Plimmer* v. *The Mayor Councillors*, and *Citizens of the City of Wellington* (7), where a wharfinger who had spent money on land, on which he had entered under a license, was deemed to have acquired a perpetual right to the same. The Privy Council held that such a license could not, in view of subsequent events, be revoked.

It is also well settled that if a person, having a right to avoid a transaction on any legal ground, and, being aware of, and reasonably capable of enforcing, such right, manifests an intention to confirm the transaction, he cannot afterwards avoid it [*Wright* v. *Vanderplank* (8) *Jarratt* v. *Aldam* (9)]. The plaintiff

(5) (1866) L. R. 1 H. L. 129; 12 Jur. (N. S.) 506; 14 W. R. 926.

(6) 28 C. 693; 28 I. A. 211 (P. C.)

(7) (1884) 9 App. Cas. 699; 53 L. J. P. C. 104; 51 L. T. 475; 49 J. P. 116.

(8) (1855) 2 K. and J. 1; 25 L. J. Ch. 753; 2 Jur. (N. S.) 599; 4 W. R. 410.

(9) 1870) L. R. 9 Eq. 463; 39 L. J. Ch. 349; 22 L. T. 192; 18 W. R. 51

BIRENDRA KISHORE v. AKRAM ALI.

had every opportunity, both before and particularly in the settlements proceedings, to have the *niskar* tanks assessed with fair rent. He deliberately abstained from so doing. He now comes but not within a reasonable time.

Again, it is a matter of common knowledge that private owners in this country, have, in times past, granted lands for various public purposes—such lands are liable to resumption when the particular purpose has been exhausted. There is, in such cases, a reversion in the grantor. On the finding that these *niskar* properties are still used as tanks, and not for the purpose of cultivation or otherwise, in opposition to the intentions of the grantor, the time has not arrived for the plaintiff to re-enter or to insist upon the payment of rent.

The plaintiff's suit is, therefore, not maintainable. But it remains to consider and decide the plea of limitation upon which we have heard the arguments of the learned Vakils engaged. In my opinion, the District Judge has fallen into error in dismissing the suit on this ground. Article 130 of the first Schedule of the Limitation Act, 1908, provides a period of twelve years within which a suit must be brought for the resumption or assessment of rent-free land, and the period begins to run when the right to resume or assess the land first accrues. In the views already expressed, the plaintiff's right has not yet accrued. He will have his remedy when, if ever, the tank again becomes silted up and is no longer used for the purposes contemplated in the year 1850. Apart from this, when the settlement proceedings were being conducted on the 21st November 1894, the tenant never asserted any right to hold rent-free for ever either the tank or its banks. He merely set up his *sanad chiti* and the Revenue officer caused a formal entry to be made that, as a fact, the tank with its banks was held rent-free "as not paying rent." There was, in my opinion, no clear and unequivocal assertion of adverse possession by the tenant in this case. And as the obligation to pay rent is a recurring obligation the landlord cannot be barred by Article 130.

In *Beni Pershad Roer* v. *Dudhnath Roy* (10) it was observed by Lord Davey that a mere notice by a person holding for his life, that he claimed to be holding on a perpetual or hereditary tenure, would not make his possession adverse within the meaning of the Limitation Act, so as to bar a suit for possession on the expiration of his life tenancy. No such claim was ever advanced by the *niskar* holders in the present litigation. Their contention merely extended to the enjoyment of the tanks, rent-free, for so long as they were required for the legitimate purposes which the parties had in view when the tanks were re-excavated. It is also impossible to conceive of a claim to hold adversely being made in respect of a right to receive rent. That right is not a limited interest; it is, in fact the entire interest of the landlord. Therefore, the rule adopted in *Ishan Chandra Mitter* v. *Raja Ramrnajan Chakarbutty* (11), with regard to the dispossession of a landlord, in a limited sense is not applicable to the present facts: the plaintiff's tenants have not encroached on any lands not covered by the *niskar* tenants.

The case of *Bir Chunder Manickya* v. *Rajmohun Goswami* (12), to which our attention has been called, originated in the same part of the district (Chakla Roshnabad) but the facts were widely different from those of the present litigation. It is, however, some authority for the plaintiff's contention that Article 130 really covers cases of resumption under the old Regulation and does not apply to suits such as these under appeal. It is manifest that the tanks with which we are now concerned were never dissociated from being a part of the revenue paying properties of the *zemindar* and no question of limitation can arise in such a case as this

The result of this appeal coincides with the decision of Chitty and N. R. Chatterjee, JJ., in an unreported case S. A No. 2551 of 1908 dated the 3rd February 1911. The decision on the question of a *beligan* entry in the Record of Rights in S. A. No. 1327 of 1909 (dated the 6th December 1910) is also consistent with that now arrived at. As I decided that case, I may observe that the facts are distinguishable, but that the word *beligan* (not assessed with rent) which has a special significance in Behar has its counterpart here in the expression *kar dhariya*

(10) 27 C. 156; 26 I. A. 216.

(11) 2 C. L. J. 125.

(12) 16 C. 449.

BIRENDRA KISHORE v. AKRAM ALI.

rai and means that rent was not imposed in the settlement proceedings.

The decree of the lower Appellate Court is affirmed but not for the reasons given in the judgment of the District Judge. The appeal is dismissed with costs.

D. CHATTERJEE, J.—The facts shortly are that in the year 1850 the ancestor of the defendant applied to the then Maharaja of Tipperah for being allowed to re-excavate an unclaimed silted up tank in the Maharaja's Zemindari Chakla Roshanabad. This permission was given by a *chitti* bearing the Maharaja's seal and the grantee was required to re excavate the tank by employing earth-cutters and the only restriction imposed was that the limits of the ancient tank were not to be exceeded: there was no provision for the payment of any rent presently or in future and nothing was said as to the duration of the grant. The ancestor of the defendant re excavated the tank at a considerable expense and it has been in the exclusive possession of the family of the defendant from father to son and still supplies good drinking water.

There were a survey and settlement of the Chakla in 1894 and the tank with its banks was numbered as 253 and 252 and included within the *nij jama* of the defendant. The defendant objected that he held both these numbers under a *niskar* title granted by the *chitti* of 1850 which he produced. The Maharaja's agent asserted that the banks of the tank were included in the *jama* of the defendant but did not say anything as to the tank. The Settlement Officer recorded both numbers as separate from the *jama* and "not paying rent." The order of the Settlement Officer is dated the 21st November 1894. The exclusive possession of the defendant continued as before and no action was taken by the Maharaja until the 25th of February 1908 when he filed the suit giving rise to the present appeal on the allegation that the tank and its banks were his *khas* property and the defendant had no right to retain possession of the same without his consent. He prayed for recovery of possession and in the alternative for assessment of fair rent.

The defendant pleaded *niskar* title under his *sanad*, estoppel and limitation.

The first Court dismissed the suit as barred by limitation and the learned District Judge not only upheld the decision on the question of limitation but held that the *sanad* intended to grant a rent-free title.

The Maharaja has appealed mainly on two grounds, *first* that the *sanad* does not confer a rent-free title and is at best a license which can be revoked at any time and, *secondly*, that the suit is not barred by limitation.

I will deal with the *sanad* first. In construing this document it must be borne in mind that it was granted by a Hindu Raja for the re excavation of an old tank. According to the Hindu Shastras the grant of land for digging tanks, the digging of new tanks and wells and the re-excavation of old ones is supremely meritorious.

* * * * *

"He who makes a tank becomes devoid of thirst for all time and enjoys the abode of Varuna."—Vishnu 61 2.

* * * * *

"Whoever causes the digging of a tank or a well in a place destitute of water goes to the heaven for a hundred years for each drop of water"—Nandi Puran quoted by Raghunandan.

* * * * *

"In respect of wells, gardens, tanks and temples the repairer gets the same merit as the original maker."—Visnu 61. 19.

The great Rishi Narada when on a visit to the great King Judhistir asked him:—

* * * * *

"Are the cultivators contented? Have you constructed large tanks full of water in proper places in your kingdom? Is agriculture independent of the rains?"—Mahabarat Savaparba Chapter V 76. 77.

* * * * *

Sukracharya when speaking of the duties of kings says:—

"When any one digs a tank or a canal or does some other similar work tending to the improvement (of his country) or reclaims new land the King shall not realize any rent for these until double the cost of the work has been realized from the usufruct."—Sukra Niti IV. 2. 121, 122.

This is when such works are done without permission.

* * * * *

Whoever makes a gift of land for the purpose of making a reservoir of water attains the abode of Varuna.—Vishnu

Dharmottar quoted in Raghunandan's Jalasayotsargatature.

As a Hindu Raja presumably possessing all the instructs and traditions of a Hindu Raja it is impossible to conceive that the ancestor of the plaintiff intended anything other than the grant of the land for the purpose of the re-excavation of the ancient tank. He could never have meant to grant a mere license as understood by English lawyers and a consistent course of conduct makes it quite clear that that was so. It is admitted that it was an ancient tank previously possessed by some one or other of the tenants, for the *sanad* calls it a *bewaris* tank, *i. e.*, one in respect of which there were no claimants as heirs: there is no suggestion that it was ever assessed to rent: there are no *zemindari* papers showing that it was ever considered as a part of the rent paying lands of the *mehal*: it has come down from father to son for at least sixty years without any claim having ever been made for rent or resumption: even in 1894 during the settlement operations the Raja's agent did not even assert that the tank was assessable and in respect of the banks of the tank merely said that they were parts of the separate holding of the defendant: even after that for over 12 years, *i. e.*, until February 1908 we see no attempt to assess or resume the land. It may be noted that there are hundreds of such tanks in Chakla Roshanabad, possessed by the tenants of the Maharaja in the same manner, some with *sanads* and some without and in respect of none of them any claim for assessment or resumption has ever been made and I have no doubt that neither the Maharaja nor the tenants ever understand that these would be ever resumed or assessed to rent, and I am of opinion that the defendant is entitled to hold the tank with its banks without payment of rent so long as the tank serves the purpose for which the grant was made.

The matter may also be considered in another light. When the former Maharaja granted permission to the ancestor of the defendant to spend an indefinite amount of money for the reconstruction of the tank, he encouraged and created an expectation in the grantee that he would be allowed to enjoy the improved property without any let or hindrance, and his heir the present Maharaja is equitably bound to give effect to such expectation. If that were not so, the Maharaja might evict him at any time after the money had been spent or demand an impossible rate of rent. This principle was followed by their Lordships of the Privy Council in the case of *Ahmad Yar Khan* v. *The Secretary of State* (6) and is eminently applicable to the facts of this case.

In this view of the rights created under the *sanad* as interpreted by the surrounding facts the question of limitation does not arise. For so long as the tank continues to be a tank no assertion of adverse title by the defendant can give the Maharaja a cause of action for resumption or assessment of rent, see *Beni Pershad Koer* v. *Dudhnath* (10). Besides, as the defendant relied upon his *sanad* as the root of his title and claimed *niskar* title under the *sanad* and not by adverse possession as an alternative source of title, his possession cannot be used for any purpose other than that of explaining the grant on which he relies: See *Labrador Company* v. *The Queen* (13) per Lord Hannon.

In this view of the case, I agree in dismissing the appeal with costs

Appeal dismissed.

(13) A. C. 104 at P. 122; 67 L. T. 730.

[*N. B.*—This case is similar to the three cases following.—*Ed.*]

CALCUTTA HIGH COURT,
SECOND CIVIL APPEAL No 1963 OF 1910.
January 4, 1912.

Present:—Mr. Justice Casperez and Mr. Justice D. Chatterjee.

Maharajah BIRENDRA KISHORE MANKYA BAHADUR—PLAINTIFF—APPELLANT

versus

DILWAR ALI AND OTHERS—DEFENDANTS—RESPONDENTS

Landlord and Tenant—Suit for resumption or assessment by landlord—Tenant's claim to hold rent-free—Adverse possession of tenant—Claim to hold land as rent-free—Limitation — Limitation Act (XV of 1877), Sch. II, Art. 130.

In a suit for possession or assessment of rent by a landlord, it appeared that the tenant defendant more than 12 years before the suit claimed to hold the land as rent-free; the plaintiff's agent denied this. The record of rights which was then being prepared contained the denial and an entry was made to the effect that no *jama* had been fixed:

BIRENDRA KISHORE *v.* ROSHAN KHAN.

Held, that a title completely hostile to the plaintiff was set up by the defendant, and the record of right did not negative the claim made by the tenant, for it did not signify that the land was liable to pay rent, that there was a clear assertion of adverse title, which had been submitted to for more than 12 years, and that the suit was, therefore, barred by limitation.

Appeal from the decree of the Sub-Judge of Tipperah, dated February 23, 1910, affirming that of the Munsif of Comilla, dated March 2, 1909.

Babus *Dwarka Nath Chakrawarti* and *Birendra Chandra Das*, for the Appellant.

JUDGMENT.

CASPERSZ, J.—This is one of the many appeals involving the same question—the right claimed by the plaintiff, the Maharaja of Hill Tipperah, to assess the *niskar* (rent-free) tanks situated in his Chakla Roshanabad. We have heard the arguments in this appeal and in *Maharajah Birendra Kishore Manikya Bahadur* v. *Akram Ali* (1), *Asalat Khan* v. *Maharaja Birendra Kishore Manikya Bahadur* (2) and *Maharajah Birendra Kishore Manikya Bahodur* v. *Roshan Khan* (3) which may be regarded as test cases. The plaintiff's suit has been dismissed in appeal in *Maharajah Birendra Kishore Manikya Bahadur* v. *Akram Ali* (1) in which judgment has just been delivered and this appeal must fail. The Sub-Judge was of opinion, in disposing of Appeal No. 293 of 1909, from which this second appeal has originated, that the defendants on the 14th May 1896 had clearly asserted a hostile title to the plaintiff, and, that being so, "the claim of the plaintiff is time-barred and the defendant's rent-free right by adverse possession is established." In my opinion, the plaintiff's suit is not maintainable, because his right to assess rent on the *niskar* tanks has not accrued. In the present case no *sanad chitti* was produced or set up by the defendants; their claim was to hold the tank rent free in virtue of immemorial user. In so far as the claim of the defendants to hold the tank and banks as *niskar* is concerned, it was clearly possible to the claim of the Maharaja to regard these lands as assessable to rent, whilst the tank continued to be used as such. In that view the suit is barred by limitation.

The appeal is dismissed but without costs as the respondents do not appear.

(1) 13 Ind Cas. 513.
(2) 13 Ind. Cas. 5.9.
(3) 13 Ind. Cas. 518.

D. CHATTERJEE, J.—In this case no *sanad* is presumed, but title by possession as *lakheraj* from time immemorial and also adverse possession pleaded. If the Courts below had found ancient possession without payment of rent there might be a presumption of *lakheraj* title, but there is no such finding, as the Court below dismissed the suit on the ground of limitation. The settlement *khatian* shows that the defendants, about May 1896, claimed to hold the land as rent free and the plaintiff's agent denied the same: a title completely hostile to the plaintiff was, therefore, set up. It does not matter when the record was finally published. There was the claim and the denial and the order for an entry that no *jama* had been fixed does not negative the claim made by the defendant, for it does not signify that the land is liable to pay rent. There is, therefore, a clear assertion of adverse title and that has been submitted to for more than 12 years. I think that under the circumstances the suit, as brought, is barred by limitation and the appeal should be dismissed.

Appeal dismissed.

[*N. B.*—This case is similar to the foregoing case and the two cases following—*Ed.*]

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL NO. 2523 OF 1910.
January 4, 1912.
Present:—Mr. Justice Casperszand Mr. Justice D. Chatterjee.
Maharajah BIRENDRA KISHORE MANIKYA BAHADUR—PLAINTIFF—APPELLANT
versus
ROSHAN KHAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Landlord and Tenant—Suit for assessment of tank—Tenant's claim to hold rent-free—Limitation—Limitation Act (XV of 1877), Sch. II, Art. 130.

Where a tenant claimed a rent-free title to the knowledge of the plaintiff and no suit for resumption or assessment of rent was brought until more than 12 years after:

Held, that the suit was barred by limitation.

Appeal from the decree of the First Sub-Judge of Tipperah, dated April 28, 1910, reversing that of the Fourth Munsif of Comilla, dated June 14, 1909.

Babu *Govinda Chandra Dey Roy*, for the Appellant.

ASALAT KHAN *v.* BIRENDRA KISHORE.

JUDGMENT.

CASPERSZ, J.—This is one of the numerous appeals involving the same question the right claimed by the plaintiff, the Maharaja of Hill Tipperah, to assess the *niskar* (rent free) tanks situated in his Chakla Roshanabad. We have heard the arguments in this appeal and in *Maharaja Birendra Kishore Manikya Bahadur* v. *Akram Ali* (1) and *Maharaja Birendra Kishore Manikya Bahadur* v *Dilwar Ali* (2) and *Asalat Khan* v. *Maharaja Birendra Kishore Manikya Bahadur* (3) which may be regarded as test cases The plaintiff's suits have been dismissed in *Maharaja Birendra Kishore Manikya Bahadur* v. *Akram Ali* (1) and *Maharaja Birendra Kishore Manikya Bahadur* v. *Dilwar Ali* (2) in which judgment has just been delivered and this appeal, also, must fail. The Subordinate Judge has held the suit to be barred because it was brought more than twelve years after the defendant's assertion of adverse title before the Settlement Officer on the 26th February 1896. In the opinions already expressed the plaintiff's suit is not maintainable because his right to assess rent on the *niskar* tanks has not accrued In the present case (which corresponds with suit No 399 of 1908 of the first Court) no *sanad chitti* was produced or set up by the defendants, their claim was to hold the tank rent-free, in virtue of their ancestral title. In so far as that claim is concerned, it has been found to be hostile and it must be deemed hostile so long as the tank is used as such. The appeal is dismissed but without costs, as the respondents do not appear.

D. CHATTERJEE, J.—In this case the defendants pleaded old ancestral rent-free title and also title by adverse possession. The defendant No. 1, however, stated in his deposition that his ancestor had got this *lakheraj* on payment of *gun* which is translated as the capitalized value of probable rent. The Courts below have held that the payment of *gun* had not been made out but that the plea of the payment implies the land was at one time *mal*. That it was once the *mal* of the plaintiff is not denied and if the payment of *gun* is not proved the land is still *mal* unless any title by adverse possession or otherwise has arisen in favour of the defendant. The finding is that the defendant and his predecessors have been in possession without paying any rent for over 12 years: that by itself is not sufficient for basing a valid title in bar of the plaintiff's suit as there is no finding as to who dug the tank and when and under whose order. There is, however, the settlement *khatyan* showing that about the 26th February 1896 the defendant No. 1 claimed the land as rent free and the plaintiff's agent denied the claim. There was thus a clear claim of *niskar* title unqualified by reference to any document and a clear denial of the same by the plaintiff's agent. A complete hostile right was claimed to the knowledge of the plaintiff and no suit was brought until more than 12 years after.

I think that this suit as framed is clearly barred by limitation and has been rightly dismissed.

I agree, therefore, in dismissing the appeal without costs.

Appeal dismissed.

(1) 13 Ind. Cas. 513.
(2) 13 Ind. Cas. 517.
(3) 13 Ind. Cas. 519.

[*N. B.*—This case is similar to the two foregoing cases and the case following.—*Ed.*]

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No 2515 OF 1910.

January 4, 1912.

Present:—Mr. Justice Casperszand Mr. Justice D Chatterjee.

ASALAT KHAN AND OTHERS—DEFENDANTS APPELLANTS

versus

Maharaja BIRENDRA KISHORE MANIKYA BAHADUR—PLAINTIFF—RESPONDENT.

Landlord and Tenant—Grant to tenant by Hindu Raja to re-excavate unclaimed tank—No mention of rent—Liability to assessment of rent—Estoppel

In 1866, a Hindu Raja granted a *sanad* for the re-excavation for an old tank and the grantee re-excavated it at a considerable expense The tank is still used as a tank and supplies drinking water. In the *sanad* no mention is made about any rent. In a suit for assessment of rent :

Held, that the plaintiff is estopped from claiming any rent so long as the tank is used for the purposes contemplated by the parties in 1866.

Appeal from the decree of the Sub Judge of Tipperah, dated May 17, 1910 reversing that of the Munsif of Comilla, dated July 16, 1909.

Babus *Mohendra Nath Roy* and *Surendra Nath Ghoshal*, for the Appellants.

BADRUDDIN HASAN v. AMIR BEGAM.

Mr. S. P. *Sinha*, Dr. *Rash Behari Ghose*, Babus *Dwarka Nath Chakravarti*, *Govinda Chandra Dey Roy* and *Romesh Chandra Sen*, for the Respondents.

JUDGMENT.

CASPERSZ, J.—This is one of the test cases in which the same question has been argued, namely the right claimed by plaintiff, the Maharaja of Hill Tipperah, to assess the *niskar* (rent-fee) tanks situated in his Chakla Roshanabad. The plaintiffs' suits have been dismissed in the other appeals, and the suit giving rise to the present appeal was dismissed by the first Court but the Sub Judge has reversed that decision. Hence the defendants, the *niskardars*, are the appellants before this Court. In the opinions already expressed in my judgment in *Maharaja Birendra Kisore Manikya Bahadur* v. *Akram Ali* (1) this appeal must succeed.

The plaintiff's suit is not maintainable because his right to assess rent on the *niskar* tanks has not accrued It cannot, therefore, be defeated by reason of the twelve years' rule of limitation.

The Subordinate Judge has discussed the defendant's title as derived from the *sanad chitti* granted by the plaintiff's predecessor in the year 1866. I attach no importance to the fact that this *sanad* was not produced in the trial of the present suit. It is common ground that the *sanads* set up or produced in this litigation were of the same type, and we have the specimen in *Maharaja Birendra Kishore Manikya Bahadur* v. *Akram Ali* (1). The *sanad chitti* merely gave permission to re-excavate an old tank: nothing was said as to rent having been paid in the past or being payable at any future time. The plaintiff is estopped from claiming any rent so long as the tank is used for the purposes contemplated by the parties in the year 1866.

The appeal is allowed with costs here and heretofore. The plaintiff's suit is dismissed.

D. CHATTERJEE, J.—This case is very similar to *Maharaja Birendra Kishore Manikya Bahadur* v. *Akram Ali* (1) and the reasons given in my judgment in that case apply. It is true that the *sanad* has not been filed in this case but it was filed in the previous cases between the ancestors of the defendants and the Maharaja and his *ijaradars* and also before the Settlement Officer and was to the same effect as in that case. The said previous litigation seems to throw some light on the question in controversy in this case. The *ijaradars* under the Maharaja having dispossessed the defendant's ancestor of some lands covered by the tank with its banks encroachments on the *khas* lands of the *mehal* the latter brought a possessory suit and got a decree. The *ijaradars* brought a regular suit and the Court held the lands were included in the *sanad*. After that—in 1874—the Maharaja brought a suit for the resumption of some lands said to have been encroached upon by the defendant in excess of the land covered by the *sanad* and that suit was dismissed on the same ground. Evidently, the Maharaja thought that no claim could be made for the *sanad* lands.

This appeal must, therefore, be decreed with costs

Appeal allowed.

(1) 13 Ind. Cas. 513.

[*N. B.*—This case is similar to the three foregoing cases.—*Ed.*]

(S. C. 14 O. C. 308.)

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 33 OF 1911.

August 15, 1911.

Present:—Mr. Lindsay, A. J. C., and Mr. Rafique, A. J. C.

Khwaja Sayiad BADRUDDIN HASAN—PLAINTIFF

versus

Musammat AMIR BEGAM AND OTHERS—DEFENDANTS.

Award, grounds for setting aside of—Arbitrators, powers and duties of—Misconduct of arbitrator—Civil Procedure Code (Act V of 1908), Sch. II, paras. 14, 15 and 20—Limitation Act (IX of 1908), Sch. I, Art. 158.

Subject to any limitations contained in the instrument of his appointment and to any statutory directions as to the manner in which he is to discharge his duties, an arbitrator may conduct his proceedings in any manner he thinks fit, so long as he acts in accordance with the principles of justice, equity and good conscience. He is not fettered by rules of practice which Courts of law adopt for general convenience, nor bound by the adjective law laid down in the Code of Civil Procedure and the rules made under it or the rules relating to evidence to be found in the Indian Evidence Act. He may also in forming his judgment act upon merely moral considerations of which a Court of law could not take cognizance.

BADRUDDIN HASAN *v.* AMIR BEGAM.

Where an award is good on the face of it, the parties cannot object to the arbitrator's decision either upon law or fact and the Courts will not ordinarily review his discretion provided he acts within his authority and behaves fairly to each party. Nor will they interfere with his judgment on any mere ground of mistake.

An arbitrator called as a witness in an action on an award might be examined as to every matter of fact with reference to the making of the award and whether in his estimate of the compensation he took into consideration any matters not included in the reference and therefore not within his jurisdiction, but he cannot be questioned as to the elements which he took into his consideration in determining the *quantum* of compensation or so as to scrutinise the exercise of his discretionary power to award compensation.

The principles accepted in the English law for regulating the conduct of arbitrators are not inapplicable to arbitration proceedings held in this country. Nor are the powers of the Courts in India to review the proceedings of arbitrators any more extensive than they are in England.

Article 158 of the first Schedule to the Limitation Act cannot apply to a written statement which a defendant is required to file in answer to an application for the purpose of having the award made a rule of Court.

Appeal against the order of the Subordinate Judge, Lucknow, dated 5th May, 1911.

Mr. *Wazir Hasan*, for the Appellant.

Mr. *Jagmohan Nath Chak*, for the Respondent No. 1.

Mr. *Fasih*, for the Respondents Nos. 2 to 5.

JUDGMENT.—This appeal has arisen out of certain proceedings taken under paragraph 20 of the second Schedule to the Code of Civil Procedure for the filing of an award.

The facts of the case are as follows:—The parties are relatives of one Khwaja Farid-ud-din Husain (*alias*) Fiddun Sahib, who died at Lucknow on the 6th May, 1909. A few days before his death he executed a Will by which he bequeathed a one-third share of his estate to Khwaja Badruddin Hasan, his sister's son, whom he appointed his executor. The rest of his estate was divisible between the parties to this litigation who are his heirs under the Muhammadan Law.

Musammat Amir Begam, the first respondent, is a full sister of Farid-ud-din, Asghar Husain and Rashid-ud-din, respondents Nos. 2 and 3, are his step-brothers and *Musammat* Mah Jabin Begam and *Musammat* Hamida Begam, respondents Nos. 4 and 5, are his step-sisters. The sixth respondent who has been joined *pro forma* and who is no longer interested in this litigation is Farid-ud-din's widow. As is not unusual in this country, the breath was scarcely out of Farid-ud-din's body when these relatives of his began to scramble for his property. The very day he died the first respondent Amir Begam applied to the District Court for the appointment of a curator to take charge of the deceased's property. The following day an application was lodged by Badruddin as executor opposing the petition for the appointment of a curator. The result of this was that the District Judge stayed proceedings. Then the parties rushed off to the Revenue Courts at Sultanpur, each trying to obtain mutation of names in respect of the *zemindari* property left by the deceased in that district; at the same time, they began wrangling over the possession of certain house property in the city of Lucknow. Ultimately, on the 6th August 1909, the parties agreed to refer their disputes to the arbitration of a gentleman, Munshi Sakhawat Ali, an old friend of the deceased who was well acquainted with the affairs of the family and who was one of the attesting witnesses to the Will executed by Farid-ud-din on the 30th April 1909. There can be no doubt that this gentleman was selected for the office of arbitrator because of his intimate knowledge of the family history and of his intimate personal relations with the deceased. The parties were well aware of all these facts and it was without doubt their intention that Sakhawat Ali should avail himself to the full of his own knowledge of the family affairs in settling the disputes between them.

Sakhawat Ali delivered his award in March 1910, and on the 10th June 1910 Badruddin Hasan applied to have it made a rule of Court. As might be expected, the other parties opposed the application. Some of them were dishonest enough to plead that they were not parties to the arbitration proceedings and had no knowledge of them. Others, who had not the temerity to deny the fact of their being parties to the reference, impeached the award on the ground of the arbitrator's misconduct. The Subordinate Judge has found that all the respondents were parties to the agreement to refer; but he has found that the award was vitiated by misconduct on the part of Sakhawat Ali and has rejected the application on that ground.

The only point we have to decide in this

appeal is whether the Subordinate Judge's finding in this respect is justified.

Before proceeding to examine the various allegations of misconduct made against the arbitrator, we think it our duty to make some general observations on the course which the proceedings took in the Court below.

In the first place, it would appear from the tenor of the judgment that the learned Subordinate Judge has misconceived the nature of the duties and powers of an arbitrator.

And, in the next place, he would seem to have misunderstood the nature of his own functions as a Judge entertaining an application for the filing of an award made out of Court. He seems to have assumed the attitude of a Court of Appeal dealing with the decision of an inferior Court and to have found fault with the award because the various findings of the arbitrator were not such as he would have come to himself had he been dealing with the matters in dispute as a Court of first instance.

Now, as regards the powers and duties of an arbitrator no fixed rules can be laid down. The extent of the powers and the nature of the duties are to be ascertained from the terms of the agreement to refer by which he is appointed. In the present case, the language of the agreement is of the widest possible description. The parties, after declaring the existence between them of disputes regarding the estate of the deceased Farid-ud-din and the Will left by him, agree to appoint Sakhawat Ali as their arbitrator to settle these disputes. They empower him to decide their differences "in any way he might deem proper" (*jis tariqa se munasib samjhenge*) and they undertook to be bound by his decision. Clearly, therefore, it was the intention of the parties to arm the arbitrator with most extensive powers, in fact they gave him authority to act in any manner he pleased, provided of course that he dealt fairly with all parties concerned. As for his duties they were well understood. He was to decide whether the deceased had executed the Will and he was to determine how the estate was to be distributed between the persons who had any claims as heirs of Farid-ud din.

Subject to any limitations contained in the instrument of his appointment and to any statutory directions as to the manner in which he is to discharge his duties an arbitrator may conduct his proceedings in any manner he thinks fit so long as he acts in accordance with the principles of justice equity and good conscience. He is not fettered by rules of practice which Courts of law adopt for general convenience. He is not bound, for example, (as the lower Court appears to think he was) to record statements or admissions of the parties, to take down the depositions of witnesses, to mark and file documents and to behave in other respects as if he were the Judge of a Civil Court bound by the adjective law laid down in the Code of Civil Procedure and the rules made under it. He is not under any obligation to make notes of his proceedings, though it may be advisable for him to do so; and if he does elect to keep such notes they are his own property and he cannot be compelled to produce them in Court. He is not bound to observe the rules relating to evidence to be found in the Indian Evidence Act (*cf.* section 3 of the Act). In short, he has greater latitude than the Courts of law in order to do complete justice between the parties and may, in forming his judgment, act upon merely moral considerations of which a Court of law could not take cognizance (*cf.* Russell on Arbitration, 9th Edition, at page 98). Again, as the parties select the arbitrator to be the judge of their disputes they cannot, where the award is good on the face of it, object to his decision either upon law or fact and the Courts will not ordinarily review his discretion provided he acts within his authority and behaves fairly to each party. Nor will they interfere with his judgment on any mere ground of mistake. He should hear all evidence material to the questions before him which the parties choose to produce, but all evidence must be tendered, otherwise no objection will lie. And, lastly, while he may be called as a witness to give evidence respecting his proceedings in the arbitration, there are certain limits beyond which he cannot properly be questioned. On this point the law was laid down in the case of *Duke of Buccleuch* v. *Metropolitan Board of Works* (1) and is summarised as follows at page 303 of Russell on Arbitration, 9th Edition:—

"It was decided in the House of Lords that an arbitrator called as a witness in an action on an award might be examined

(1) L. R. 5 H. L. 418; 27 L. T. 1; 41 L. J. EX. 137.

as to every matter of fact with reference to the making of the award, what claims were made and what admitted, so as to put the Court in possession of the history of the litigation up to the time of his proceeding to make the award, and whether in his estimate of the compensation he took into consideration any matters not included in the reference and therefore not within his jurisdiction, and it was laid down plainly that the defendants had no right to go further and question the arbitrator as to the elements which he took into his consideration in determining the *quantum* of compensation or to scrutinise the exercise by the arbitrator of his discretionary power to award compensation." Such are the principles which are accepted in the English Law for regulating the conduct of arbitrators and we are not aware of any provisions in the law of India which render them inapplicable to arbitration proceedings held in this country. Nor is there any reason to suppose that the powers of the Courts in India to review the proceedings of arbitrators are any more extensive than they are in England. Those powers are defined in paragraphs 14 and 15 of the second Schedule to the Code of Civil Procedure, and, speaking broadly, the Courts are authorized to interfere with the award on grounds personal to the arbitrator only when he is shown to have been guilty of corruption or misconduct or when he has acted after his jurisdiction has been withdrawn or when the award is, on the face of it, illegal, incomplete or indefinite. In the present case, leaving out the objections which were taken to the validity of the agreement to refer and which were decided against the defendants, the award was challenged on two grounds only, namely, the misconduct of the arbitrator and his exceeding the powers conferred upon him by the instrument of submission, and what we have now to consider is whether in accordance with the principles, we have set out above these objections were made good so as to vitiate the award.

Before we proceed to do so, we have to notice a point which was raised *in limine* by the learned Counsel for the appellant. He contended that the written statements filed by the defendants were in substance applications to set aside the award and argued that as they were lodged in Court more than ten days after the award was produced before the Subordinate Judge they could not be entertained as having been presented beyond the period of limitation laid down in Article 158 of the first Schedule to the Limitation Act (IX of 1908). We cannot accept this argument. In our opinion this Article cannot possibly apply to a written statement which a defendant is required to file in answer to an application made for the purpose of having the award made a rule of Court. It is obvious that this rule of limitation cannot be applied because under paragraph 20 (3) of the second Schedule to the Code of Civil Procedure it is for the Court itself to fix the time within which cause is to be shown against the application.

On this point, therefore, we find against the appellant. To turn now to the various allegations of misconduct.

The first, second and third defendants alleged in the first place that there had been no proper inquiry, that the parties were not summoned to appear before the arbitrator and that they had no opportunity of meeting the case set up by the plaintiff. The burden of proof was on the defendants and, as regards these allegations, the only witness they produced was one Shaban Ali, a person in the employment of Amir Begam, the first defendant. According to him, there was no inquiry at all. No party or witness was examined nor were the defendants called upon to rebut the plaintiff's case. In cross examination he was obliged to admit that he was representing Amir Begam and that he was sent for by the arbitrator on several occasions and questioned with respect to the value of certain immoveable property. As against this evidence, we have the statement of the arbitrator on oath. He swears that he invited all the parties to put in written statements of their respective claims. He says they declined to do so because, as they said, he knew all the facts himself. He states that he was never asked by the parties to hold inquiry upon any particular points, that none of them tendered any oral evidence and that he received and considered every document which any of the parties laid before him. In short, it would appear that the arbitrator got little or no assistance from the parties themselves and was left to make such inquiries as he could without their aid. It is quite clear that he did make inquiries to supplement his own knowledge of the various matters before him

and it does not lie in the mouths of the defendants who declined to file written statements and to tender oral evidence to turn round and accuse the arbitrator with having held no inquiry at all, or at least an *ex parte* inquiry We hold, therefore, that these allegations against the arbitrator were not proved. With regard to the arbitrator's procedure which has elicited the adverse comment of the Subordinate Judge we have only to remark that the strictures passed upon the arbitrator's conduct in this respect are unjustifiable. The arbitrator admitted having kept some notes of his proceedings which he says he destroyed as he thought there was no need to retain them after he had prepared his award. This is a perfectly valid explanation. We have already said that an arbitrator is under no obligation to keep notes, or if he keeps them, to produce them in Court and the Subordinate Judge was quite wrong in imputing misconduct to Sakhawat Ali on this score. He was equally wrong in imputing blame to the arbitrator for returning documents to the parties who produced them. He was under no duty to retain them and his answer that he gave back the documents as he no longer required them was all that was necessary to justify his conduct. As we have pointed out an arbitrator is not the Judge of a Civil Court, tied down by the rules of procedure prescribed for the trial of suits in such tribunals. The second count in the indictment of misconduct is based on allegations of partiality. Briefly put, the defendants' case was that the choice portions of the property were allotted to the plaintiff and that in fact the share awarded to the plaintiff was of greater value than he was entitled to. First, it is claimed that the arbitrator based his valuation of the *zamindari* property upon wrong data. It is said that he had before him two sets of figures showing the profits of the property. There were certain accounts kept, or said to have been kept, by the deceased: on the other hand, there were the village papers kept by the *patwari*. The former showed the profits at a higher figure than that set out in the latter and the argument was that the arbitrator was guilty of misconduct because he based his calculations of the value of the property upon the *patwari's* accounts. The Sub-Judge has accepted this contention. We have no hesitation in saying that the learned Sub-Judge was wrong in so doing. It lay entirely within the discretion of the arbitrator to accept or reject any evidence which was laid before him. The arbitrator explains that he accepted the *patwari's* figures because he was of opinion that they were more likely to be correct than the figures in the private accounts and he also gave his reasons for suspecting that the private accounts were unreliable. It was not competent to the Court below to review the discretion exercised by the arbitrator in this respect and to hold that he was wrong in preferring one set of accounts of another. There is absolutely no evidence to show that the arbitrator's choice of the materials before him in this connection was influenced by any corrupt or unworthy motive and we hold him acquitted of any charge of misconduct in this respect.

The next point taken by the objectors with respect to valuation of the property related to certain dwelling houses in Lucknow. The Subordinate Judge came to the conclusion that the arbitrator made no sufficient inquiry as to the value of these houses. He refers to certain answers given on this subject by the arbitrator in the course of a cross-examination which lasted several days and exceeded the limits of propriety as defined in this case of *Duke of Buccleuch* v. *Metorpolitan Board of Works* (1) to which we have already referred. The arbitrator, it is said, made a cursory inspection of the property which he said enabled him along with some experience he possessed in the matter of building to form an estimate of the value. Then, when he was further heckled in cross-examination he said he took into account the probable rental value though he admitted that the houses themselves had never been rented. He said he relied upon his personal knowledge of the rents of houses in the vicinity. What he did finally, however, was to invite the parties to send in sealed tenders, stating the prices they were prepared to pay for the whole lot of the houses, four in number. The only one of the parties who offered for all four houses was the plaintiff who bid Rs. 11,900. The arbitrator considered that Rs. 11,800 was a fair estimate of the value of the property and he assigned it to the plaintiff at that figure. The conduct of Sakhawat Ali with respect to this portion of the award is characterized by

the lower Court as arbitrary. We dissent entirely from that opinion and consider that the arbitrator acted quite fairly and carefully. *Musammat* Amir Begam put forward another grievance with respect to this house property, namely, that one of these four houses belonged to her and was not a portion of Farid-ud-din's estate. The arbitrator's reply to this was that he knew that the house in question had been assigned many years ago to Amir Begam under a deed of compromise. But he added that Farid-ud-din had never given up possession of the property and had always treated it as his own mentioning it in his will as being a portion of his estate. He said he believed Farid-ud-din had a good title by adverse possession and that the house was in fact his own notwithstanding the deed of compromise. That is a sufficient answer to *Musammat* Amir Begam's claim to the house.

A third point taken by the defendants was that the arbitrator acted unfairly in allotting to them *zemindari* property affected with an encumbrance of Rs. 20,000. It was admitted that the arbitrator in dividing the property had laid down each of the parties was liable to pay a rateable portion of this debt in accordance with the extent of his or her share, but it was argued that the defendants were placed at a disadvantage because the share in *Mauza* Rasulabad which was subject to this charge had been made over to them whereas the plaintiff had got the village of Hajiganj (Mohiuddinpur) which was free from encumbrance and would not be exposed to the risk of suit brought by the mortgagee. The Subordinate Judge was impressed with this argument and thought the arrangement unfair as it might be difficult for the defendants to obtain contribution from the plaintiff in case they were obliged to pay up the whole debt. We pointed out to the respondents' learned Counsel that whatever method of distribution was adopted one or other of the parties would have to take over the encumbered property and we invited them to suggest any other arrangement that could have been adopted, but we were unable to obtain any satisfactory answer to this invitation. And we are satisfied, after a careful examination of the facts, that the arbitrator's action in this respect was quite fair and proper. It is to be noted here that Amir Begam was already a co-sharer in *Mauza* Rasulabad: she held a share in co-tenancy with Farid-ud-din and it was, therefore, quite proper that the arbitrator should, as far as he could, assign her a share of the deceased's property in that village. As for the defendants Nos. 2 to 5 it is proved that they specially asked the arbitrator to give them a share in Rasulabad. Exhibit 19 is a letter addressed to the arbitrator on their behalf in which, after a reference to the house property in Lucknow, the following passage occurs:—"after giving us a share in this (house) property let the rest of our share be made up to us by giving us a share in Rasulabad adjacent to our share in Mahal Pachchim which we already possess."

It may well be asked, as was asked by the appellant's learned Counsel, what right these defendants have to turn round now and complain because they have got what they asked the arbitrator to give them. Their objection to his part of the award is positively dishonest and should not have been entertained for a moment.

* * * * *

The only other matter in dispute is the amount of the Pleader's fee and with regard to this we propose to pass a special order.

There seems to be a notion abroad among litigants in this Province that, after having entered into solemn engagements to refer their disputes to arbitration and after having had proceedings taken ending with an award, they are at liberty to come into Court and dispute the award in the most reckless fashion. It is by no means an uncommon experience to find parties behaving as the defendants have done in this case. They do not get all they want out of the arbitrator and forthwith proceed to resist the filing of the award by putting forward wild accusations of misbehaviour and what not on the part of the arbitrator. Not infrequently, they go the length of impeaching the agreement to refer, pleading, as did some of the defendants here, that they were not parties to the contract. In short, the inclination seems to be to look upon arbitration proceedings as a more or less solemn farce, a mere interlude in the course of litigation which either party can ignore if he is disappointed in his expectations. We think it is proper that this peculiar view of the nature of arbitration proceedings should be

ZENAB v. SHAH NAWAZ KHAN.

discouraged to the utmost extent. In the present case the behaviour of the defendants has been scandalous and merits the severest condemnation and we propose, therefore, to mark our sense of their conduct by availing ourselves of the discretion reserved to us by paragraph 288 of the Oudh Civil Digest. Ordinarily, in proceedings of this kind the Pleader's fee would be calculated at one quarter of the ordinary fee in a suit or appeal. Under clause (6) of this rule we are empowered to award costs on a higher or lower scale than the ordinary rules in special cases and we think that this is a proper occasion for special order.

We direct therefore that this appeal be allowed, that the order of the Court below be set aside and that the award be filed and made a decree of Court, save and in so far as it provides for the partition of Rasulabad by metes, and bound between the defendants. And we direct that the plaintiff-appellant's costs in both Courts including in each Court Pleader's fees on the highest scale as laid down in paragraph 288 clause (1) of the Oudh Civil Digest be paid by the defendants-respondents, one half by the defendant respondent No 1, and other half by the defendants respondents Nos. 2 to 5.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 300 OF 1909.

January 22, 1912.

Present:—Mr. Justice Johnstone and Mr. Justice Rattigan.

Musammat ZENAB—PLAINTIFF—APPELLANT

versus

SHAH NAWAZ KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Pathans of *Miani, District Hoshiarpur—Alienation in favour of son-in-law—Right of son's daughter to object to alienation—Son bequeathing right to daughter—reversioner's right to object not alienable—Alienation by male-holder not void but voidable.*

The right of a reversioner under the Punjab Custom to dispute an alienation of ancestral property by the male-holder cannot be transferred by him to a stranger.

Tota v. *Abdullah Khan*; 66 P. R. 1897 *Muladad* v. *Ram Gopal*, 22 P. R. 1900; 186 P. L. R. 1900; *Jawala Sahai* v. *Ram Singh*, 97 P. R. 1909; 98 P. W. R. 1909; 2 Ind. Cas. 954; 133 P.L. R. 1909, followed.

An alienation by a male-holder, otherwise than for necessity, is only *voidable*. It is not void and on the death of the alienor the property alienated does not vest in the reversioner without any action on his part.

Among *Pathans* of Miani in the Hoshiarpur District, a daughter of the son of a male alienor is not entitled to object to the alienation by him of ancestral immoveable property to a son-in-law, even though the said daughter's father has in a Will bequeathed to her the right to raise such objection and to sue for the recovery of such property.

Atma Singh v. *Kalu*, 93 P. R. 1905; 162 P.L.R. 1905; *Chiragh Bibi* v. *Hassan*, 19 P. R. 1906; 70 P.L.R. 1906; *Nawab-ud-din* v. *Musammat Kami*, 12 P. R. 1901; 77 P. L. R. 1901., distinguished.

Second appeal from the order of the Divisional Judge, Hoshiarpur Division, dated the 9th February 1909, reversing that of the Subordinate Judge, Hoshiarpur, dated the 26th November 1908, decreeing plaintiff's claim.

The Hon'ble Mr. *Muhammad Shafi*, for the Appellant.

The Hon'ble Mr. *Shadi Lal*, for the Respondent.

JUDGMENT.—The pedigree of the parties given below illustrates the dispute between them:—

GHULAM MUHAMMAD,

- Ghulam Rasul,
  - *Musammat* Zenab, plaintiff, married to Sadullah Khan.
- *Musammat* Khadeja, (defendant No. 3.) married to Shah Nawaz, (defendant No. 1.)
  - Abdur Rahman, (defendant No. 2.)

The claim is against defendants for 190 *kanals* 15 *marlas* of land which plaintiff alleges Ghulam Muhammad, the common ancestor, gave to Shah Nawaz, defendant No. 1, his son-in-law, in exchange for 159 *kanals* 16 *marlas* of other land. The contentions were that the exchange was not an act of management merely, but was effected for the purpose of unduly benefiting defendant No. 1, the land in suit being much more valuable than that taken in exchange, and that this act was *ultra vires* of Ghulam Muhammad, a *Pathan* of Miani in the Hoshiarpur District, and so subject to ordinary Punjab custom. It wa

also urged that before he died Ghulam Rasul executed a Will in favour of his daughter, the plaintiff, in which *inter alia* he bequeathed to her the right to sue for cancellation of the aforesaid exchange.

Defendants resisted the claim, impugning the Will and its effectiveness, denying plaintiff's right to sue apart from the Will, affirming the good faith of the exchange and adding that it was done to reward Shah Nawaz defendant No. 1 for his services to Ghulam Muhammad.

The first Court held the Will proved and effective; that plaintiff can sue under section 42, Specific Relief Act, though she is a woman, reliance here being placed on the remarks in *Lahori* v *Radho* (1), that the exchange was effected to injure Ghulam Rasul and his family, and that there is nothing to show that the exchange was made to reward defendant No. 1 for his services, which had been already otherwise sufficiently rewarded

Plaintiff thus obtained her decree on the condition that she should surrender the land taken in exchange by her grandfather, and the defendants, of course, appealed The learned Divisional Judge sided with defendants and dismissed plaintiff's suit with costs throughout, holding that while the exchange was intended to benefit defendant No. 3, the transaction, in view of the size of Ghulam Muhammad's estate, was not calculated to cause any appreciable injury to reversioners; that Ghulam Rasul though he did attempt to revive or keep alive a grievance about the exchange by making mention of it in his Will, had virtually acquiesced in it by silence; that even if Ghulam Rasul had power to contest the exchange, he could not transmit the power to his daughter—C. A. 356 of 1908 of this Court, —and that plaintiff had herself no right to contest an alienation by a former male owner.

Plaintiff has preferred a further appeal here and we have heard the whole case argued by Mr. Shafi for appellant and by Mr. Shadi Lal for respondents. The contentions in the appeal petition are that both Courts having found the exchange a one-sided one, the lower Appellate Court should have upheld the order of the first Court; that Ghulam Rasul did not acquiesce in the exchange but intended to dispute it; that both by virtue of the Will of Ghulam Rasul and in her own right as heiress plaintiff had the right to have the exchange set aside.

We need give no decision as regards the first and second of these contentions, for we have arrived at the conclusion that the third contention is untenable. It has been frequently held that the right of a reversioner under Punjab custom to dispute an alienation of ancestral property by the male-holder cannot be by him transferred to a stranger.—See *Tota* v. *Abdulla Khan* (2); *Mouladad* v. *Ram Gopal* (3); *Jawala Sahai* v. *Ram Singh* (4), and Rattigan's Digest, para 67, Remark.

In the ruling of *Jawala Sahai* v. *Ram Singh* (4) a previous ruling by a Single Judge of this Court was treated as being in conflict with the Full Bench decision, namely, *Sher Singh* v *Sidhu* (5), which is quoted by Mr. Shafi in his argument. The line taken is that, the exchange being *ultra vires* of Ghulam Muhammad, immediately on his death Ghulam Rasul became owner of the land now in suit and that what he dealt with in his Will was not a prospective right as reversioner but an actual vested title, and that thus the Full Bench ruling has no application in such a case as the present one. We are unable to assent to this kind of reasoning. It is admitted by Mr. Shafi, and indeed it is beyond the reach of controversy, that at most the exchange here is a *voidable*, and by no means in itself a *void*, transaction, and therefore it is obvious that at the time of executing his Will Ghulam Rasul had nothing more than a right to sue and to contest the exchange. We hold, therefore, that Ghulam Rasul's Will, even if executed and otherwise valid, does not operate to transfer to plaintiff the testator's rights as a reversioner under Punjab custom. We also lay it down that, if Lal Chand, J., in *Sher Singh* v. *Sidhu* (5), intended to rule that an alienation by a male proprietor, otherwise than for "necessity" is a void act and that on his death the property alienated vests without more in his reversioner, then his view is incorrect.

(1) 72 P. R. 1906.

(2) 66 P. R. 1897

(3) 22 P. R. 1900; 186 P. L. R. 1900.

(4) 67 P. R. 1909; 98 P. W. R. 1909; 2 Ind. Cas. 954; 133 P. L. R. 1909.

(5) 11 P. R. 1907; 9 P. W. R. 1907; 30 P. L. R. 1907.

And it is still easier to show that plaintiff has no power in herself, as son's daughter of Ghulam Muhammad, to question any act of his. Mr. Shafi argues here that in the absence of collaterals near enough to inherit a daughter becomes full owner by inheritance, and further that, if a gift to a daughter is valid, it makes her a full owner. He also points out that these *Pathans* are endogamous, that they lean towards Muhammadan Law and that their daughters are more favoured than among *Jats*. He admits that there is no direct authority for the proposition that a female of *Pathan* race, even if she is heiress, can control her father's father's dealings with his landed estate or indeed that in any Punjab tribe a woman heiress can control *any* male holder's dealings with his land; and in these circumstances his contentions are somewhat startling. He appears to lose sight of the fact that his references to the favoured position of daughters among these *Pathans* tell rather against his client than in her favour, for after all the exchange was for the benefit of a daughter and the land given was a very minute fraction of the 10,000 *kanals* of land owned by Ghulam Muhammad. But we need not labour this point for the authorities cited by Mr. Shafi, admittedly not directly in point, seem to us to fall far short of establishing his propositions. Clearly such rulings as *Atul Krishna Sircar* v. *Sanyasi Churan Sircar* (6); *Radha Prasad* v. *Rani Mani Dassee* and *Peary Lal Mullick* v. *Rines Mani Dassee* (7); *Padam Lal* v. *Tek Chand* (8); *Atma Singh* v. *Kalu* (9) which are cited as showing that gifts of immoveable property to daughters import transfer of full ownership, unless the documents indicate the contrary, are quite beside the mark, for here there is no gift or bequest of *the land* to plaintiff.

Then, in *Chiragh Bibi* v. *Hassan* (10) and *Lahori* v. *Radha* (1), the alienations which females were allowed to impugn were by females with life interest only, and this seems to us to make all the difference. A female heir may well be allowed to prevent a predecessor who has only a life-interest from making away with the property without "necessity", but it is a long step from this to the position that, because she is heiress, she can control the acts of a *male* predecessor. In this connection we do not think that such rulings as those in which a daughter is said in certain circumstances and in certain tribes to come within the category of "*aulad*" are sufficient authority for according to her the peculiar rights of control allowed by Punjab custom to male agnates. The origin of those rights is to be found in the desire of Punjabi tribes to keep ancestral property in the hands of the agnatic group whose common ancestor acquired the property, and it is always the male agnates who have been found to have these rights. Lastly, such a case as *Nawab ud-din* v. *Massammat Kami* (11) cited by Mr. Shafi, does not seem to us to help him much. There upon the death *pendente lite* of a reversioner plaintiff, who had sued to set aside an alienation by a previous male-holder his heir, a female was allowed to prosecute the suit in his stead; but, in our opinion, it does not follow from this, even if the decision is a sound one, a point on which we offer no opinion, that she would have been entitled to institute such a suit herself, if her predecessor-in interest had not instituted one at all.

We hold, then, that it has not been shown that among these *Pathans* of Miani in the Hoshiarpur District a daughter of the son of a male alienor is entitled to object to the alienation by him of ancestral immoveable property to a son-in-law even though the said daughter's father has in a Will bequeathed to her the right to raise such objection and to sue for recovery of the said property. We, therefore, dismiss this appeal with costs.

Appeal dismissed.

(6) 32 C. 1051; 9 C. W. N. 784; 2 C. L. J. 50.
(7) 33 C. 947; 3 C. L. J. 502; 10 C. W. N. 695.
(8) 29 A.217.
(9) 93 P. R. 1905; 162 P. L. R. 1905.
(10) 19 P. R. 1906; 70 P. L. R. 1906.
(11) 12 P. R. 1901; 77 P. L. R. 1901.

CALCUTTA HIGH COURT.
CIVIL RULE No. 4273 OF 1911.
January 19, 1912.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice N. Chatterjea.

BENGAL NAGPUR RAILWAY CO., LD.
—DEFENDANTS—PETITIONERS
versus
RAM PROTAP GHANESWAM DAS—
PLAINTIFF—OPPOSITE PARTY.

Railways Act (IX of 1890), *s.* 47—*Rules made by Railway Company—Rules adopted by Railway Company to be deemed as made by them—Identity of rules, whether should appear on face of Circular or Gazette.*

Rules adopted by a Railway Company, though not originally prepared by it, would come within the description of rules made by it: and rules so adopted, if sanctioned by the Governor-General in Council and published in the Gazette of India, would satisfy the requirements of section 47 of the Railways Act.

It is not necessary that the identity of rules made by a Railway Company with those sanctioned and published, should appear on the face of the Circular or the Gazette.

Rule against the order of the Small Cause Court Judge of Sealdah, dated April 29th, 1911.

Mr. *Bogram* and Babu *Manmatha Nath Mukherjee*, for the Petitioner.

JUDGMENT.

JENKINS, C. J.—This application arises out of a suit brought against the Bengal-Nagpur Railway Company for the refund of wharfage charges alleged by the petitioner to have been illegally realized from him.

A decree was passed againt the Railway Company in petitioner's favour.

The Railway Company then obtained a Rule under section 25 of the Provincial Small Cause Courts Act, 1887, questioning the validity of this decree, and it is with that application that we are now concerned.

Having regard to the circumstances of the case and the materials on the record, the only point that arises for decision is whether rules have been made, sanctioned and published as prescribed by section 47 of the Indian Railways Act, 1890, which entitled the Railway Company to make the wharfage charges claimed by them.

Section 47 provides "that every Railway Company.....shall make general rules consistent with this Act.....(*f*) for regulating the terms and conditions on which the Railway Administration will warehouse or retain goods at any station on behalf of the consignee or owner". It is, however, enacted by sub-section (3) that a rule made under this section shall not take effect until it has received the sanction of the Governor-General in Council and been published in the Gazette of India.

The rules on which the Railway Company relies are those which were published in the Gazette of India on the 3rd of July 1902, and those rules were sanctioned by the Governor-General in Council.

But the question is whether they were made by the Railway Company.

Rules adopted by the Railway Company, though not originally prepared by it, would come within this description, and rules so adopted, if then sanctioned by the Governor-General in Council and published in the Gazette of India, would satisfy the requirements of section 47.

It is not clear that the learned Judge considered the case from this point of view. Moreover, he appears to have regarded the decision in *Hari Lal Sinha* v. *The Bengal-Nagpur Railway Company* (1) as in some measure governing this case.

But that is not so; that case came before the High Court on a reference under section 69 of the Provincial Small Cause Courts Act with the limitations which that procedure implies, and the decision turned wholly on the finding of the Small Cause Court that it had not been proved that there were rules made, sanctioned and published as requried by the Act.

Here, on the other hand, the question is whether the rules were so made, sanctioned and published, and this question must be considered afresh by the Court of Small Causes in the light of the above remarks

It is to be regretted that any doubt on this point should be permitted to continue.

The remedy is simple and it may reasonably be hoped that it will be applied, so that Railway Companies may be spared the expense and annoyance of that class of litigation of which the present suit is a type.

The Rule is, therefore, made absolute, the decree of the Small Cause Court is set aside, and the case sent back to the Small Cause Court for a fresh hearing in the light of the above remarks. The parties

(1) 13 C.L.J. 150; 15 C. W. N. 195; 9 Ind. Cas. 331.

will be at liberty to adduce further evidence for the purpose of establishing or negativing the identity of the rules (if any) made by the Railway Company with those sanctioned and published; and I would here remark that it is not necessary, as the learned Judge seemed to suppose, that this identity should appear on the face of the Circular or the Gazette.

The costs of this application, which we assess at 2 gold *mohurs*, and of the suit up to this stage, will abide the result of the re-hearing.

N. CHATTERJEA, J.—I agree.

Rule made absolute;
Case remanded.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 516 OF 1911.
January 26, 1912.

Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.

CHAMPA LAL—PLAINTIFF—APPELLANT
versus
SHAM SUNDAR MALI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Son's pious liability to pay father's debt—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 120.

The liability of a son to pay his father's debt arises from the moment when the father fails to discharge his obligations and such a claim is governed by Article 120 of the Limitation Act.

Second appeal from the decision of the Additional Judge of Jaunpur, dated 26th November 1910.

Mr. *L. M. Banerji*. for the Appellant.

Mr. *O'Conor*, for the Respondents.

JUDGMENT.—A perfumery business was carried on by one Radha Kishen. The business as well as other property moveable and immoveable passed on his death to his two sons Bindesri Pershad and Nandan Pershad and to Sham Sundar and Ram Behari, two sons of Bindesri Pershad. Nandan Pershad relinquished all his right in the business and property and for some years the business was carried on by Bindesri Pershad. In December 1903 the plaintiff-appellant advanced a sum of Rs. 1,201 to Bindesri Pershad for the purposes of the business.

On December 15th, 1905, Bindesri Pershad executed a deed of gift in favour of his son Sham Sundar. He seems to have repented of the gift and litigation followed. Ultimately *Musammat* Gangajali was appointed guardian of Sham Sundar. In the present suit, instituted in August 1909, plaintiff claims a decree for Rs. 2,369 odd against Bindesri Pershad, Nandan Pershad and Sham Sundar. The amount claimed is made up of the sum of Rs. 1,201 mentioned above, interest thereon and other items. Bindesri Pershad and Nandan Pershad died after the institution of the suit but the plaintiff's rights are not affected thereby.

The first Court passed a decree against Sham Sundar for a small sum of money and dismissed the rest of the claim. The plaintiff appealed. The questions for decision in the lower Appellate Court were (1) whether the plaintiff had succeeded in proving the advance of Rs. 1,201 in December 1903 and that the debt was still outstanding; (2) whether the acknowledgment made by Bindesri Pershad on November the 18th, 1906, is binding on the defendant Sham Sundar and could be used for the purpose of extending limitation as against Sham Sundar, and (3) whether the claim should be decreed against Sham Sundar by reason of his liability under the Hindu Law to pay his father's debts.

The District Judge held that the advance of Rs. 1,201 was proved and that the debt was still outstanding; that the acknowledgment made by Bindesri Pershad in November 1906 was not binding on the defendant Sham Sundar because the father and son had separated before that date and the acknowledgment was made for the purpose of harassing Sham Sundar and his mother, and that the plaintiff's claim could not be decreed against Sham Sundar because on the execution of the deed of gift of December 1905 Bindesri Pershad ceased to have an interest in the property and the family ceased to be joint.

The decision of the learned Judge on the first two points is accepted by the plaintiff, but it is contended that the claim of the plaintiff should have been decreed in full against Sham Sundar in enforcement of his pious liability to pay his father's debts. On behalf of Sham Sundar it is contended, that as no use can be made of the acknowledg-

ment of the 18th of November 1906 as against him the plaintiff's suit is barred by limitation as against him, and that, in any event, execution could not be taken out against the property transferred to Sham Sundar by the deed of gift.

It seems to us that the deed of gift may be put out of consideration. It is not a case of a man who is indebted to others transferring his property to strangers. At the date of the deed of gift there was a joint family consisting of Bindesri Pershad and his two sons. It is contended on behalf of the plaintiff that the deed was altogether ineffectual. We think that if it had any effect it was as a relinquishment by the father of his undivided interest in the joint family property. Both before and after the gift the whole of the property of the family was liable to answer to the plaintiff's claim and it could not cease to be liable by one member of the family relinquishing his interest in it.

The plaintiff's case as brought was, no doubt, as contended by Mr. O'Conor, based upon an implied promise made by Bindesri Pershad as manager of the business to re-pay the sum advanced by the plaintiff for the purposes of that business. As against Bindesri Pershad the suit was governed in respect of limitation by Article 57 of the first Schedule of the Limitation Act., it might also be regarded as being governed by that Article as against Sham Sundar if he is liable for the loan as one contracted on behalf of the family by the Manager of the family business. The suit was instituted in August 1909 and the claim is barred by limitation against Sham Sunder, if it is regarded as one for money lent, for, as already stated, the acknowledgment of November 1906 is of no use to the plaintiff as against Sham Sundar. But we think that we should be tying the plaintiff too closely to the words of his plaint if we declined to consider the claim as one to enforce against a son his pious obligation under the Hindu Law to pay the debts of his father and to obtain a decree which could be executed against the joint family property.

In paragraph 4 of the plaint it is stated that "all the defendants (personally), the property of all the defendants and the family property of all the defendants are liable to pay all the sums due to the plaintiff," and one of the questions considered by the lower Appellate Court was whether the claim should be decreed against Sham Sundar by reason of his liability to pay his father's debts. It has been held in several cases that the liability of a son to pay his father's debts arises from the moment when the father fails to discharge his obligations and that such a claim is governed by Article 120. This suit was instituted less than six years after the money advanced became due to the plaintiff and is, therefore, within time against Sham Sundar.

We, therefore, allow this appeal and in modification of the decree of the lower Appellate Court we give the plaintiff a decree against Sham Sundar for Rs. 1,162 with interest at 6 per cent. per annum from the date of the suit to the date of realization to be enforced against any portion of the joint family property now in his hands. The sum decreed is, of course, included in the sum already decreed against Bindesri Pershad. The plaintiff will get his costs in all three Courts on the sum of Rs. 1, 216 against Sham Sundar and will pay the costs of Sham Sundar on the sums disallowed; the costs of this Court will include fees on the bigher scale.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 244 OF 1910.

January 10, 1912.

Present:—Sir Henry Richards, KT., K. C., Chief Justice, and Mr. Justice Banerji.

RAMCHANDRA DAS—PLAINTIFF—APPELLANT

versus

Rao FARZAND ALI KHAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Registration Act (III of 1877), ss. 32, 60, 73, 87—Presentation for registration—Endorsement of certificate of registration on the bond—Presumption—Evidence Act (I of 1872), s. 114—Defect in procedure of registration, consequences of—Admissibility of document in evidence.

The certificate of due registration endorsed upon a bond raises a strong presumption in favour of its due registration and, in the absence of clear proof that the requirements of law were not complied with, the Court is bound to admit the same in evidence.

Mujibunnissa v *Abdur Rahim*, 23 A, 233; 28 I. A. 15; *Muhammad Ewaz* v. *Birj Lal*, 4 1. A. 166; 1. A.

RAMCHANDRA DAS v. FARZAND ALI KHAN.

465; *Ishri Prasad* v. *Baij Nath*, 28 A. 707, A. W. N. 1906) 195; 3 A. L. J. 373, referred to.

A document was presented for registration to a Sub-Registrar who for some reason refused to register it. An application was then made to the Registrar who set aside the order of the Sub-Registrar but, instead of returning the document to the applicant for making a fresh presentation to the Sub-Registrar, himself sent the document to the Sub-Registrar for registration. The document was thereupon registered.

Held, that the irregularity in sending the decument direct to the Sub-Registrar for registration was a defect in procedure and did not vitiate the registration.

First appeal from the decision of the Subordinate Judge of Saharanpur, dated the 29th June, 1910.

The Hon'ble Mr. *Moti Lal* (with him Dr. *Satish Chandra Benerji*), for the Appellant.

Mr. *Choudhri* (with him the Hon'ble Mr *Sunder Lal*), for the Respondents.

JUDGMENT.— This appeal arises out of a suit brought by the plaintiff against the defendants to realise the amount of a mortgage-bond dated the 5th of February 1888. The bond was originally made in favour of Bansi Lal, the father of the plaintiff Seth Ram Chandra Das. The bond was apparently executed by the defendant Rao Farzand Ali Khan on behalf of himself and also on behalf of his mother. The merits of the case have not been gone into by the Court below and the question involved in this appeal is the question whether or not the learned Subordinate Judge was right in holding that the bond in suit had not been duly registered and accordingly could not be given in evidence by the plaintiff. The bond was in fact registered to this extent at least that it was received in the Registration Office and a certificate of registration is endorsed thereon, or rather certain endorsements appear upon the bond. From these endorsements it would appear that the bond was presented for registration in the office of the Sub-Registrar on Monday the 4th of June 1888. Assuming for a moment that the bond was duly presented within the meaning of section 32 of the Registration Act of 1877, the presentation was made in time. Simultaneously with the presentation of the bond, an application was made under section 36 of the same Act to summon the executants. They did not appear. The Sub-Registrar considered that execution was not admitted and he, therefore, refused registration. The matter then came before the District Registrar under an application made on behalf of Bansi Lal under section 73 of the Act. The presence of Farzand Ali was procured and he admitted the execution of the bond. The District Registrar made an order in the following terms:—"The document be registered as admitted to have been executed by Farzand Ali Khan." Some way or another the bond found its way back to the Sub-Registrar's office and was registered. Exactly how the bond found its way back to the Sub-Registrar's office is not very clear. The plaintiff, who is the son of Bansi Lal, in his evidence says: "The document was not returned to me by the Judge. It was sent to the Roorki *Tahsil* and it was registered there." Except this statement, there is nothing to show how the bond got back to the Sub-Registrar's office, and the witness was speaking of matters which happened more than 20 years before he made his deposition and when he was a boy of about 15 years of age. The learned Subordinate Judge held that the bond had not been duly registered and that it was not admissible in evidence. He accordingly dismissed the plaintiff's suit. Hence the present appeal.

It is argued on behalf of the defendants, *first*, that the bond was not in fact duly presented for registration on the ground that the person who presented it was not authorised to make the presentation in the manner prescribed by the Registration Act, and *secondly*, that even if it be presumed that the first presentation was in accordance with law, it was necessary that there should be a second presentation by a person duly authorised after the Registrar had made his ruling on the application to him under section 73 to which we have already referred. Section 32 of the Registration Act enumerates the persons who are entitled to present a document for registration: it may be presented by some person executing or claiming under the same, or by a representative or assign of such person or by the agent of such person, representative or assign, duly authorised by power-of-attorney executed and authenticated in the manner prescribed by the Act. From a document issued by the Registration Office which will be found at page 15 of the appel-

lant's book, it would appear that the document in question was presented by one Dasondi Ram, *Karinda* of Bansi Lal. Section 36 provides means for procuring the attendance before the Registrar of any person whose presence or testimony is necessary for the purpose of registration. Section 60 provides for the endorsement by a Registering officer of a certificate of registration and further provides that such certificate shall be admissible for the purpose of proving that the document has been duly registered in the manner provided by the Act and that the facts mentioned in the endorsements referred to have occurred as certified. In our opinion the production of the bond with the certificate of due registration endorsed thereon raises a strong presumption in favour of the due registration of the bond; and that, in the absence of clear proof that the requirements of law were not complied with, the Court was bound to admit the document in evidence. Section 114 of the Evidence Act, coupled with section 60 of the Registration Act, seems to us to be abundant justification for this proposition.

The defendants strongly rely on the case of *Muibunnissa* v. *Abdur Rahim* (1). In that case the person who had executed the deed and on whose behalf the application for registration purported to have been made was dead at the time of the presentation of the document for registration. Their Lordships of the Privy Council held that the authorisation ceased upon the death of the donor of the power-of attorney, and that consequently the presentation was made by a volunteer, that is to say, by a person who had no authority whatever to "present" the document. They held also that the presentation of the document was not a mere matter of procedure. The distinction between the facts in this case, and in the case before us, is, we think, quite obvious. In the case before their Lordships it was proved by conclusive evidence, and admitted by the parties, that the person presenting the document purported to do so on behalf of a dead person. In the present case (to deal with the two questions separately) it is not at all admitted that the document was presented for registration by an unauthorised person It is contended that the document to which we have arleady referred shows that the bond was presented by a *karinda*. It does not at all follow that the *karinda* may not have been duly authorised in the manner prescribed by the Act.

We have already pointed out that in our view that production of the bond, with the registration certificate endorsed thereon, raised a strong presumption in favour of due registration. We think that this was the view taken by their Lordships of the Privy Council in the case of *Mohammad Ewas* p. *Birj Lal* (2). At p. 175 their Lordships say: "But there is another part of the judgment of the High Court, which their Lordships think, requires consideration. The High Court say: 'It has been held by this Court more than once, that unless a deed be registered in accordance with the substantial provisions of the law, it must be regarded as unregistered, though it may, in fact, have been improperly admitted to registration.' Their Lordships think this is too broadly stated, if the High Court is to be understood to mean that in all cases where a registered deed is produced, it is open to the party objecting to the deed to contend that there was an improper registration, that the terms of the Registration Act in some substantial respects have not been complied with. Undoubtedly, it would be a most inconvenient rule if it were to be laid down generally that all Courts, upon the production of a deed which has the Registrar's endorsement of due registration, should be called on to inquire before receiving it in evidence whether the Registrar had properly performed his duty. Their Lordships think that this Rule ought not to be thus broadly laid down. The registration is mainly required for the purpose of giving notoriety to the deed and it is required under the penalty that the deed shall not be given in evidence unless it be registered. If it be registered, the party who has presented it for registration is then under the Act in a position which *prima facie* at least entitles him to give the deed in evidence. If the registration could at any time, at whatever distance of time, be opened, parties would never know what to rely upon, or when they would be safe." In our opinion there in nothing in the judgment of their Lordships in the case of *Muibunnissa* v. *Abdur Rahim* (1), which is inconsistent with the above observations.

(1) 23 A. 233; 28 I. A. 15.

(2) 4 I. A. 166; 1. A. 465.

The case of *Ishri Prasad* v. *Baij Nath* (3) is also relied upon by the defendants. In that case the document was presented for registration by a Pleader who was not duly authorised in compliance with the provisions of the Registration Act and this fact was admitted by the parties. In our judgment, this case is no authority for holding that the *onus* lay in the present case upon the plaintiff of showing that the requirements of the Act were duly complied with. In the case mentioned above, as also in the case of *Mujibunnisa* v. *Abdur Rahim* (1), the presumption in favour of due registration was rebutted by evidence and by the admission of the parties. In the case before us there is no such evidence and no such admission. We are, therefore, unable to hold that the initial presentation of the bond was defective.

We now deal with the second point. Section 75 of the Registration Act provides as follows: "If the Registrar finds that the document has been executed and that the said requirements have been complied with, he shall order the document to be registered. And if the document has been duly presented for registration within 30 days after the making of such order, the Registering officer shall obey the same, and thereupon shall, so far as may be practicable, follow the procedure prescribed in sections 58, 59 and 60. Such registration shall take effect as if the document had been registered when it was first duly presented for registration". The defendants contend that the provisions of this section render it necessary that there should be a second presentation within 30 days, and that second presentation must be in all respects similar to the initial presentation made under section 32. In the first place, we may point out that but for the evidence of the plaintiff, to which we have already referred, in which he says that the bond was not returned to him but that it was sent to the Roorki *Tashil* and was registered there, there is nothing to prove that the document was not in fact duly presented a second time by a duly authorised agent. The evidence of the plaintiff on this particular point is very vague. As we have already pointed out, he is speaking of a very ancient matter and he does not even say who brought the document for registration, and it is only an inference which may be drawn from his evidence that it was the Judge, that is the Registrar, who directed the document to be sent back to the Sub-Registrar for registration. In our opinion, it would be hardly reasonable to bind the plaintiff by this vague statement and to hold that it is sufficient to rebut the strong presumption in favour of everything required by the Act having been duly performed. However, even if we assume in favour of the defendants that the bond after it had been adjudicated upon by the Registrar was not returned by the Registrar to Bansi Lal or his attorney but was forwarded direct to the Sub-Registrar, we think the matter ought to be dealt with as a defect in procedure. Section 87 provides that "Nothing done in good faith pursuant to this Act, or any Act hereby repealed, by any Registering officer shall be deemed invalid merely by reason of any defect in his appointment or procedure." If it was irregular of the Registrar to send himself the bond to the Sub-Registrar instead of handing it back to the applicant, the irregularity was the irregularity of the Registrar not of the applicant. It is no doubt true that their Lordships of the Privy Council say in the case of *Mujibunnissa* v. *Abdur Rahim* (1) in dealing with the acceptance by the Registrar of the document from the attorney of a deceased person, "it has been suggested, however, that the error of a Registrar was a defect in his procedure only and accordingly under section 87 does not invalidate the act of registration. To their Lordships the error appears to be of a more radical nature. When the terms of section 32 are considered with due regard to the nature of registration of deeds it is clear that the power and jurisdiction of the Registrar only come into play when he is invoked by some person having a direct relation to the deed." Their Lordships were here dealing with the initial presentation for registration. And that presentation was made by a mere volunteer. For the purposes of the point we are now dealing with, it must be presumed that the bond was originally presented by a person duly authorised and that the error, if any, which was committed was the sending of the bond by the Judge to the Sub-Registrar instead of handing it back to the part'

(3) 28 A 707; A. W. N. (1906) 195; 3 A. L. J. 373.

KISHORI LAL *v.* TODAR SINGH.

to be represented. In our opinion the second point which has been argued in support of the decision of the learned Subordinate Judge also fails.

We, therefore, hold that the appeal should be allowed. We accordingly allow the appeal, set aside the decree of the learned Subordinate Judge and remand the case to his Court under Order XLI, rule 23 of the Code of Civil Procedure, to be heard and determined according to law. The appellant will have his costs in this Court including fees on the higher scale. Other costs will abide the result.

Appeal allowed: Case remanded.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 431 OF 1911.

January 18, 1912.

Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.

KISHORI LAL—PLAINTIFF—APPELLANT

versus

TODAR SINGH—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), *s.* 10—*Co-sharer who has transferred his share, whether becomes ex-proprietary tenant of entire co-parcenary body—Suit for profits against* lambardar—*Neglect of* lambardar *in collection of rent—Liability of* lambardar—*Private partition does not affect undivided co-parcenary body—United Provinces Land Revenue Act (III of* 1901*)*, *s.* 164.

C. a co-sharer in a certain undivided *mahal* transferred his share to *K.* and became an ex-proprietary tenant in respect of the *sir* which was in his possession. *K.* got the rent fixed on the ex-proprietary tenancy and attempted to recover it from *C.* and subsequently tried to eject him both in the Revenue and Civil Courts but failed. He then sued *T.*, the *lambardar*, for profits on the ground that he had neglected to collect the rent from *C*:

Held, (*Karamat Husain, J*, *dissenting*) that under the circumstances *T.* could not be said to have neglected the collection of the rent from *C.* and was not liable to *K.* for his neglect.

Per Karamat Husain, J.—Where a co-sharer in an undivided *mahal* transfers his share to a third person he becomes an ex-proprietary tenant in respect of his *sir* of the entire co-parcenary body and not only of his transferee.

Co-sharers in a *mahal* have no power to put an end to the undivided character of the *mahal* by a private arrangement.

Jagannath Prasad v. *Badri Prasad*, 9 A. L. J. 48; 11 Ind. Cas. 768, referred to.

Second appeal from the decision of the District Judge of Aligarh, dated the 8th February 1911.

Mr. *Gulzari Lal*, for the Appellant.

Mr. *Nihal Chand*, for the Respondent.

JUDGMENT.

CHAMIER, J.—This appeal arises out of a suit brought by the appellant for his share of the profits of two properties which may be called *khata* No. 1 and *khata* No. 2 in *mouzah* Chiti. The suit relates to the years 1314, 1315 and 1316 *Faslis*. The appellant was a recorded co-sharer during the years in question. Respondent was *lambardar* of *khata* No. 1 during the same period. The claim for profits in *khata* No. 2 is not before us in appeal and may be disregarded.

In *khata* No. 1 there were five co-sharers, each owning a one-fifth share. Each of them was in possession of separate lands on account of his share. In other words, the whole property was held by them as *sir* or *khud kasht*. The actual cultivators of the land were treated as the tenants of one or other of the co-sharers. The whole of the share of one of the co-sharers named Charan Singh excepting ten *bighas* was sold at execution sales to the appellant in or before 1901. The remaining ten *bighas* were sold to the respondent. The result was that Charan Singh became ex-proprietary tenant of the whole of the lands constituting his share. At the instance of the appellant the Revenue Authorities fixed the rent to be paid by Charan Singh. In August 1904 the appellant sued Charan Singh for the rent of his holding for the years 1309, 1310 and 1311 *Faslis* and obtained a decree. In July 1905 the appellant had Charan Singh formally ejected from the holding on account of non-payment of the amount decreed. But, as so often happens in such cases, Charan Singh did not give up the land and in January 1906 the appellant brought a suit against him in the Civil Court for possession and for mesne profits. Charan Singh pleaded that he was tenant of the land and was referred to the Revenue Court which held that he was no longer tenant of the land. The Munsif then gave the appellant a decree for possession and for mesne profits and his decree was affirmed on appeal in June 1907. Shortly after that, the respondent commenced proceedings for partition of the lands comprised in the *khata*. In the course of those proceedings, in January 1910, the appellant presented a petition to the Court in which he urged that what had been Charan Singh's

KISHORI LAL v. TODAR SINGH.

land was his, the appellant's, separate *maqbuza* and should be allotted to him. The present suit was instituted in June 1900. The appellant claims his share of the profits of the land in the *khata* for the years 1314, 1315 and 1316 *Faslis*. He admits, or rather his learned Pleader in this Court admits, that the respondent did not in fact collect the rents of what has been described as the appellant's *maqbuza*, *i. e.*, the land which was Charan Singh's holding less the 10 *bighas* above mentioned, but he says that it was the duty of the respondent as *lambardar* to collect those rents and the respondent is liable for them under section 164 (2) of the Tenancy Act. The respondent has pleaded and it has been found that each of the original co-sharers was in possesson of separate lands on account of his share. He urges that Charan Singh became the tenant of the appellant in respect of all the lands constituting that share; that the appellant alone has been in possession of those lands through Charan Singh, and that he (the respondent) has never been in possession or collected the rents thereof. The question whether a co-sharer in a *zemindari* becomes on the transfer of his share the tenant of the transferee alone or of the whole proprietary body has been discussed before us at length. In *Chote Lal* v. *Ramadhin* (1) Evans J., and I held that the co-sharer becomes the tenant of the transferee alone. In *Bhagwandin* v. *Debi Prasad* (2) decided on October 31st, 1911, Griffin, J., held that the co-sharer becomes the tenant of the whole proprietary body, and the same view is involved in the decision of Stanley, C. J., and Banerji, J., in Second Appeal No. 538 of 1907 decided on March 19th, 1909. The difficulties pointed out in our judgment in the case of *Chote Lal* v *Ramadhin* (1) are not noticed in either of the decisions in this Court and I cannot say that I am convinced that the view taken in them is correct. At all events, I see no reason why the transferor should not pay his rent to the purchaser alone where, as in the present case, there has been a kind of private partition which no one wishes to disturb. But even if it is assumed that the correct view is that taken in the two unreported cases in this Court I think that this appeal should be dismissed. In the present case, as in the Oudh case, all parties concerned seem to have assumed that the co-sharer became the tenant of the transferee alone. Whether that view was correct or not does not appear to me to be a matter of any importance in the present case. We are asked in effect to hold that the respondent negligently and improperly failed to collect the rents in what was Charan Singh's holding. Before we can do this we must look at the facts. It was the appellant who applied to the Revenue Authorities to fix the rent to be paid by Charan Singh. It was the appellant alone who sued Charan Singh for his rent for the years 1309-1311 *Faslis*. It was the appellant alone who had him ejected in execution and it was the appellant alone who brought another suit against him for possession in the Civil Court. The other co-sharers took no interest in those proceedings and allowed the appellant to establish a claim to separate possession of the bulk of Charan Singh's holding. As late as January 1910 we find the appellant laying claim to the holding as his peculiar property. In these circumstances, I do not see how it is possible to hold that the respondent has negligently and improperly allowed the rent of the land to remain uncollected. If the decisions in this Court mentioned above are correct then, as a matter of strict law, the respondent might perhaps have been able to obtain decrees against Charan Singh. He is related to Charan Singh and, therefore, probably was not anxious to bring suits against him, but he would certainly have been opposed by the present appellant had he attempted to compel Charan Singh to pay rent to him. It is quite obvious that the appellant for years treated Charan Singh as his own separate tenant and tried by every means in his power to recover rent from him. When he failed, he tried to get possession of the land from Charan Singh and when the partition proceedings began he claimed the land as his separate property. It was only when all his endeavours to obtain the profits of the land had failed that he turned round and attempted by the present suit to get the profits from the respondent on the ground that the latter had improperly and negligently allowed the rent to remain uncollected. It was urged by the respondent that the

(1) 13 O. C. 70; 5 Ind. Cas. 945.
(2) 12 Ind. Cas. 630.

KISHORI LAL v. TODAR SINGH.

appellant is not estopped from asserting his strict rights by any action that he has taken against the respondent. I am prepared to concede that but, in face of the various proceedings taken by the appellant, is it possible to hold that the respondent should have collected the rent? It seems to me that he cannot have supposed that he was under any obligation to collect the rents. The sale of Charan Singh's share did not necessarily put an end to the private arrangement which had subsisted for years between the co-sharers whereby each collected his own rents and there was no settlement of accounts between them. If the purchaser of Charan Singh's share and the old co-sharers also were willing that it should continue (and all that has happened since the sale of the share seems to show that they were willing) I see no reason why the *lambardar* should be bound to put an end to it. Something was said about such an arrangement not being sanctioned by law but such an arrangement is exceedingly common and is certainly not illegal. It is designed to prevent friction between the co-sharers. On the facts it seems to me impossible to hold that the *lambardar* has been guilty of negligence in failing to collect the rents of what was Charan Singh's holding. I would dismiss this appeal with costs.

KARAMAT HUSAIN, J.—The facts of the case are set out in the judgment of my learned brother and need not be repeated. The decision of the appeal, in my opinion, turns upon determining whether a co-sharer in an undivided *mahal* on the transfer of his share becomes in respect of his *sir* an ex-proprietary tenant of the transferee or of all the co-sharers in the *mahal*.

I have no doubt that under the law as it exists he becomes the tenant of all the co-sharers in the *mahal*. When a co-sharer in an undivided *mahal* has some *sir* in it he is in exclusive occupation of the entire *sir* and is a co-sharer of the proprietary interest in the land, his share therein being proportionate to his share in the *mahal*. The ownership of the rest belongs to other co-sharers. If such a co-sharer transfers his proprietary interests in the *mahal* the ownership of his share passes to the transferee and the transferor by virtue of section 10 of the Agra Tenancy Act becomes an ex-proprietary tenant with a right of occupancy in his *sir*. This right is conferred upon him in the *sir* land and there is nothing in section 10 to show that any change is made in those who are the proprietors of the *sir* land. The logical inference, therefore, is that the transferor becomes the tenant of all the proprietors of the *sir* land. It is not equitable to hold that he becomes the tenant of one of them, *i. e.*, the transferee, to the exclusion of the rest.

Why should they be deprived of their proprietary interest in the *sir* land? The view I take was in *Bhagwindin* v. *Debi Prasad* (2) decided on the 31st of October 1911 and the decision in Second Appeal No. 538 of 1907 decided on the 19th of March 1909 rests on the same view. In *Chote Lal* v. *Ramadhin* (1) it was ruled that a co-sharer on the transfer of his share becomes the tenant of the transferee alone. With due respect to the learned Judges who decided that case, I am unable to agree with them. There are no words in section 10 of the Agra Tenancy Act to that effect and on principle there is nothing to cut off the relation of landlord and tenant between the other co-sharers and the transferor.

It is urged that the view I take reduces the value of the shares of the co-sharers other than the transferor while the view taken in the Oudh case reduces the value of his share only. It is, therefore, more equitable of the two. There is not much force in this. According to the view taken in the Oudh case the transferor is entitled to hold his *sir* at a reduced rate of rent against the transferee but the other co-sharers lose their proprietary interest in the *sir* land. According to the view I take he holds his *sir* against all the co-sharers but they retain their proprietary interest in it and I have no doubt that if a co-sharer be given a choice between receiving a reduced rent and giving up his proprietary interest he will elect the former. Moreover, the right to hold the *sir* at a reduced rate of rent is not peculiar to the transferor in question; any co-sharer who transfers his share will have the same right. Then again the law gives a tenant under certain conditions the right of occupancy in an undivided *mahal* against all the co-sharers therein and this to some extent reduces the value of their shares but they cannot plead equity against it. In the same way, if the law gives a co-sharer on the transfer of his share the right of holding his *sir* at a

reduced rate of rent they cannot complain of any hardship. If there is any hardship it is for the Legislature to remove it, but a Court of Justice has no power to read into section 10 of the Agra Tenancy Act words which are not there in order to put an end to the hardship. The transferee has no proprietary interest in certain portions of the *sir* land and it is difficult to hold that he becomes the landlord of the transferor in respect of the land in which he has no interest. For the above reasons I hold that Charan Singh on the transfer of his share in *khata* No. 1 became the tenant of all the co-sharers in that *khata* and as the respondent was the *lambardar* of that *khata* during the years in suit the duty of recovering rent from Charan Singh, in the absence of anything to the contrary, devolved upon the respondent. The fact that each of the five co-sharers in *khata* No. 1 separately held 1/5th of the *khata* as his *sir* prior to the transfer of Charan Singh's share is not sufficient to destroy the undivided character of the *khata*. The law of partition prescribes certain procedure which must be followed in order to bring about partition. It empowers certain Revenue officers to make it and no one else can do it. An application for partition is a condition precedent to all that may follow. (Sections 106, 107 of the Land Revenue Act). The Collector at any stage of a partition before confirmation may stay the partition and order the proceedings to be quashed (section 109). He may also allow the parties to make the partition themselves (section 103). All this conclusively shows that the co-sharers in a *mahal* have no power whatsoever to put an end to the undivided character of a *mahal* by a private arrangement. The separate occupation of 1/5th by Charan Singh with the consent of the other four co-sharers caused no partition for the purposes of the Rent and Revenue Laws. He simply was in the exclusive occupation of certain plots in an undivided *mahal* which belonged to all the co-sharers and as soon as he became the tenant he became the tenant of them all. The objection of the appellant on the 18th of January 1910 in the partition proceedings started by the respondent conclusively establishing that up to that date *khata* No. 1 was an undivided *mahal*. The decision in *Jagannath Prasad* v. *Badri Prasad* (3), in my opinion, does not touch the point. It does not go the length of ruling that a private agreement of the co-sharers in an undivided *mahal* can effect partition. It is urged that granting that Charan Singh on the transfer of his share became the tenant of all the co-sharers in *khata* No. 1 the steps taken by the appellant against Charan Singh disentitled him from claiming his share of profits of Charan Singh's *sir* from the respondent. Those steps are that he successfully applied for the fixing of the rent to be paid by Charan Singh; that he obtained a decree for the arrears of rent and ejected Charan Singh from his *sir* and that as Charan Singh did not give up possession of the *sir* the appellant sued him in the Civil Court for possession and mesne profits and obtained formal possession, Charan Singh continuing in the actual occupation of the *sir*, and that when the respondent applied for partition the appellant in the application dated the 18th of January 1910 asserted that he was in the exclusive possession of Charn Singh's *sir*. In my opinion the above mentioned steps do not debar the appellant from claiming his share of profits of the *sir* from the respondent. The appellant under section 36 (4) (Act No III of 1901) as a "co-sharer directly interested in such matter" had a right to apply for the fixing of the rent payable by Charan Singh. The Revenue Court simply fixed the rent and made no change in the proprietors entitled to receive it from Charan Singh. The decrees for arrears of rent and the ejectment were procured by the appellant against Charan Singh behind the back of the respondent and those steps in no way effected any change in the legal relation of landlord and tenant which came into existence between all the co-sharers in *khata* No. 1 and Charan Singh. The mere fact that the appellant mistook his legal position towards Charan Singh cannot estop him from claiming his share of profits in the *sir* from the respondent who was bound to recover rent from Charan Singh but who, according to the finding of the lower Appellate Court, being a near relation of Charan Singh took no action against him. It is plain law that if *A*. succeeds in ejecting *B*. a tenant of *C*. in a suit to which *C*. is no party, *B*. in a suit by *C*. for rent cannot plead ejectment by *A*. It is to be noted that the respondent did not plead any local custom or special contract by which the appellant was entitled to receive

(3) 9 A. L. J. 48; 11 Ind, Cas. 768.

separately his share of the rent payable by Charan Singh as an ex-proprietary tenant of his *sir*.

The civil suit for possession by the appellant against Charan Singh and formal possession against him cannot put an end to the legal duty cast upon the respondent as a *lambardar* of realising rent from Charan Singh. The respondent was no party to the civil suit and his right to recover rent from Charan Singh cannot be affected by its results.

Charan Singh, as a matter of fact, in spite of all the steps taken by the appellant was admittedly in actual occupation of his *sir* during the years in suit and the assertion made by the appellant in his application dated the 18th of January 1910 may be taken to mean anything else, but it cannot be taken to mean that the appellant was in actual occupation of Charan Singh's *sir*. That assertion of the appellant, therefore, does not alter the legal relation which sprang up by operation of law between Charan Singh and the respondent as a *lambardar*. The proceedings taken by the appellant against Charan Singh in the Revenue and Civil Courts to which the respondent was no party do not, in my opinion, affect the position of the respondent as a *lambardar of khata* No. 1.

For the above reasons, I would allow the appeal in respect of *khata* No. 1 and would send down the case to the lower Appellate Court in order to find the amount of the share of the appellant in the profits for the years in suit on the basis that the respondent had to realise the rent of the *sir* from Charan Singh. Considering the facts of the case, I make no order as to costs.

Order of the Court is that the appeal be dismissed with costs which in this Court will include fees on the higher scale.

Appeal dismssied.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1033 OF 1909.

January 25, 1912.

Present:—Mr. Justice Johnstone and Mr. Justice Rattigan.

AHMAD KHAN—DEFENDANT—APPELLANT

versus

RATAN CHAND AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Interest—Delay in suing—Redemption by co-mortgagor of part of property—Right of mortgagee to allow partial redemption—Jurisdiction of Civil or Revenue Court—Mortgage with possession—Mortgagor undertaking to assist mortgagee in recovering produce, status of.

Mere delay in suing is no sufficient reason for refusing to allow a mortgagee full interest at the stipulated rate.

A mortgagee is legally entitled to allow redemption by a co-mortgagor of his share of the mortgaged property only.

Where a mortgage-deed recites that possession is given to the mortgagee and the mortgagor only agrees to assist the mortgagee in recovering produce from the tenants who are in cultivating possession of the mortgaged land, a suit for recovery of possession by the mortgagee against the mortgagor is cognizable by a Civil Court.

Buta Shah v. *Kalu*, 46 P. R. 1894 (F. B), distinguished and explained.

A mere engagement by the mortgagor to assist the mortgagee in recovering produce from tenants does not make him a tenant under the mortgagee; he is at most in some sort an agent for the mortgagee.

Second appeal from the order of the Divisional Judge, Rawalpindi, dated 15th June 1909, confirming that of the Subordinate Judge, 1st class, Rawalpindi, dated 16th November 1908, decreeing plaintiff's claim.

Khwaja *Kamal-ud-Din*, for the Appellant.

Mr. *Nanak Chand*, for the Respondents.

JUDGMENT.—On 29th July 1896 the two defendants Ahmad Khan and Maddat Khan, who are brothers, mortgaged a joint holding to plaintiff No 1 and Bhagu Mal deceased, father of both plaintiffs, for Rs. 2,200. The land was cultivated by certain occupancy and non-occupancy tenants. Interest was stipulated for at annas 12 per cent. per mensem and mortgagees were to pay the Government revenue, and the deed recites that possession is given to the mortgagees. It was also stated in the deed that the mortgagors would assist the mortgagees in recovering share of produce from the tenants and would make it over to the mortgagees, who would first pay themselves out of it the interest due and the amount of the Government demand and would credit the balance, if any, to mortgagors against principal. In June 1907 defendant No. 2 satisfied the mortgagees as regards his half of the liability and the latter allowed him to redeem his share. But, defendant No. 1, plaintiffs say, only paid interest and the amount of Government demand for the first two years, with the result that at date of suit Rs. 2,080 in all is due from him, of which Rs, 1,100 is principal.

AHMAD KHAN v. RATAN CHAND.

Defendant No. 1 denied execution by free consent, denied receipt of consideration and promise to pay interest or to deliver possession; and upon the issue drawn on these pleadings, in connection with which the burden of proof was noted by the Court as upon the plaintiffs, the Court found everything in favour of the plaintiffs and granted them a decree in full.

When the case came up on appeal before the Divisional Court, it was first contended that the suit was one for a Revenue Court, being by a landlord to eject a tenant. This point had been taken also in the first Court, though it was not formally put in issue, and both Courts found it against defendant No. 1, the first Court because defendant No. 1, having denied the validity of the mortgage and receipt of consideration, was no tenant, and the lower Appellate Court on the ground that the suit was not by a landlord to eject a tenant but by a mortgagee for possession, the mortgagors not being intermediate tenants between the mortgagees and the cultivators but merely undertaking to assist in recovering the lawful dues from the latter, and defendant No. 1 holding now not under the mortgagees but adversely to them. On all other points also the lower Appellate Court endorsed the allegations and contentions of the plaintiffs, and so dismissed the appeal, but without costs. When defendant No. 1's appeal came before a Judge of this Court in Chambers, he was permitted to put in amended grounds, and it is with this amended memorandum of appeal alone that we have to do. Further, Mr. Kamal-ud-Din has dropped para. 4 of the memorandum.

To clear the ground we may say at once that there is no reason to doubt the passing of consideration. The deed was a registered one and actual execution has been admitted, and defendant No. 1, appellant, has not been in any way able to show that he was deceived or coerced into signing the document. No doubt the first item, Rs. 1,000, was on account of the debt due by his father-in-law Saidu Khan, but he undertook liability, and it is for him to show that he did so otherwise than with "free consent," that is, he must show undue influence or deception exercised or practised by the mortgagees; and this he has wholly failed to do. Again, we can see no good reason to refuse to plaintiffs the full interest claimed; delay in suing is no sufficient reason for such refusal. Further, we are aware of no law under which mortgagees were prevented from allowing mortgagor defendant No. 2 to redeem his share. No doubt a joint mortgage is indivisible ordinarily as against joint mortgagors who cannot without consent of their mortgagees split up the transaction; but we cannot see that the converse rule applies. In our opinion the settlement with defendant No. 2 for his share was lawful, though, of course, if the settlement and the consequent absolution of defendant No. 2, give rise to any equities in favour of defendant No. 1 against defendant No. 2, no doubt, the former can have his remedy against the latter by separate proceeding.

There remains only the question of jurisdiction. Mr. Kamal-ud Din relies upon *Buta Shah* v. *Kalu* (1). The head-note of that case sets forth the facts of three separate suits, and the view of this Court was that the first two suits were cognizable exclusively by a Revenue Court, while the third was a civil suit. Of these cases Mr. Kamal-ud-din contends that the first is the one that is similar to the present case. In that the deed stipulated that possession was to be with the mortgagee but the plaint alleged that at some time thereafter, not stated, mortgagee let the land to mortgagor on a money-rent which was paid regularly until the latter's death and then refused by his sons. We are unable to see now that the case is on all fours with the present one, for here mortgagees were to have possession at once and no subsequent subsidiary contract was entered into between the parties.

Nor can we see that the second case dealt with in the Full Bench ruling is parallel to the one before us. There the mortgagee was to pay the land revenue and receive certain produce as *malikana*, mortgagor remaining in possession, and on default in any year mortgagee had the right to claim possession.

In the present case cultivating possession was with tenants, and the mortgagors were not to keep possession in any true sense of the word. The deed does not say that they shall keep possession, but merely that they shall assist the mortgagees in recovering produce.

The third of the cases in the Full Bench ruling at first sight looks more like the present case than either the first or the

(1) 46 P. R. 1894 (F.B.)

second, but in it, too, there are distinguishing features.

The plaint, no doubt, did in that case state, as here, that *mailkani* (here produce) had been paid for a time, but plaintiff in his deposition contradicted this, so that his case really was that, though possession had been promised to him in the deed, it had never been given. There obviously no relation of landlord and tenant had actually come into being, though the deed had intended that it should come into being. Here, on the contrary, plaintiffs stated, and still insist, that for two years produce sufficient to cover interest and land revenue was actually recovered by them, and it is thus apparent that this case must be dealt with on its own facts.

Mr. Nanak Chand for respondent was inclined to argue that the existence of tenants in cultivating possession *ipso facto* made it impossible that the mortgagors could be tenants under the mortgagees; but we are not prepared to adopt this *ratio decidendi*. No doubt the Full Bench all through wrote of "cultivating possession," but that is merely because in the cases before it there were no cultivators below the mortgagors; and we see no difficulty in holding that mortgagors with tenants under them might, by virtue of appropriate stipulations and conditions, contract to hold their land "under" their mortgagees. At the same time, we do not think that by the deed before us the defendants remained in possession at all or held "under" the plaintiffs. In our opinion the effect of the deed was to remove the defendants from possession and to leave them in the position of proprietors whose only connection with the land thereafter was that they still had the right to redeem, their engagement to assist the mortgagees plaintiffs in recovering produce making them at most in some sort agents for the plaintiffs.

Mr. Kamal-ud din, in reference to this way of dealing with the problem, asks why, if defendant No. 1 was not under the deed left in possession, plaintiffs should sue him for possession, and contends that there is no cause of action against him, it being *ex hypothesi* open to plaintiffs to proceed year by year for their rent against the actual cultivators. The answer is easy. Defendant No. 1 is in possession. Plaintiffs' pleadings imply that sometime after the first two years defendant No. 1 usurped possession, and defendant No. 1 himself certainly asserts and defends his own possession. In these circumstances, plaintiffs clearly have a cause of action against him; and we must hold that the suit is one for a Civil Court and that plaintiffs have proved their case.

We, therefore, dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 4739 OF 1911.

December 19, 1911.

Present:—Sir Lawrence Jenkins, Kt., Chief Justice, and Mr. Justice N. Chatterjea.

JNAN CHANDRA NAG DAS AND OTHERS —PLAINTIFFS—PETITIONERS

versus

LOCHH MOHAN BASAK AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Specific Relief Act (I of 1877), s. 9—Possessory suit—Point for determination—Dispossession within six months before suit—Finding that plaintiff not in possession—Suit to be dismissed—Limitation Act (XV of 1877), Sch. II, Art. 3.

It is not a point requisite for the purposes of a suit under section 9 of the Specific Relief Act that the plaintiff was in possession of the land in suit within six months from the date of dispossession. All that has to be determined is, whether the plaintiff was dipossessed and whether his suit was brought within six months from when the dispossession occurred.

Where a Court finds that there was no dispossession, because there was no possession by the plaintiff, the suit should be dismissed.

Rule against the judgment of the Munsif of Dacca, dated May 13th, 1911.

Babu *Harendra Narain Mitter*, for the Petitioners.

Babu *Probodh Kuwar Das*, for the Opposite Party.

JUDGMENT.—Though the officiating Munsif has obviously bestowed considerable labour upon his judgment the result has been by no means satisfactory, because he has delivered a judgment which has reasonably led to an application for this Rule. The suit is one under section 9 of the Specific Relief Act, and the points for determination were formulated by the learned Judge at the outset of his judgment. Amongst those points was this, "whether the plaintiffs were in possession of the land in suit within six months from the date of dispossession." That is not one of the points

requisite for the purposes of a suit under section 9. All that has to be determined for the purposes of that section is whether the plaintiff was dispossessed, and whether his suit was brought within a six months' time from when the dispossession occurred. in other words, regard is to be had to the terms of section 9 of the Specific Relief Act and Article 3 of the second Schedule to the Indian Limitation Act. The judgment, undoubtedly, has scattered, throughout it, phrases which would appear to indicate that the Judge thought that there had been a dispossession, and if those phrases stood alone, then the plaintiff would have been entitled to the relief he seeks by means of this application. But there are other parts of the judgment which have to be taken into consideration, and those other parts make it clear to my mind that the expression used by the learned Judge as to dispossession was hypothetical; in the sense that he said that if there was dispossession then it was in the month of February. But he goes on to make it clear that in his opinion there was no dispossession because there was no possession by the plaintiff; and in this view of the judgment, it appears to me that we ought not to interfere in revision. We must accordingly discharge the Rule, but as the plaintiff has been misled by the judgment of the Court we make no orders as to costs.

Rule discharged.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No.1912 OF 1909.

June 19, 1911.

Present:—Mr Justice Mookerjee and Mr. Justice Carnduff.

HEWA MAL—PLAINITIFF—APPELLANT

versus

KARUNAMOY GUPTA—DEFENDANT—RESPONDENT.

Jurisdiction—Assumption of jurisdiction in irregular manner—Objection not taken at proper time—Waiver—Transfer of pending execution case—Sale held irregularly—No application by judgment-debtor to set aside sale—Transferee of judgment-debtor, whether competent to question sale—Civil Procedure Code (Act XIV of 1882),ss. 244, 311.

Where a Court assumed jurisdiction in an irregular manner and not in a matter over which the Court would not acquire jurisdiction under any circumstances, the objection to assumption of jurisdiction may be waived, and if not taken when the jurisdiction was assumed, it will be considered as waived.

Rai Balkrishna v. *Msauma Bibi*, 9 I. A. 182 at p: 196; 13 C. L. R. 232; 5 A. 142 and *Gurdeo Singh* v. *Chundrika Singh*, 36 C. 193; 5 C. L. J. 611; 1 Ind. Cas. 913, referred to.

A pending execution proceeding was transferred by the Judge from the Court of a Munsif to that of a Sub-Judge who held a sale and no objection was taken at the time to the Sub-Judge's jurisdiction:

Held, that even if the Judge was not competent to transfer the case, yet the objection to the jurisdiction of the Sub-Judge not having been taken at the proper time must be considered as waived; the sale, therefore, was not liable to be set aside on the ground that the Sub-Judge had no jurisdiction to hold the sale.

A judgment-debtor should take appropriate proceedings for the reversal of an irregular sale, under sections 244 and 311 of the Code of 1882. If he does not take any such step, his transferee is bound by the same estoppel and cannot question the sale.

Appeal from the decree of the Sub Judge of Patna, dated July 28th 1909, affirming that of the Munsif of Bankipur, dated March 25th 1909.

Babus *Umakli Mukherjee* and *Ganesh Dutt Singh*, for the Appellant.

Babus *Ram Chandra Majumdar* and *Karunamoy Bose*, for the Respondent.

JUDGMENT.—This is as appeal on behalf of the plaintiff in a suit for declaration of title to immoveable property and confirmation of possession thereof. The property admittedly belonged to a person by name Dhanukdhari Singh. The case for the plaintiff is that in execution of a money-decree which he held against the admitted owner, he purchased the property on the 19th February 1906, that the defendant in execution of another decree against the same judgment-debtor purchased the property on the 20th January 1907, and that under these circumstances, the defendant has acquired no title to the property and is consequently not entitled to interfere with his possession. The defendant resisted the claim substantially on two grounds, namely, *first* that the decree which was the foundation of the title of the plaintiff was fraudulent and collusive, and, *secondly*, that the execution sale was inoperative to pass any title to the plaintiff, because it was irregular and had been held by a Court which had no jurisdiction to deal with the matter. The Court of first instance found that the decree was fraudulent and collusive and dismissed the suit. Upon appeal, the

HEWA MAL v. KARUNAMOY GUPTA.

Subordinate Judge has reversed that finding and has held that the decree was not fraudulent but was based upon a promissory note executed for valuable consideration. The Subordinate Judge, however, has affirmed the decree of dismissal on the ground that the Court in which the execution proceedings took place had no jurisdiction to deal with the matter, and that, at any rate, the sale was vitiated by grave irregularities.

The plaintiff has now appealed to this Court and on his behalf the decision of the Subordinate Judge has been challenged on two grounds; namely *first*, that the Court by which the execution sale was held was a Court of competent jurisdiction and that at any rate as no objection was taken by the judgment-debtor at the time to the jurisdiction of the Court, it is too late for the defendant to take exception on that ground on the present litigation; and *secondly*, that no question of irregularity in the proceedings antecedent to the sale can be raised or considered in the present proceedings. In our opinion, both these objections are well founded and must prevail.

In support of the first ground, it has been pointed out by the learned Vakil for the appellant that the decree was obtained by the plaintiff on the 17th March 1903 in the Court of a Munsif who had jurisdiction to try suits of the value of Rs. 2,000. The application for execution of the decree was made in the Court of the same Munsif for recovery of the sum of Rs. 1,707. The properties appear to have been attached but the proceedings were subsequently dismissed for default. There was a second application for execution which was also infructuous. On the 27th September 1905, the decree-holder applied for execution of the decree before the Munsif who had jurisdiction to entertain a suit of the value of Rs. 2,000. This Munsif, however, was subsequently transferred, and the result was that by an order of the District Judge, the execution proceedings pending before him were transferred to the Court of the Subordinate Judge, Babu Ram Lal Das. No objection was taken by the judgment-debtor, and the sale, as we have already stated, was held on the 19th February 1906. It is now suggested, upon the authority of the decision of this Court in the case of *Kishori Mohan Sett* v. *Gul Mohammad Saha* (1), that it was not competent to the District Judge to transfer a pending execution proceeding from the Court of the Munsif to that of the Subordinate Judge, and that consequently the Subordinate Judge when he held the sale must be deemed to have acted without jurisdiction. In our opinion, this contention is manifestly fallacious.

In the first place, the decision in *Kishori Mohan Sett* v. *Gul Mahomed* (1) must be deemed to have been impliedly overruled by the decision of the Judicial Committee in the case of *Thakur Prasad* v. *Fakir Ullah* (2). It may be pointed out, that in so far as that case decided that a suit which has been heard in part cannot be transferred, it was not followed in the cases of *Mahadeo Prasad* v. *Gajadhar* (3) and *Bidyamoye Debya* v. *Surja Kanta* (4). It is also worthy of note that the Legislature has subsequently indicated by the altered phraseology of section 24 of the Code of Civil Procedure of 1908, that is by the introduction of the words "at any stage", that the decision in *Kishori Mohan Sett* v. *Gul Mahomed Saha* (1) did not give effect to the true intention of the Legislature. The Legislature in substance has approved the contrary view taken by the High Courts of Bombay, Madras and Allahabad in the cases of *In re Balaji Ranchhoddas* (5), *Muttalagiri* v. *Muttayar* (6); *Bandhu Nuik* v. *Lakhi Kuar* (7), *Palanisami* v. *Thondama* (8), and *Nassarvanji* v. *Kharsedji* (9).

In the second place, the case of *Kishori Mohan Sett* v. *Gul Mahomed Saha* (1) is clearly distinguishable. The case before us is not one of transfer of execution proceedings from one Court to another. It appears that by reason of the transfer of the Judicial officer before whom the execution prceedings had been commenced, that Court ceased to exist. The result, therefore, was that under section 649, Civil Procedure Code of 1882, it became the duty of the Court in which the original suit might have been instituted

(1) 15 C. 177,
(2) 17 A. 106;22 I. A. 44.
(3) 10 C. W. N. 12.
(4) 9 C. W. N. 705; 32 C. 875.
(5) 5 B. 680.
(6) 6 M. 357.
(7) 7 A. 342.
(8 26 M. 595.
(9) 22 B. 778.

DURGA SHANKAR v. RAM RATAN.

to take cognisance of the execution proceedings. That Court was clearly the Court of the Subordinate Judge, because it cannot be disputed, upon the materials placed before us, that there was not at the station another Munsif competent to take cognisance of a suit valued at any sum between Rs. 1,000 and Rs. 2,000 [*cf. Dulal* v. *Ram Narain* (10)]. Under these circumstances, we are clearly of opinion that the Subordinate Judge had jurisdiction to entertain the execution proceedings under section 649 of the Code of 1882.

In the third place, it may be pointed out that even if it be assumed that the case of *Kishori Mohan Sett* v. *Gul Mahomed Saha* (1) was correctly decided and applies to the circumstances of the present case, the judgment-debtor, now represented by the respondent, has waived objection to the assumption of jurisdiction by the Subordinate Judge. There is no room for controversy that the Subordinate Judge was competent to execute a decree for more than Rs. 1,000, if it was brought into his Court for execution after the necessary formalities Even if it be assumed, therefore, that the District Judge had no jurisdiction to make an order for transfer, as it cannot be disputed that the order for transfer might have been made by this Court, the case would clearly be one of assumption of jurisdiction in an irregular manner and not assumption of jurisdiction in a matter over which the Court could not acquire jurisdiction under any circumstances. The objection to assumption of jurisdiction in circumstances like these may clearly be waived See *Rai Bulkrishna* v. *Masumat Bibi* (11); *Gurdeo Singh* v. *Chandrika Singh* (12)] We must, therefore, hold that the view taken by the Subordinate Judge cannot be maintained and the execution sale is not liable to be challenged on the ground that the Court in which the execution proceedings took place had no jurisdiction to hold the sale.

In so far as the second objection is concerned, it is, in our opinion, equally groundless. The Subordinate Judge has held that as it is not established that any attachment, was effected or sale proclamation issued, the sale must be treated as invalid and inoperative in law. That is a view which clearly cannot be maintained. If the sale was liable to be challenged on the ground that there were material irregularities in connection with the execution proceedings, it was the duty of the judgment-debtor to take appropriate proceedings for reversal of the sale under sections 244 and 311 of the Code of 1882. The judgment-debtor did not take any such step and the present respondent does not occupy a position of greater advantage. He has purchased the right, title and interest of the judgment debtor and he is bound by the same estoppel as would bind the judgment-debtor. The result, therefore, is that the two grounds upon which the validity of the sale, which is the root of the title of the plaintiff, was assailed cannot be sustained; as the defendant purchased the property subsequently to the purchase by the plaintiff, he has obviously acquired no title.

The result, therefore, is that this appeal is allowed and the decree made by the Court below discharged. The suit will stand decreed with costs in all the Courts.

Appeal allowed.

(10) 31 C. 1057.
(11) 9 I. A. 182 at p. 196: 13 C. L. R. 232; 5 A. 142.
(12) 36 C. 193; 5 C. L. J. 611; 1 Ind. Cas. 913.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 289 OF 1910.
September 4, 1911.

Present:—Mr. Lindsay, A. J. C.

DURGA SHANKAR AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAM RATAN—PLAINTIFF—RESPONDENT.

Hindu Law—Grant to widow—Nature of estate.

Under the Will of a Hindu certain of his relatives were to receive the profits of certain property in fixed shares from generation to generation. There being some trouble in distributing the profits among the maintenance-holders, the executors of the Will decided to get rid of their burden by handing the property over absolutely to the respective legatees who had charge on it. The result was a compromise under which the widow of a maintenance-holder, who had died before the compromise, got a share of the property along with others:

Held, that the grant to the widow was limited to her life, as she took in a different quality from that of the males, and that she had no absolute power to dispose of the property granted to her.

Kashi Prashad v. *Indar Kunwar*, 5 A. L. J. 590; A. W. N. (1908) 222; *Narayana* v. *Changalamma*, 10 M. 1, followed.

Appeal against the order of the District Judge of Hardoi, dated the 31st March 1910,

confirming that of the Subordinate Judge, Unao, dated the 17th June 1909.

Pandit *Gokaran Nath Misra*, for the Appellants.

Mr. *Samiullah Beg*, holding the brief of Mr. *Nabiullah*, for the Respondent.

JUDGMENT.—The only question for determination in this second appeal is the nature of the interest possessed by the appellant, *Musammat* Bilas Koer, in a certain share of *zemindari* property on the 11th of January 1905 when she executed a deed of gift transferring the share in question to the other appellant Durga Shankar.

The suit out of which this appeal has sprung was instituted by the respondent Ram Ratan as a reversioner of Bilas Koer's deceased husband who prayed for a declaration that Bilas Koer had only a widow's estate in the property and that the transfer executed by her in favour of Durga Shankar could not operate beyond the period of her life.

In order to explain how Bilas Koer came to have possession of the property in dispute it is necessary to set out some facts which are admitted by the parties. One Gur Prasad, who died many years ago, left a Will executed in 1882 by which he left the bulk of his property to his son-in law, Ram Sahai, and his two grandsons, Durga Prasad and Sheo Shankar Lal. In order to make provision for the maintenance of some of his poorer relations Gur Prasad directed in his Will that they should receive the profits of certain *zemindari* shares from generation to generation. These shares were to be held by the legatees Ram Sahai, Durga Prasad and Sheo Shankar subject to the charge for maintenance in favour of these relations, and they were directed to distribute the profits in the shares appointed. Two groups of relatives were specified in the Will and separate parcels of landed property were specified as charged with the maintenance of the members of each group. One of the groups consisted of nine members and of these one member was Suraj Bali, the husband of *Musammat* Bilas Koer. Another was Bhagwan Din, the father of the plaintiff-respondent Ram Ratan. After the death of Gur Prasad his legatees and executors appear to have had some trouble in the matter of distributing the maintenance to the various persons entitled to it. It is said they handed the property charged over to one of the maintenance-holders so that he might divide the profits among his co-sharers. This individual appropriated most of the income to his own use with the result that the executors found themselves sued by some of the persons entitled to maintenance who claimed arrears of the allowances which had been withheld from them.

This suit was put an end to by a compromise. The executors determined to get rid of their burden by handing the property over absolutely to the relatives who held a charge on it. For this purpose every one of the persons then receiving maintenance was made a party to the deed of compromise, though all of them were not parties to the suit.

The date of the document is the 7th April 1904. The property was declared to be divisible into 9 shares to be held by the 9 persons mentioned in the Will or their representatives who were alive at the time. The executors released their reversionary interest in the lands to these persons who, it was declared, were to hold the property thenceforward absolutely with full powers of disposal.

One of the parties to this document was *Musammat* Bilas Koer, the widow of Suraj Bali, who had died before those proceedings were taken. Her share in the property was declared to be 1/9th. Another party was Ram Ratan, the present plaintiff, who was also given a 1/9th share. It is the 1/9th share so assigned to Bilas Koer which she has transferred by deed of gift to Durga Shankar. According to the plaintiff's case, Bilas Koer has only the estate of a Hindu widow in this share and has, therefore, no power to alienate it absolutely. It is claimed accordingly that the transfer cannot bind the reversioner-plaintiff beyond her lifetime.

On the other hand, it is contended that Bilas Koer is full owner of the share, that she took an absolute title under the deed of compromise, and that she is entitled to dispose of the property as she chooses.

The view taken by both the Courts below is that any interest taken by Bilas Koer under the compromise was taken by her in her quality of a Hindu widow, she having succeeded on the death of her husband to his interest in the charge on the lands allot-

ted for maintenance by the Will, and that consequently she must be held to be in possession of the enlarged estate in the same capacity as she had when it was taken.

There can be no dispute as to the meaning of the compromise deed. The executors released all their interest in the property to the maintenance-holders to whom the entire estate was transferred absolutely. But it does not necessarily follow from this, in my opinion, that the widow can set up a case that she is full owner of the share.

Both the Courts below relied upon the principle laid down in a decision of the Allahabad High Court reported in *Kashi Prasad* v. *Indar Kunwar* (1). In that case the facts were that one Newal Rai held an under-proprietary right in a village. He died and was succeeded by his wife *Musammat* Jaika. During her life-time the superior proprietor made default in the payment of his Revenue with the result that the settlement with him was annulled and a fresh settlement was made with *Musammat* Jaika. No *sanad* appears to have been granted but it was recited in a Government order that the *zemindari* of the village had been conferred upon the widow. The first Court held that the *zemindari* rights were conferred by her deceased husband, and not in acknowledgment of any right of her own and this decision was upheld on appeal. It was ruled that as Jaika acquired the property of her husband for a Hindu widow's estate and as, by virtue of her ownership derived from her husband, she acquired from Government the *zemindari* rights which had not been previously enjoyed: the acquisition of these rights amounted merely to an enlargement of the interest to which she had succeeded as the widow of her husband and must be treated as acquired for the benefit of all persons interested as reversioners in her husband's estate. The learned Judges held that the doctrine of graft, as expounded in the case of *Keech* v. *Sandford* (2) and as embodied in section 90 of the Indian Trusts Act, 1882, applied to the case. It is argued that this case can be distinguished from the one now under consideration. In the first place, it is said that at the time the compromise was drawn up *Musammat* Bilas Koer was not in receipt of maintenance as the representative of her deceased husband, that the executors could have declined to pay her maintenance as she was not a lineal descendant (*i. e.*, of the *nasl*) of her husband and that, therefore, the grant was made by the executors to her independently of her status as a widow. This contention cannot prevail. The interest of the maintenance-holders in the charge upon the property was declared by the Will to be a heritable interest. They were to be entitled to the profits of this property *naslan bad naslan*, words which have been repeatedly held to confer an estate of inheritance which would descend according to the rules of inheritance applicable to the grantee. Suraj Bali's interest in the charge, therefore, descended upon his widow as he died without issue.

Again, it is said that in the Allahabad case there was not as here any deed of grant the terms of which evidenced the conferment of an absolute estate and that the nature of the grant had to be deduced merely from the fact that the Government made a settlement with the widow. I do not think any distinction between the two cases can be made upon this ground. It was held that *zemindari* rights were actually conferred upon the widow.

However, I may refer here to a decision of the Madras High Court reported in *Narayana* v. *Chengalamma* (3), in which a case of a similar nature was considered and in which there was very clear evidence of the terms of the grant which were contained in *sanad* issued by Government to a widow. There an estate had been held by one Lakshmi Ragavappa Nayudu who died on the 23rd August 1860 leaving him surviving a widow Kannamma and a daughter Chengalamma.

The estate had been held on service tenure and had not been brought under permanent settlement.

In 1865 the Government discontinued the service and charged on the whole estate in perpetuity a quit-rent of Rs. 1,250 in commutation of the service and of the reversionary interest which the Crown claimed as the paramount power under the terms of the original grant. A title-deed was issued to the widow in which after an acknowledgment by Government of the widow's title to the estate it was declared that subject to the payment of the quit-rent just mentioned the

(1) 5 A. L. J. 590; A. W. N. (1908) 222.
(2) Select Cas., Ch. 61; 2 Eq. Cas. Abr, 741.
(3) 10 M. 1.

estate was confirmed in her as "free-hold or as your absolute property."

After this the widow alienated portions of the property and a suit was brought by her daughter for a declaration that the alienations were void beyond her mother's life-time. It was contended that the alienations were binding and that the widow took as absolute owner under the *sanad* granted by the Government, but it was held that Kannamma notwithstanding the language of the *sanad* had nothing more than the estate of a Hindu widow. The effect of the grant was to enlarge the interest already possessed by her and to constitute an accretion to an ancestral and hereditary tenure. No new right of property was acquired under the title-deed nor could the conversion of a precarious tenure into permanent property alter the incidents of the estate either in regard to the mode of descent or partibility. The words contained in the grant were intended to be operative only as between the Crown and the grantee and not as between the latter and his heir.

I think this case is exactly in point here; and, applying the same principles of interpretation to the deed of compromise under which Bilas Koer claims, it must be held that the grant was made to her as the heir of her husband and does not operate to alter the nature of the estate she already held so far as the manner of descent is concerned.

It has been argued that as all the maintenance-holders now show title under the same deed of grant it is not open for one of them to assert that while the grant to him was absolute the grant to the widow was limited. I am unable to see any force in this contention. Clearly, those who were males took in a different quality from *Musammat* Bilas Koer and it is the quality in which the person takes that determines the nature of the estate conferred. The appeal fails and is dismissed with cost.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 436 OF 1910.

August 29, 1911.

Present:—Mr. Lindsay, A. J. C.

BINDA PRASAD—DEFENDANT No. 7—APPELLANT.

versus

GAYA PRASAD SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Mitakshara—*Joint family property, alienation of, by some members—Consent of all not taken validity—'Antecedent debt'—Necessity—Limitation Act (IX of* 1908), *Sch. I, Art.* 91—*Declaration.*

Article 91 of the Limitation Act does not apply to a suit by one member of a joint Hindu family for a declaration that a mortgage of the joint family property effected by the other members of the family, without the consent of the plaintiff, is invalid and does not bind the family property.

In dealing with the question whether or not a particular family is joint, the principal thing to be regarded is jointness of estate. Separation in food or worship may be evidence of partition but it is not conclusive evidence.

Where an alienation of the joint family property is made by several brothers of the family and the act is challenged by another brother, the question of "antecedent debt" does not arise. The defence of "antecedent debt" is available only in cases where sons are seeking to avoid an alienation made by their father.

In a joint family governed by the *Mitakshara* law one sharer has no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint family property in order to raise money on his own account and not for the benefit of the family.

Sadabart Prasad Sahu v. *Foolbash Koer*, 3 B. L. R. 31 (F. B.); 12 W. R. 1 (F. B.), followed.

Appeal against the order of the District Judge, Hardoi, dated the 16th July 1910, reversing that of the Sub-Judge, Unao, dated the 31st March 1910.

Mr. *J. Jackson* and Pandit *Gokaran Nath Misra*, for the Appellant.

Messrs. *Basudeo Lal* and *Puttu Lal*, for the Respondents.

ORDER.—In this case the matter in dispute is the validity of a mortgage executed in 1902 in favour of the defendant-appellant Binda Prasad by three brothers Sati Din, Mutai and Bhagwan Baksh. This suit has been brought by a fourth brother Gaya Prasad Singh and his son for a declaration that the mortgage is invalid on the ground that at the time of the mortgage all four brothers were members of a joint Hindu family and that the shares mortgaged were in fact shares of joint family property.

The principal issue in the case was whether or not the mortgagors were joint with

BINDA PRASAD v. GAYA PRASAD SINGH.

the plaintiff Gaya Prasad. The first Court held that they were not and dismissed the suit. In appeal this finding has been reversed by the District Judge. He has held it to be proved that the family was joint and he has decreed the claim.

Five grounds are taken in the memorandum of appeal to this Court. The *first* is a plea of limitation to the effect that the suit being one for cancellation of the mortgage deed the suit should have been brought within three years from the date of the execution. This plea was not raised by the defendant-appellant in the first Court and cannot, in my opinion, succeed. It is not pretended that the plaintiff Gaya Prasad was any party to the instrument. He is not seeking to set aside a document executed by himself, he is merely seeking a declaration that a document executed by his three brothers does not bind the joint family property.

The second and fourth grounds are not pressed.

In the third ground it is pleaded that the finding of the District Judge that the family is joint is vitiated by "various errors of law." In argument the error is said to consist in the finding having been come to in the absence of any evidence to show that the brothers were joint in food and worship. But there is evidence to establish both these facts. It may not be very strong but still it is there and being there the finding of fact cannot be impeached in second appeal. Moreover, in dealing with the question as to whether or not a particular family is joint the principal thing to be regarded is jointness of estate. Separation in food or worship may be evidence of partition but it is not by any means conclusive evidence. This ground must fail.

It only remains to notice the fifth ground, namely that the Court below ought to have tried the question as to whether the money borrowed was spent for an object binding on all the members of the joint family.

The point was not raised definitely in this form in the appellant-defendant's written statement. He stated in paragraph 10 of that document that the mortgage-deed was executed for legal necessity and that the money was borrowed for legal necessity and a portion of it was an antecedent debt.

So far as the question of antecedent debt is concerned it cannot arise in a case of this kind where the alienation was made by several brothers of a family and the act is challenged by another brother. As I understand the law, the defence of antecedent debt is available only in cases where sons are seeking to avoid an alienation made by their father.

As for the plea of legal necessity, it is somewhat vague. No personal necessities of these mortgagors could justify the alienation. The law is settled that in a joint family governed by the *Mitakshara* law one sharer has no authority without the consent of his co-sharers to mortgage his undivided share in a portion of the joint family property in order to raise money on his own account and not for the benefit of the family [*Sadabart Prasad Sahu* v. *Foolbash Koer* (1)].

However, it may be that the mortgagee did intend to raise the defence that the money was borrowed for the family benefit and that, therefore, the transaction was justified on the ground of legal necessity and, in the circumstances, I think, it is proper to allow him an opportunity of making this ground good. I, therefore, remand the following issue for determination by the lower Court:—

Was the money advanced by the mortgagee on the mortgage-bond executed on the 16th January 1902 borrowed by the mortgagors for the benefit of the joint family?

The Court will receive all evidence which the parties may produce on this issue and will return the findings within two months from this date. Ten days to count from the date of the lower Court's finding will be allowed to the parties to file objections.

Case remanded.

(3) 3 B. L. R. 31 (F. B.); 12 W. R. 1 (F. B.).

JIWAN *v.* DIT.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1126 OF 1910.

January 23, 1912.

Present:—Mr. Justice Chevis.

JIWAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

DIT AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom —Adoption—Effect on property already acquired by succession—Right of succession in natural family as against collaterals—Presumption—Burden of proof—Bajwa Jats *of Sialkot District.*

An adopted person does not by adoption lose the property to which he has already succeeded.

A person adopted as an heir in the customary manner of the Punjab does not thereby lose his rights to succeed to property in his natural family as against collaterals.

Among *Bajwa Jats* of the Sialkot District, when a person is adopted into another family his right of succession in his natural family, so far as collaterals are concerned, is the same as before.

Rukun Din v. *Musammat Mariam*, 68 P. R. 1898; *Ghela* v. *Haider*, 59 P. R. 1906; 68 P. L R. 1907; *Jhanda Singh* v. *Kesar Singh*, 37 P. R. 1910; 6 Ind. Cas. 712; 62 P. W. R. 1910, followed.

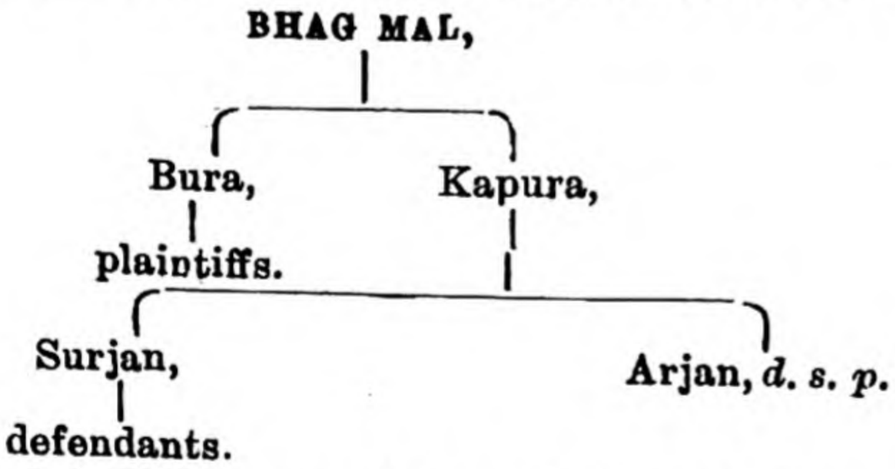
Mukh Ram v. *Not Ram*, 100 P. R. 1906, 101 P. L. R. 1907, distinguished.

Second appeal from the decree of the Divisional Judge, Sialkot Division, dated the 23rd of August 1910, reversing that of the Munsif, 1st Class, Sialkot, dated 6th of January 1909, dismissing plaintiffs' claim.

Lala *Dharm Chand*, for the Appellants.

Mr. *M. Obedullah*, for the Respondents.

JUDGMENT.—The genealogical tree is:—



The plaintiffs are descendants of Bura, defendants are the descendants of Surjan.

Surjan was adopted by his maternal uncle Asa.

The plaintiffs sue for the land in suit, which comprises the whole of the estate left by Kapura, on the ground that Arjan has died sonless.

According to plaintiffs, Surjan's descendants have lost all rights by Surjan's adoption.

The first Court held that by adoption Surjan had not lost his rights and dismissed the suit. The learned Divisional Judge on appeal held that by adoption Surjan lost is right to inherit in his natural family, and so Surjan's descendants could not inherit Arjan's share of the land, but that Surjan had never given up his own share of the land and so his descendants could not be ousted from that share. So the Divisional Judge decreed the claim to the extent of one half.

Both sides appeal to this Court. This judgment will cover both appeals.

For the plaintiffs a preliminary objection is raised as to certain respresentatives of deceased parties not having been brought on to the record in time.But, granting that there has been a default, it is one which is common to both sides.

First, as regards Surjan's share of the land. It is admitted by plaintiffs' Counsel that Kapura had died before Surjan's adoption. So Surjan had received half of the land in suit by inheritance from his father even before his adoption, and plaintiff's Counsel admits that he is unaware of any ruling in support of the idea that a man should lose by adoption property to which he has already succeeded.

Next, as regards Arjan's share of the land, it is admitted before me that Surjan's adoption was only a customary one, and not a regular adoption under Hindu Law.

The Divisional Judge has confused the question of the right of an adopted son to succeed collaterally in his natural family with the question of his right to succeed collaterally in his adoptive family; with the latter question we have nothing to do.

The parties are *Bajwa Jats* of the Pasrur *Tahsil* of the Sialkot District. The general presumption is that a person adopted in the customary manner of the Punjab as an heir does not thereby ordinarily lose his rights to succesd to property in his natural family *at least as against collaterals*, see Rattigan's Digest of Customary Law, Article 48, though in some cases he loses his right to a share in the estate of his natural father if he has brothers.

The *Riwaj-i-am* of the Sialkot District is to the same effect. In Answer 74 it is laid down that if an adopted son is the only son of his natural father, he can succeed to the property of his natural father and also to the property of the collaterals of his natural father, but if he is not the only son of his natural father he cannot succeed even to a share of his natural father. This clearly points to the fact that when a man

is adopted into another family his rights of succession in his natural family are the same as before so far as collaterals are concerned, though he takes a second place so far as his own brothers are concerned.

The old *Riwaj-i-am* of 1865 simply recites that an adopted son loses his right to inherit as son from his natural father unless he is the only son. This agrees with the later *Riwaj-i-am* so far as it goes.

So, too, in *Rukun Din* v. *Musammat Mariam* (1) it was held that an adopted son and his descendants were entitled to succeed in the natural family of the adopted son. The case seems very like the present. One Bhana had three sons, Ismail, Khalil and Jamal, of whom the last was adopted by Bhana's uncle Isa. Ismail and Khalil died sonless and on the death of Khalil's widow Jamal's descendants were held to be entitled to succeed to the exclusion of the descendants of Wazir, another uncle of Bhana. Had Jamal been reckoned merely as the son of Isa, his descendants would have had to share equally with the descendants of Wazir.

The question is decided in the same way in *Ghela* v. *Haider* (2) where the learned Chief Judge remarks that "the reasons that would induce an adopted son to give up his rights in his natural family against his own brothers do not apply, or at all events not with the same force where it is a question of succeeding collaterally." If further authority were needed reference might be made to *Jhanda Singh* v. *Kesar Singh* (3).

For respondents *Mukh Ram* v. *Not Ram* (4) is quoted, but this is merely an instance of an adopted son not succeeding to a share of his natural father's family in the presence of a brother, so that this is not at variance with the general rule. It may be noted, too, that the case is one of the Karnal District, in a part of the Punjab where, as remarked in *Jhanda Singh* v. *Kesar Singh* (3), more stress is laid upon the fact of adoption and its consequences than in other parts of the Province. So the general custom and the *Riwaj-i-am* are both in favour of the defendants. As to the instances cited by the witnesses for the plaintiffs, they merely show that an adopted son loses his right to succeed to a share in his natural father's estate in the presence of a brother. This does not help plaintiffs at all.

The *onus* of proving that the defendants, descendants of Surjan, are disentitled by reason of Surjan's adoption from succeeding to the land left by Surjan's only brother is on the plaintiffs and they have failed to discharge it. The appeal of the defendants is, therefore, accepted with costs. The appeal of the plaintiffs is dismissed with costs. The decree of the learned Divisional Judge is set aside and that of the first Court dismissing the suit is restored.

Plaintiffs will pay costs in all Courts.

Appeal accepted.

(1) 68 P. R. 1898.
(2) 59 P. R. 1906; 68 P. L. R. 1907.
(3) 37 P. R. 1910; 6 Ind. Cas. 712; 62 P. W. R. 1910.
(4) 100 P. R. 1906; 101 P. L. R. 1907.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 570 OF 1910.

January 25, 1912.

Present:—Mr. Justice Chevis.

Musammat NIHAL KAUR—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

Will—Construction—Hindu Law—Devise to widows and daughters—Widows' share to go to daughters on their death—Nature of widow's interest—Tenancy-in-common—No right of survivorship between widows—Nature of daughter's interest—Absolute estate—Land Acquisition Act (I of 1894), ss. 18, 32—Deposit of widow's share in Court on objection of daughters—Withdrawal of objection—Subsequent death of widow—Jurisdiction—Determination of question of succession to deceased widow—Daughter not claiming her own share left by Will—Recognition as heir of deceased widow in acquisition proceedings—Application of s. 18 to question of succession of deceased claimant and investment of money—Investment in securities, when to be made.

A testator left two widows, *A.* and *B.*, and two daughters, *C.* and *D.* By his Will he left his lands half to his widows and half to his daughters stating that after the death of the widows their half would go to the daughters, and after the death of the daughters to their descendants.

The testator died in 1887. In 1899, *C.* sued the widows and obtained a decree for ¼th of the lands. *D.* did not join in the suit and never obtained the ¼th share left her by her father.

In 1909 a portion of the lands left by the testator was acquired by Government. The Land Acquisition Officer awarded ¼th of the compensation to *C.* and ¾ths to the widows. As *C.* objected that the widows were not competent to alienate the land, the officer deposited the ¾ths of the money in Court. Subsequently, *C.* withdrew her objection and the Land Acquisition Officer reported that the money might be

NIHAL KAUR *v.* SECRETARY OF STATE.

paid to the widows. Before the Divisional Court had time to deal with the matter, *A.* died and a dispute arose as to who were her heirs, *C.* and *D.* claiming that *A.*'s share went to them while the surviving widow claimed that it went to her. The Divisional Judge held that *A.*'s share went to the daughters and ordered that the money deposited in Court should be invested in Government Po-notes and that the interest should be paid half to *B.* and one quarter to each of the daughters:

Held, (1) that the Divisional Judge was right in deciding the question of title arising between the rival claimants. Such questions should be decided in the case aud should not be left to be decided by a separate suit. The Court was bound to decide all points the decision of which was necessary to enable it to pass orders as to the disposal of the money, including questions arising as to who was the proper heir of the claimant who had died after the deposit of money in Court.

Babujan v. *The Secretary of State for India in Council and the Chairman, Gaya Municipality*, 4 C. L. J. 256, followed.

(2) That the money having been once deposited in Court, the Court was obliged to observe the provisions of section 32 of the Land Acquisition Act, in spite of the withdrawal of *C.*'s objection.

(3) That sectien 18 of the Act did not apply to the determination of the question as to the succession to *A.*'s share and as to the investment of the money.

(4) That, on a proper interpretation of the Will, each of the widows was to hold for life as a tenant-in- common without the benefit of survivorship and the share of either widow passed at her death to the daughters.

Munni v. *Umrao Singh*, 39 P. R. 1909; 55 P. W. R. 1909; 59 P. L. R. 1909; 1 Ind. Cas. 720, referred to.

(5) That as *D.* did not choose to sue for her ¼th share which fell to her immediately on her father's death, she could not claim to get that share out of the share left by *A.*'s death by a disproportionate division of the compensation-money. If *D.* claimed a share in the land, she should have put in a claim before the Land Acquisition Officer in her own right as heir of her father.

(6) That *D.* could only be recognized in these proceedings as *A.*'s heir and could get her share only of *A.*'s property.

(7) That the Will left to *A.* and *B.* nothing more than the life-interest of a widow, but *C.* and *D.* took an absolute estate under the devise as their interest was not entailed by express words or by necessary implication.

Radha Prasad Mallick v. *Ranee Moni Dossee*, 33 C. 947; 3 C. L. J. 502; 10 C. W. N. 695, relied upon.

(8) That, consequently only *B.*'s share of the compensation awarded should be invested in securities while the daughters' share of the money should be made over to them.

First appeal from the order of the Divisional Judge, Ambala, dated 18th February 1910, directing that the money in deposit be invested in purchase of Government promissory-notes and that the ¼th of the interest arising therefrom be paid to the appellant.

Rai Sahib Pandit *Sheo Narain*, for the Appellant.

JUDGMENT.—The late Sardar Bishen Singh left two widows *Musammat* Jaswant Kour and *Musammat* Askour, and two daughters (by a third wife) *Musammat* Nihal Kour and *Musammat* Suraj Kour. By Will he left his lands half to his widows and half to his daughters, stating in the Will that after the death of the widows their half would go to his daughters, and after the death of the daughters to their descendants or, if one daughter left no issue, to the children of the other daughter. Bishen Singh died in 1887. In 1899 *Musammat* Nihal Kour sued the widows, and after a trial in which the validity of the Will was unsuccessfully contested by the widows, obtained a decree for ¼th of the land. (See Further Appeal No. 116 of 1901, decided in Nihal Kour's favour by this Court on 4th February 1904). *Musammat* Suraj Kour did not join in the suit and has so far not obtained the ¼th share left her by her father. So when in 1909 certain land was acquired by Government for the Thanesar-Kaithal Railway, the land was shown in the Revenue papers as held in the following manner:—

Musammat Askour	in equal share ¾
Musammat Jaswant Kour	
Musammat Nihal Kour ...	„ „ ¼

The Land Acquisition Officer awarded Rs. 1,572 6 8 for the land, and of this ¼th was paid over to *Musammat* Nihal Kour, but as she objected that the widows were not competent to alienate the land and, therefore, they could not get the money in cash according to section 32 of the Act, the Land Acquisition Officer deposited the remaining ¾ths of the money in Court. But *Musammat* Nihal Kour then withdrew her objection and the Land Acquisition Officer simply reported that no action was needed under section 32 of the Act and that the money might be paid to the widows. But before the Divisional Judge had time to deal with the matter *Musammat* Jaswant Kour died, and a dispute then arose as to who were her heirs, both the daughters claiming that according to the Will, *Musammat* Jaswant Kour's share of the estate went to them, while the surviving widow claimed that it went to her and that the daughters could not get it till the death of both of the widows. The Divisional Judge held that the share of *Musammat* Jaswant Kour went

to the daughters and ordered that the money which had been deposited in his Court should be invested in Government Pro-notes, and that the interest should be paid half to *Musammat* Askour and one-quarter to each of the daughters. From this order there are three appeals to this Court.

(1) In Appeal No. 570 of 1910, *Musammat* Nihal Kour urges that she should get the compensation in cash and not merely the interest. The Secretary of State is the only respondent in this appeal.

(2) In Appeal No. 571 *Musammat* Askour urges that the share of the deceased widow falls to her, and that the Divisional Judge had no cause to interfere at all as the parties concerned had come to terms before the Land Acquisition Officer, and also that she should get the money in cash and not merely the interest. In Appeal No. 572 *Musammat* Suraj Kour urges that *Musammat* Nihal Kour was only entitled to $\frac{1}{8}$th of Jaswant Kour's share, and also that her share of the money should be paid in cash and not invested.

This judgment will cover all three appeals. I will first deal with a plea raised on behalf of *Musammat* Askour, which is that the Court should not have decided who was entitled to *Musammat* Jaswant Kour's share as she was alive at the time of the award, but that the Court should have kept the money in deposit until the parties had settled by separate litigation who was entitled to receive it. (It may be noted that the dispute between the daughters and the surviving widow as to who should succeed to *Musammat* Jaswant Kour's share is one which extends, not merely to the compensation-money, but to the whole of *Musammat* Jaswant Kour's share in the estate). For *Musammat* Askour and also for *Musammat* Suraj Kour, it is urged that the Divisional Judge was the only Court who had the power to decide who was to succeed to the share of the deceased widow in the compensation money. In *Babujan* v. *The Secretary of State for India in Council and the Chairman, Gaya Municipality* (1), when it was suggested that the question of title should have been left open for determination in a regular suit, the learned Judges held that "wherever a question of title arises between rival claimants it must, under the terms of the Act, be decided in the case and cannot be made the subject of a separate suit." This is a clear ruling, and no authority to the contrary has been quoted. It is true that the above was not a case of a dispute arising as to who was entitled to succeed to the share of a claimant who had died after the award, but I think that the same principle applies. The compensation money, owing to a dispute having arisen, had been deposited in the Court, and, I think, the Court was bound to decide all points, the decision of which was necessary to enable it to pass orders as to the disposal of the money, including questions arising as to who was the proper heir of a claimant who had died after the deposit of the money in Court. Whether the decision arrived at in this case will be binding between the parties in any suit which may arise between the daughters and the surviving widow as to who should succeed to the share of the deceased widow in the rest of the estate (*i.e.*, in the land which has not been acquired by Government), I need not decide, though perhaps *Chowakaran Makki* v. *Vayyaprath Kunikutti Ali* (2) might throw some light on the question if it were a question for decision in this case.

Then it is urged that the matter having been settled amicably between the parties to the award, there was nothing left for the Court to decide. But the money having once been deposited in Court, the Court was obliged to observe the provisions of section 32. And in order to observe those provisions the Court was, I think, bound to come to a finding as to who was the heir of *Musammat* Jaswant Kour, for until this question was decided the Court could not come to a decision whether the money should be invested or handed over to the claimant, or to whom the interest of money invested was to be made payable.

As to the plea raised in *Musammat* Askour's appeal that the matter is time-barred under section 18, I note that section 18 seems to me not to apply at all, for this is not a case in which any party is objecting to the original award, either as concerns "the measurement of the land, the amount of the compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested."

(1) 4 C. L. J. 256.

(2) 29 M. 173.

That *Musammat* Nihal Kour is to get $\frac{1}{4}$th and the widows $\frac{1}{4}$ths between them in equal shares is not in dispute; the questions now are only who is to succeed to *Musammat* Jaswant Kour's share, and whether the money is to be invested according to section 32 or not.

The next question I will consider is whether the share of the deceased widow goes to the surviving widow or to the daughters. The Will leaves half the land to the Sardarnis (*i.e.*, the widows) and half to the daughters, and says, "after the death of the Sardarnis the other half will also go to my daughters." It is true that the Will does not say "after the death of both Sardarnis," but it is contended that this is the meaning, and that the daughters cannot get any of the Sardarnis' half till both the widows are dead, and that *Musammat* Askour takes *Musammat* Jaswant Kour's share by survivorship. On the other hand, there is no recital in the Will that one Sardarni is to succeed to the share of the other, and I consider that the Will simply means that each Sardarni holds for life with reversion to the daughters. It seems to me a case of a tenancy-in-common but without benefit of survivorship. [*Munni* v. *Umrao Singh* (3)]. If we look at the codicil in favour of Chattar *prohit*, the case is even clearer, but Counsel for *Musammat* Askour urges that there is no good proof of the genuineness of this codicil. Still, leaving the codicil apart, I think that on the wording of the Will itself it must be held that the share of either widow passes at her death to the daughters.

In ground 5 of *Musammat* Askour's appeal it is pleaded that as *Musammat* Suraj Kour did not sue for her share, *Musammat* Nihal Kour cannot get more than her share. Counsel has not argued this ground of appeal, and I do not understand it. I do not understand that *Musammat* Nihal Kour claims more than her share.

For *Musammat* Suraj Kour it is pleaded that she is entitled to more than she has been allotted because the share of the widows comprised the $\frac{1}{4}$th share which she had been awarded under the Will. To this $\frac{1}{4}$th share she was entitled immediately on the death of her father, and if she did not choose to sue for it, I fail to see how she can get it now by claiming a disproportionate share of the compensation-money. If she claimed a share in the land, she should have put in a claim before the Land Acquisition Officer. In these proceedings, she can only be recognized as the heir of *Musammat* Jaswant Kour, and as her sister is equally an heir, she can only get $\frac{1}{2}$ of *Musammat* Jaswant Kour's share just as her sister does, the decision of the lower Court that each of the sisters is to get $\frac{1}{2}$ of *Musammat* Jaswant's share seems to me correct. Lastly, as to whether the money should be invested.

For *Musammat* Askour it is urged that the widows were absolute owners under the Will. But the bequest to the widows was clearly one with reversion to the daughters, and I hold that nothing more than the ordinary life interest of a widow was given to each. Doubtless, the widow could alienate for necessity, but this would not be a power of alienation sufficient to authorize the Court to hand over the money to her.

The case of the daughters seems to me different. It has been held that under Hindu Law a married daughter takes by inheritance only a limited estate, but that under a demise by Will she takes an absolute estate unless her interest is curtailed by express words or by necessary implication; see *Radha Prasad Mallick* v. *Ranee Moni Dossee* (4). In that case provision was made for the succession of the daughters' sons after the death of the daughters, and for the succession of the surviving daughter and her sons to the share of a daughter dying sonless, so the case seems very similar to the present, and following it I hold that the daughters are absolute owners and can, therefore, get the money.

The result is that I uphold the decision of the learned Divisional Judge except as regards the investment of the daughters' share of the money. The appeal of *Musammat* Askour is dismissed with costs. The appeals of *Musammat* Nihal Kour and of *Musammat* Suraj Kour are accepted and I direct that $\frac{1}{4}$th of the money deposited in the Court of the Divisional Judge shall be made over to each of them; if the money has already been invested, this order will be carried out as soon as the money can be withdrawn from

(3) 39 P. R. 1909; 55 P. W. R. 1909; 59 P. L. R. 1909; 1 Ind Cas. 720.

(4) 33 C. 947; 3 C. L. J. 502; 10 C. W. N. 695.

investment. No order as to costs in the appeals of *Musammat* Nihal Kour and Suraj Kour.

Appeal accepted.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 442 OF 1910.

August 23, 1911.

Present:—Mr. Evans, J. C., and Mr. Piggott, A. J. C.

RAGHUNANDAN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat JARAO AND ANOTHER—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Improvements—Well sunk by tenant without consent of landlord—Mandatory injunction—Damage not alleged—Maintainability of suit—Presumption—Oudh Rent Act (XXII of 1886), ss. 22 to 28—Transfer of Property Act (IV of 1882), s. 108—Specific Relief Act (I of 1877), ss. 54, 55, 56.

A landlord is not entitled to maintain a suit for mandatory injunction to restrain a tenant from the construction of a well upon his holding, merely upon the ground that such construction was being effected without his consent or against his will. He must allege and prove some sort of damage to himself and futher that the damage is of such a nature that the equities of the case would not be met by pecuniary compensation.

It is contrary to the policy of the Oudh Rent Act that the interference of the Civil Courts should be invoked upon an allegation that the tenant is using the land in a manner not approved of by his landlord.

The costruction of a well by a tenant upon his holding should *prima facie* be regarded as beneficial, unless and until the contrary is proved.

It cannot be presumed that the construction of a well upon a holding is likely to be destructive or permanently injurious to the same or is on the face of it an act amounting to the use of the land for a purpose other than that for which it was leased.

When it appears doubtful that the provisions of the Oudh Rent Act do not completely cover a case, the Court may resort to the general principles laid down in section 108 of the Transfer of Property Act.

Section 23 of the Oudh Rent Act contemplates the possibility of a tenant's making an improvement upon his holding without the consent of his landlord. The only result of not following the procedure prescribed by the Act is that the tenant is not entitled to claim compensation for improvements effected without the written consent of the landlord.

Appeal against the order of the Subordinate Judge, Sultanpur, dated the 13th July 1910, reversing that of the Munsif, Sultanpur, dated the 6th May 1910.

Babu *Basdeo Lal*, for the Appellants.

Mr. *A. P. Sen*, for the Respondents.

JUDGMENT.

PIGGOTT, A. J. C.—This is an appeal by the plaintiffs. Their case is that the defendants hold a certain plot of land as their tenants, and have proceeded to construct upon a portion of the said plot a masonry well, without the consent of the plaintiffs, and are persisting in its construction against the will of the plaintiffs. The relief sought is a mandatory injunction directing the defendants to fil up the well in question and to restore the plot of land to its original condition. The suit was decreed by the Court of first instance; but on appeal the learned Subordinate Judge of Sultanpur has dismissed the suit on the ground that it is not maintainable and is not cognizable by a Civil Court.

The present appeal was heard in the first instance by a single Judge of this Court, who referred it to a Bench of two Judges on the ground that it raised a question of general importance not covered by authority. That question is whether an agricultural tenant in Oudh is or is not entitled to construct a masonry well upon his holding without the consent of the landlord. The point has been fully argued before us, and I think it is expedient that we should decide it. At the same time, I feel bound to express my opinion that this appeal ought to be dismissed upon a ground which does not exactly involve the question above stated.

The lower Appellate Court has held that the suit, as brought, is not maintainable; and, in my opinion, the plaint, as it stands, does not disclose any valid cause of action, or, at any rate, any cause of action entitling the plaintiffs to the relief sought. The suit is one for specific relief by way of injunction and is governed by the provisions of Chapter X of the Specific Relief Act (I of 1877). A plaintiff seeking relief of this nature must satisfy the Court that he has suffered actual damage, and also that the damage suffered is of such a nature that the equities of the case would not be met by pecuniary compensation. It follows that he must, at the very outset of his case, both allege and prove some sort of damage to himself. On this point the plaint is absolutely silent. There is no allegation as to the nature of the injury

RAGHUNANDAN SINGH v. JARAO.

or loss which the plaintiffs consider themselves to have suffered by reason of the construction of this well; the attitude taken up in the plaint is such as would be justifiable only in the case of an action against a trespasser, when the mere wrongful occupation of the plaintiffs' land for the purpose of constructing a well thereon would, on the face of it, cause injury to the plaintiffs by depriving them of possession over the same. In the present case the defendants are the lessees of the plaintiffs and the latter have, during the continuance of the tenancy, no right to actual occupation or use of the land in suit. Before, therefore, they can ask the Civil Court to interfere between them and their lessees so as to restrain the latter from making a particular use of the land included in their holding, it is necessary that they should both allege and prove that the defendants are making use of this land in such a manner as to cause some sort of loss or injury to the plaintiffs. In coming before this Court in second appeal the plaintiffs have laid particular stress upon the plea that the lower Appellate Court was not justified in presuming a well to be necessarily an "improvement" as regards the land in suit. In my opinion this argument is based upon a misconception of the nature of the pleadings required in a suit like the present: before the defendants could be required to adduce evidence that the construction of the well in question had increased the letting value of the holding, it was for the plaintiffs to show what damage or injury they alleged themselves to have suffered in consequence of the same. They have come into Court without even alleging any such damage, and for this reason I would hold that the suit as brought must fail and has been rightly dismissed by the lower Appellate Court.

With regard to the general question of the rights of tenants in the matter of the construction of wells the provisions of the Oudh Rent Act (XXII of 1886) seem to me by inference favourable to the defendants rather than to the plaintiffs. The sections dealing with the improvements by tenants are sections 22 to 28 inclusive, and the wording of section 23 suggests to my mind that the possibility of a tenant's making an "improvement" without the consent of the landlord was clearly contemplated. All that is provided by sections 24 and 25 is, that in certain cases a tenant may not only make an improvement upon his holding without the consent of his landlord, but may successfully maintain a claim for compensation against the latter in respect of the said improvement, provided that he has followed the procedure laid down by these sections and has obtained the permission of the Deputy Commissioner. If the tenant does not choose to avail himself of the procedure thus provided the only result will be that he will not be entitled to claim compensation for any improvement made by him without the written consent of his landlord.

The question of the making of wells by tenants has been before the Allahabad High Court in a number of cases. In an old case, *Sheo Churan* v. *Busunt Singh* (1) the question was considered by a Full Bench on general principles independently of any special provisions of the Rent Act (X of 1859, as to tenants' improvements. It was laid down that "Any rule which prohibits a tenant from improving his holding is one which on grounds of public policy Courts are bound to restrain within its strictest limits"; also that a *zemindar* claiming to prohibit the construction of *kacha* wells by his tenants should be put to proof that he does so in the exercise of a right customarily existing upon his estate. In the case relied on by the lower Court, *Raj Bahadur* v. *Birmka Singh* (2) it was held, with reference to the provisions of Act XVIII of 1873, that tenants of all classes were implicitly authorized to construct wells for the improvement of the land held to them and that a landlord could not sue for the demolition of a well constructed by his tenant merely on the ground that it had been made without his consent.

A similar principle was very clearly affirmed by Mahmud, J., in *Mohamad Raza Khan* v. *Dalip* (3), where the learned Judge laid down the broad proposition that an alleged custom preventing the construction of such wells without the consent of the landlord, even

(1) 3 N. W. P. H. C. R. 282; Agra (F. B) Ed. 1874, 258.
(2) 3 A. 85.
(3) A. W. N. (1892) 103.

if proved to exist, should not be enforced by the Courts on the ground that, "It is unreasonable and opposed to public policy in an agricultural country like India where the recurrence of famine is caused by the failure of rains, and where necessary works for irrigating agricultural land must be regarded as beneficial." This decision is authority for the proposition that the construction of a well upon a holding should *prima facie* be regarded as beneficial, unless and until the contrary is proved; and I would draw the same inference from the definition of the word "improvement" in section 23 of the Oudh Rent Act.

Again, in *Dharam Raj Kunwar* v. *Sumeran Singh* (4) the right to construct either a *kacha* or a *pakka* well on his holding without reference to the consent of the landlord was affirmed in favour of occupancy-tenants generally. It is true that there is no class of tenants in Oudh precisely corresponding to "occupancy-tenants" in the sister Province, but, in my opinion, the general principles underlying these rulings are equally applicable to ordinary tenants in Oudh who hold under the seven years' rule. The provisions of Chapter V of the Transfer of Property Act (IV of 1882) are not applicable in their entirety to leases for agricultural purposes, by reason of the provisions of section 117 of the said Act. I am, however, of opinion that the Courts may well be guided by the general principles laid down in section 103 of the Transfer of Property Act regarding the respective rights and liabilities of lessors and lessees, when it appears doubtful whether the provisions of the Oudh Rent Act completely cover the case. The duty of the lessee is to keep and, on the termination of the lease, to restore the property held by him in as good condition as it was at the time when he was put in possession; he is also entitled to use the property and its products (if any) as a person of ordinary prudence would use them if they were his own. He must not use the property for a purpose other than that for which it was leased or commit any act which is destructive or permanently injurious thereto. I should certainly not be prepared to presume that the construction of a well upon a holding was likely to be destructive or permanently injurious to the same, or was on the face of it an act amounting to the use of the land for a purpose other than that for which it was leased. I am, therefore, clearly of opinion that the landlord is not entitled to maintain a suit in the Civil Court for an injunction to restrain a tenant from the construction of a well upon his holding, merely upon the ground that such construction was being effected without his consent or against his will.

These findings are more than sufficient to dispose of the present case; but I may add in conclusion that I am extremely doubtful whether in any case the Civil Courts would be entitled to interfere by way of injuncion (except perhaps by way of a temporary injunction pending proceedings in ejectment) with the use made by a tenant of the land in his possession as such. If he uses it in a manner not warranted by the conditions of his tenancy he is liable to ejectment under the provisions of section 62 of the Oudh Rent Act; and it seems to me contrary to the policy of the said Act that the interference of the Civil Courts should be invoked upon an allegation that the tenant is using the land in a manner not approved of by his landlord. It is scarcely conceivable that a suit for an injunction to restrain a tenant from making use of a particular kind of manure, or from growing a particular rotation of crops, would be permitted; and yet I see no valid distinction in principle between such a suit and that now before the Court. On all these grounds, I am satisfied that this appeal must fail and should be dismissed with costs.

EVANS, J. C.—I concur.

Appeal dismissed.

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(4) 21 A. 386.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 667 OF 1911.

January 29, 1912.

Present:— Mr. Justice Chevis.

MIRAN BAKHSH AND OTHERS—DEFENDANTS—APPELLANTS

versus

GOUDE RAM—PLAINTIFF—RESPONDENT.

Custom—Alienation—Son contesting father's alienation—Debts not imaginary—Father not immoral or extravagant—Consideration—Burden of proof—Necessity—Alienor's holding a small one—Mortgagee's suit against reversioners—Mortgage not wholly for necessity—Falling back on previous mortgage.

MIRAN BAKHSH *v.* GOUDE RAM.

Where a son contests an alienation made by his father in consideration of old debts and it appears that the debts are not imaginary and that the father was not immoral or extravagant the burden of proving want of consideration lies on the son.

It is for the alienee to prove clearly the necessity for an alienation. Necessity cannot be inferred merely from the facts that the alienor's holding was a small one and that he got into debt by degrees.

A mortgagee cannot, in a suit against the alienor's reversioners, obtain possession of even a fraction of the land unless he can prove that the transaction was wholly for necessity.

Ghulam Ghaus v. *Nabi Bakhsh*, 24 P. R. 1903; 35 P. L. R. 1903, followed.

But where the consideration of a mortgage partially consists of an old mortgage which is for necessity, the mortgagee may fall back on the former mortgage.

Second appeal from the order of the Divisional Judge, Hoshiarpur, dated the 22nd April 1911, reversing that of the Munsif, 1st class, Hoshiarpur, dated the 17th November 1910, dismissing the claim.

Rai Bahadur Lala *Sukh Dayal*, for the Appellants.

Rai Sahib Pandit *Sheo Narain*, for the Respondent.

JUDGMENT.—The plaintiff sues for possession as mortgagee of 17 *kanals* 17½ *marlas* of land mortgaged to him by Hasta, the father of defendants Nos. 1 and 2, who are the principal defendants. The remaining defendants are only *pro forma*, being members of plaintiff's family. The mortgage-deed has fallen to plaintiff by partition. The question is whether the mortgage was for consideration and necessity.

The deed in question was executed on 28th June 1898. The land was mortgaged for Rs 582. The first Court dismissed the suit holding that neither necessity nor the passing of consideration except to the extent of Rs. 176 8 0 was proved and that the mortgage was incomplete. The Divisional Judge held that the mortgage was for necessity and consideration, and gave plaintiff a decree for possession "as mortgagee for Rs. 712."

The defendants appeal to this Court, and for plaintiff-respondent Counsel raises a preliminary objection that no further appeal lies. But in view of the fact that the mortgage-debt is fixed at Rs. 712 in the Divisional Judge's decree, I follow the Full Bench ruling in *Ghulam Ghaus* v. *Nabi Bakhsh* (1) and overrule the objection.

(1) 24 P. R. 1903; 35 P. L. R. 1903.

The details of the consideration, as given in the deed are:—

		Rs.
On mortgage-deed, dated 20th June 1890	... ...	351
On bond dated 29 th June 1895	...	185
On *bahi* account	... ...	19
Cash before Sub-Registrar	...	20
Registration expenses	...	7
TOTAL	...	582

By the mortgage-deed of 20th June 1890 15 *kanals* 6½ *marlas* were mortgaged for Rs. 325; the deed recites that Rs. 28 is to be paid yearly *munafa*, and adding arrears of *munafa* this sum of Rs. 325 swells to Rs. 351 in the deed now in question. The details of Rs. 325 are as follows:—

		Rs.	A.
Due on mortgage-deed dated 30th May 1889	... ...	209	0
Due on bond dated 5th January 1890	... ...	53	0
Cash paid at home	...	12	0
Cash paid before Sub-Registrar	...	45	8
Registration expenses	...	5	8
TOTAL	...	325	0

By the mortgage-deed of 30th May 1889, 15 *kanals*, 6½ *marlas* were mortgaged for Rs. 200, the details of which are:—

		Rs.	A.
For payment to Ralla, prior mortgagee	... ...	160	0
Costs of registration	...	4	8
Cash before Sub-Registrar	...	35	8
TOTAL	...	200	0

The bond of 5th January 1890 was for Rs. 49-13, and this is shown in the bond as money taken for payment to Asa Singh and others, creditors.

The bond of 29th June 1895 is for Rs. 130 with interest at 18 per cent. The details, as shown in the bond, are:—

		Rs.	A.
Due on bond dated 12th February 1893	... ...	57	8
Due on *bahi* account	...	28	13
Munafa for 1 year (due on the mortgage-deed dated 20th June 1890)	... ...	28	0
Taken in cash	... ...	15	11
TOTAL	...	130	0

MIRAN BAKHSH *v.* GOUDE RAM.

The details of the bond of 12th February 1893 are shown even in the bond,—

		Rs.	A.
Due on *bahi* account	...	22	8
Taken in cash ...	...	25	8
TOTAL	...	48	0

There is a witness Gulab Mal who deposes that the sum of Rs. 25-8 was paid in his presence. Beyond this there is no evidence as to payment of any of the sums, though we may take it that sums shown as paid in cash before the Sub-Registrar were actually paid. There is no proof on the record of payment to Asa Singh and the other creditors mentioned in the bond of 5th January 1890, in fact there is no proof that such debts really existed. Of course, it is hard now to prove such old debts. Asa Singh is said to be dead and I do not really suspect that the debts were imaginary ones. In fact, considering that Hasta is not shown to have been either a fool or a knave I should say that the *onus* of proving want of consideration should lie on the defendants. Hasta was not a debauchee, and no reason is shown why he should spite his own sons by alienating land for money which he had not received. The deed in question is a registered one. It is true that the plaintiff's suit has been brought a good many years after the execution of the deed, but I see no sufficient reason to doubt plaintiff's statement that *munafa* for some years was paid; and a further explanation of the delay in suing is to be found in the fact that the mortgage was not executed in favour of plaintiff personally, and that it only fell to him later on by partition between himself and the other members of the family. If I were to hold that plaintiff had to prove consideration, I should find that he had only succeeded to a limited extent, the *chaupattas* put in to prove the *bahi* accounts might be written up at any time. But as I regard the *onus* ef proof as being on the defendants so far as consideration goes, I agree with the learned Divisional Judge in holding that the mortgage was for consideration.

But it certainly lies on the plaintiff to prove the necessity. It is admitted that 9 *kanals* of land was formerly mortgaged with possession to Ralla for Rs. 160 and that Rs. 160 out of Rs. 200 which formed the consideration for the mortgage of 30th May 1899 went to pay off Ralla. But it must be remembered that this mortgage to Ralla of 9 *kanals* was of land belonging jointly to Hasta and his brother, so, although this was an antecedent debt, Hasta's sons may well contend that only half of the burden should fall on them. As to the whole of the remaining items, there is not a scrap of evidence of any sort to show what particular necessity there was. The Divisional Judge has simply assumed necessity from the fact that Hasta and his brother held between them only about 4 *ghumaos*. The actual area seems to have been about 35 *kanals* of which 9 *kanals* were mortgaged to Ralla, leaving 26 *kanals* for the two brothers. The Divisional Judge says that the history of the case shows that the mortgagor was hopelessly in debt and never succeeded in paying off even the interest on the mortgage. What is clear is that Hasta repeatedly executed fresh bonds and mortgages in plaintiff's favour and so got deeper and deeper into debt, but I cannot find that this is sufficient ground for holding that Hasta's conduct was justified by necessity. It is for the plaintiff to prove necessity, and I do not think we can *guess* that the whole of the dealings were for necessity simply because Hasta's holding was a small one. In cases of this sort one does not always expect strict proof as to necessity, but I think the mortgagee must give some proof as to what the necessity was, and that it is not sufficient for him simply to show that the mortgagor's holding was a small one and that the mortgagor got into debt by degrees. Beyond the redemption from Ralla of a mortgage for only half of which Hasta was liable, I can find no proof of necessity.

I, therefore, hold that the mortgage in question was for consideration, but that necessity has been proved only to the small extent of Rs. 80.

Now in *Khaira* v. *Maula*(2) it is laid down that even though the mortgage may be for consideration, the mortgagee cannot obtain possession of even a fraction of the land unless he can prove that the transaction was wholly for necessity. This is the decision of a Division Bench, to which I bow. But I see nothing to prevent me from following the course adopted in Civil Appeal No. 1040

(2) 49 P. R. 1911; 11 Ind. Cas. 191; 136 P. W. R. 1911; 212 P. L. R. 1911.

KIMAN *v.* SULTANI MAL.

of 1903 [referred to in *Khaira* v. *Maula* (2)] *i.e.*, allowing plaintiff to fall back on the former mortgage in favour of Ralla, which to the extent of one half was binding on Hasta and should now be regarded as binding on his sons.

By this mortgage 9 *kanals* out of No. 470 was mortgaged for Rs. 160, and I propose to give plaintiff a decree for ½ of this land. I have to-day asked Counsel for appellants if he has any thing to urge against such a course, and he replies in the negative.

As to costs, I must confess that my sympathies are with the mortgagee in the present case, for I think it is quite likely that the transactions were, at least in the main, for necessity, although the mortgagee is unable to prove what the necessity was. But in any case I could not go so far as the Divisional Judge and hold the mortgage to be *entirely* for necessity, for there appears to have been absolutely no need for Hasta to take over the whole burden of the prior mortgage in favour of Ralla, that mortgage having been entered into by Hasta and his brother jointly.

I so far accept the appeal as to reduce the decree to one for possession as mortgagee of ½ of the land formerly mortgaged to Ralla, *i. e.*, ½ of 9 *kanals* out of *Khasra* No. 470 the plaintiff will hold possession as mortgagee for Rs. 80. I leave the parties to bear their own costs in all Courts, the suit having failed except to a small extent.

Appeal partly accepted.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 303 OF 1909.

January 31, 1912.

Present—Mr. Justice Johnstone and Mr. Justice Rattigan.

KIMAN—DEFENDANT—APPELLANT

versus

SULTANI MAL—PLAINTIFF—RESPONDENT.

Mortgage—Suit for possession by mortgagee—Decree, form of—Lien to be left for determination in redemption suit—Mortgagor leaving a portion of money for payment to previous mortgagee—Non-payment to previous mortgagee—"Reasonable time", how to be determined—Incomplete mortagage—Demand—Acquiescence—Payment of interest—Mortgagee's right to possession on default in payment of interest—Mortgagor pleading payment within twelve years—Limitation.

In a suit by a mortgagee for possession against his mortgagor, if the right of the mortgagee to possession is established, it is sufficient to pass a decree for possession *simpliciter*, the matter of the amount of the lien being left to be decided upon redemption.

On 25th June 1891, *A.* mortgaged certain land to *B.* for Rs. 350. Out of the consideration, a sum of Rs 147-12-0 was retained by *B.* for payment to a previous mortgagee *C.* who was in possession of a part of the land. Two years elapsed without *B.* paying off *C.* On 18th July 1893, *A.* again mortgaged the same land to *B.* for Rs. 600, Rs. 147-12-0 being as before left for payment to *C.* The essential conditions of both the mortgage-deeds were that *A.* was to hold possession and pay interest at the stipulated rate, *B.* was to pay off *C.* and set free the land with him: on default of payment of interest in any one year, *B.* was to be entitled to possession. It was not till 1904 that *B.* paid off *C.* and so secured for *A.* the possession of the whole land.

In 1907, *B.* sued for possession on the allegation that interest for the first six years on Rs. 450 was paid by *A.* but nothing was paid thereafter.

A. pleaded that the suit must fail because of the non-payment of *C.'s* debt within a reasonable time and further alleged that he had paid interest in full on Rs. 600 to date of suit:

Held, (1) that the suit was within time as *A.* himself asserted payment of interest within 12 years before date of suit;

(2) that by regular payment of interest *A.* acquiesced in the continued possession by *C.* of a portion of the land; that *A.* acted as if the delay in paying *C.* off was not unreasonable and made *B.* understand that he did not intend to raise any objection on this score;

(3) that *A.* could not plead that the mortgage was incomplete and ineffectual by reason of non-payment of *C.'s* debt within a reasonable time.

In deciding what is "reasonable time" for payment of the unpaid portion of mortgage-money the wishes and interest of the mortgagor are an important factor in most cases they are the decisive factor.

The absence of a demand by the mortgagor upon the mortgagee for redemption of the previous mortgage would not prevent the mortgagee from losing the benefit of his mortgage by reason of the non-payment of the debt due to the previous mortgagee.

Gokal Chand v. *Rahman*, 59 P. R. 1907 (F. B.), explained and discussed.

Second appeal from the order of the Divisional Judge, Ambala Division, dated the 10th December 1909, reversing that of the Munsif, 1st class, Ludhiana, dated the 14th December 1907, dismissing plaintiff's claim.

Babu *A. L. Roy*, for Appellant.

Mr *Ganpat Rai*, for the Respondent.

JUDGMENT.—On 18th May 1891 one Ram Singh obtained a decree against the present defendant No. 1 and his deceased brother for possession of part of the land in suit, the mortgage lien being stated as Rs. 147-12 in all, and on 29th June 1891 he got possession by execution. Meantime, on 25th June 1891, defendant No. 1 mortgaged

that and other land to plaintiff for Rs. 350 without possession. Of this sum Rs. 147-12-0 was retained by plaintiff to be paid to Ram Singh, who on redemption would, of course, hand over the land with him (21 *bighas kham*) to defendant No. 1 to cultivate and enjoy; and the rest of the consideration passed in other ways. Two years passed without plaintiff's paying off Ram Singh, who naturally retained the land mortgaged to him; and then, on 18th July 1893, defendant No 1 again mortgaged the same land (now in suit) to plaintiff for Rs. 600, made up of Rs. 147-12-0 as before due to Ram Singh, Rs. 247 due on the earlier deed aforesaid, and other items. The essential conditions of both mortgage-deeds were the same: mortgagor to hold possession and pay interest at 1 per cent. per mensem, mortgagee to pay off Ram Singh and set free the land with him; on default of payment of interest in any year mortgagee to be entitled to possession. It was not until 1904 that plaintiff paid off Ram Singh and so secured for defendant No. 1 possession of the whole land. Finally, in July 1907, plaintiff sued for possession, alleging that for six years from 1893 defendant No. 1 had paid interest Rs. 54 per annum upon an arrangement that, until Ram Singh was paid off, Rs. 18 should be remitted from the annual interest, and that thereafter he paid nothing and so made default.

Defendant No. 1, on the other hand, pleaded that the suit must fail because of the non-payment of Ram Singh's debt within a reasonable time, and further alleged that he had paid interest regularly in full (Rs. 72 per annum) to date of suit.

The first Court laid on plaintiff the burden of proving non-receipt of interest for the years 1899 to 1907 and of establishing title to possession, and also drew two issues as to limitation and as to whether *shamilat* was included in the mortagage or not. The last point was decided finally in favour of plaintiff and the question is now at rest; and the question of limitation was also decided in favour of plaintiff. On the other two points that Court held that plaintiff had not proved non-receipt of interest, and that his suit must fail because of the neglect to pay off Ram Singh.

The suit being dismissed (without costs) plaintiff appealed, and the learned Divisional Judge remanded the case to the first Court for inquiry and report, first holding that "the suit for possession as mortgagee appears to be liable to dismisal" because plaintiff had twice broken his engagement to pay off Ram Singh, and then going on to inquire into "how much was due to plaintiff in order to settle the dispute between the parties once and for all." It was on this point that remand was made.

We need not, as we shall see later on, go into the details of this further inquiry. On the Divisional Judge's finding that the suit must fail, the discussion of how much was due was quite uncalled for: but we may mention that the first Court reported that *plaintiff owed the defendant* No. 1 Rs. 211, and that the latter should be compensated to this extent.

When the Divisional Judge, however, again took up the case, its complexion entirely changed. He reconsidered his finding aforesaid against plaintiff on the case as a whole, referred to *Gokal Chand* v. *Rahman* (1) as authority for holding that because it was not proved that defendant No. 1 had made any actual demand upon plaintiff to pay off Ram Singh, "the lien was not destroyed," and ruled that defendant No. 1 acquiesced in the arrangement under which Ram Singh was not paid off but a reduction of interest was allowed, and finally gave a decree for possession in lieu of Rs. 600 principal *plus* Rs. 216, being the interest on that sum from 1904 to date of suit at Rs. 72 per annum. Against this defendant No. 1 Kiman has appealed and we have heard arguments and have examined the records.

Appellant's case now is,—

(*a*) that passing of Rs. 600 consideration has not been proved;

(*b*) that the mortgage was never complete because plaintiff failed to pay off Ram Singh till 1904;

(*c*) that the suit is barred as having been brought more than 12 years after date of mortgage;

(*d*) that the interest allowed is wrong.

The first and third points can be disposed of in a few words. The deed was registered and passing of consideration was admitted at registration. The *onus* of proving non-receipt of the money was, therefore, on appellant who has really made no attempt to discharge it. Then, no question of limitation arises, plaintiff alleging payment of modified interest

(1) 59 P. R. 1907 (F.B.).

for six years, up to 1899, and defendant-appellant stoutly asserting payment of full interest up to year of suit. As regards (*d*) we do not think we need discuss the amount due on the footing of the mortgage. If plaintiff is to have possession it is sufficient for the purposes of this case that he should have a decree for possession as mortgagee *simpliciter*, the matter of the amount of the lien being left to be decided upon redemption. Had the learned Divisional Judge taken this, to our minds the correct view, much time and expense would have been saved to the parties and much trouble to the Courts.

There remains, then, only the question whether the mortgage was, at date of institution of suit, in effectual existence, for plaintiff's cross-objections are concerned only with the question of amount claimable by him and with the additional question of costs, which is after all only incidental.

Our final opinion is that plaintiff must have his decree, but we are far from agreeing with the lower Appellate Court in its interpretation of the Full Bench ruling of 1907. We need not labour the point. In that case apparently demand had been made by the mortgagor upon the mortgagee that latter should redeem from the previous mortgagee and the demand had not been met; but in the judgment of Reid, J., in which alone is any mention made of the demand, there is no indication that he considered that absence of such demand would prevent a defaulting mortgagee from losing the benefit of his mortgage. Not only is there in his discussion of the case no *dictum* to this effect, but further, in the rulings quoted by him as being, taken together, authority for his views, we can find no such *dictum* and indeed not even mention of the subject. When we also see that the other two Judges on the Full Bench say nothing about such demand, and when we consider that plaintiff-respondent's Counsel is unable to cite a single authority in support of the idea that such demand by mortgagor is indispensable in order to destroy the mortgage, the true interpretation of Reid, J.'s *dictum* is abundantly clear.

This, however, does not conclude the case. Mr. Ganpat Rai, for plaintiff-respondent, very forcibly argues that it is too late for defendant-appellant in this case to fall back upon the Full Bench ruling. Defendant-appellant pleaded that he did pay the interest regularly up to date of suit, thus acquiescing in the continued possession by Ram Singh of a portion of the land. Plaintiff-respondent alleged payment only of Rs. 54 per annum for six years upon a special agreement. Defendant-appellant has, no doubt, not *proved* any payments beyond what plaintiff-respondent admits; but even so the former can hardly be heard to say that soon after 1893, when a "reasonable time" had elapsed, the mortgage, never complete, became extinct and unenforceable. Defendant-appellant says he went on paying full interest until 1904 and even until 1907, thus treating the contract as still an enforceable one; how can he say now that before 1904 "reasonable time" had expired? In deciding what is "reasonable time" the wishes and interests of the mortgagor are an important factor—in most cases the decisive factor, and defendant-respondent acted as if in his opinion the delay in paying off Ram Singh was not unreasonable, and so made plaintiff-respondent understand that he did not intend to raise any objections on this score.

For these reasons, we accept this appeal but only to this extent that we make the decree one for possession as mortgage without any attempt to specify what sum is due to plaintiff-respondent. In all the circumstances we think the parties should bear their own costs, as much of the litigation and trouble and expense of the case has been due to the manner in which the lower Appellate Court has dealt with it rather than to the fault of either party.

Appeal partly accepted.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 5 OF 1910.

January 23, 1912.

Present:—Mr. Justice Johnstone and Mr. Justice Rattigan.

FATEH CHAND AND OTHERS—DEFENDANTS—APPELLANTS

versus

KIRPA SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Pre-emption —Waiver — Acquiescence — Pre-emptor assisting in sale negotiations and demarcation af land—Delay in suing.

FATEH CHAND *v.* KIRPA SINGH.

A pre-emptor assisted in negotiating a sale being himself present at the time; he further actively assisted when the land sold was being demarcated out of a large field of which it was a part. The suit for pre-emption was brought on the very last possible day:

Held, that the pre-emptor must be deemed to have waived his right of pre-emption, as by his conduct he actively brought about in the vendee's mind that he was perfectly agreeable to the purchase by vendee and did not intend to enforce his right.

Ram Ratan Shah v. *Kirpa Ram*, 8 Ind. Case. 246; 86 P. L R. 1910, followed.

Rulla Mal v. *Dulo Mal* 7 P. R. 1876; *Bhairon Singh* v. *Lalman*, 7 A. 23, referred to.

Fazaldad Khan v. *Sawan Singh* 37 P. R. 1908; 30 P. W. R. 1908; 39 P. L. R. 1908; *Roshan Din* v. *Khuda Bakhsh*, 99 P. R. 1910; 8 Ind. Cas. 1155; 42 P. L. R. 1911; *Shah Bodraj* v. *Sundar Singh*, 100 P. R. 1885; *Mala* v. *Nihal Chand*, 78 P. R. 1881; *Ram Kishen* v. *Fakir Ali*, 185 P. L. R. 1905, explained and distinguished.

Second appeal from the order of the Divisional Judge, Hoshiarpur Division, dated the 17th November 1909, reversing that of the Subordinate Judge, Hoshiarpur, dated the 5th July 1909, dismissing plaintiffs' suit.

The Hon'ble R. B. *Shadi Lal* and Sheikh *Umar Bakhsh*, for the Appellants.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—In this case the facts are very simple and are to be found detailed in the judgment of the Subordinate Judge. The suit was one for pre-emption and the only question now remaining for decision is whether the plaintiffs waived their rights or not. The Courts below are agreed as to the facts. The first Court remarks: "I find, therefore, the evidence of defendant to be reliable. Plaintiffs have taken active part in the completion of the contract of sale and thus have waived their right. The long delay in the institution of this suit lends colour to the fact that at first the plaintiffs were willing in the sale but now have been set up by some unpleasant incidents" (*sic*). The lower Appellate Court, when it comes to this part of the case, says: "I, therefore, accept the finding of the lower Court that the plaintiffs were present when the price was fixed and I also agree that they took some part in fixing the price. That is to say, I think it is proved that they took part in the discussion as to the price though I do not think it is shown that they did anything else to bring about the sale. It appears also that Kirpa Singh helped to measure the land which was sold."

Having agreed as to the facts the Courts part company when they come to draw inferences. The first Court says that it considers that plaintiffs waived their rights, while the second Court says that the degree of acquiescence proved falls far short of what is required and it adds, "I cannot hold that a man who, with half a dozen others takes part in a discussion as to the price of land to be sold, even though the ultimate object of the discussion is to bring the parties to terms, has by so doing, by the unpremeditated act of a single afternoon, waived his right to claim pre-emption."

The defendants-vendees come up here on further appeal on this point, and we think that this appeal must succeed. Mr. Tek Chand on behalf of respondents raises, as he is entitled to do, the question of fact anew. We have carefully examined the evidence of defendants' witnesses who are five in number. The respondents have against them the concurrent findings of the two Courts below, which cannot be set aside unless shown to be manifestly incorrect. Far from thinking that they are manifestly incorrect, we are inclined to believe implicitly in the appellants' assertion that the plaintiffs were both present and helped in the sale negotiations, and that one of the plaintiffs was not only present when the land sold was being demarcated out of a large field of which it was a part, but that he actively assisted in the measurement work.

A large number of rulings have been quoted before us, but very few of them are in point. In such cases as these the decision depends upon the circumstances of the particular case, and previous rulings are not generally of much assistance because circumstances vary very largely. The case which is almost exactly in point of all those quoted to us is *Ram Ratan Shah* v. *Kirpa Ram* (1): where the plaintiff was proved to have taken an active part in the negotiation for sale, to have appeared at mutation and made no objection, and to have sued at the eleventh hour. In the present case also the suit was brought very late, in fact on the very last possible day. There it was held that waiver was proved. Two other rulings relied upon by Mr. Shadi Lal for the appellants are *Rulla Mal* v. *Dulo Mal* (2) and *Bhairon*

(1) 8 Ind. Cas. 246; 86 P. L. R. 1910.
(2) 7 P. R. 1876.

NIHAL CHAND *v.* ABDULLAH.

Singh v. *Lalman* (3), but we do not lay much stress upon these, because both of them, and certainly the latter, appear to us probably to go too far.

On the other side Mr. Tek Chand relies, first of all, upon *Fazaldad Khan* v. *Sawan Singh* (4) and *Roshan Din* v. *Khuda Bakhsh* (5), but we cannot say that they help him much. In both of them the point was that the plaintiff, who was already mortgagee of the land in suit, either accepted his money without warning the vendee of his intention to bring a suit, or himself brought a suit for his mortgage-money. It seems to us obvious that the fact that in those cases plaintiff was not held to have waived his rights can be no guide for us in the present case. Then Mr. Tek Chand cited several rulings in which it was held that a mere refusal of an oral offer just before sale was no waiver. With those rulings we have no quarrel. It is quite correct to say that at a time when the law required a written notice to be served on pre-emptors, a mere verbal offer to them followed by refusal was of no account.

Mr. Tek Chand's next ruling, *Shah Bodhraj* v. *Sundar Singh* (6), is to the effect that a petition-writer, who actually wrote a rough draft of the deed of sale for the parties, is not precluded from suing for pre-emption thereafter. This ruling is on a par with those regarding oral offers. The petition-writer in that case had no duty imposed upon him by law to proclaim his intentions, the law allowing time to think over what he would do. The important point in the present case is this, that the plaintiffs by their conduct actively brought about in the vendee's mind the belief that the plaintiffs were perfectly agreeable to the purchase by the vendees and did not intend to enforce their rights and this differentiates the present case from all those quoted by Mr. Tek Chand. Lastly, the two rulings, *Mula* v. *Nihal Chand* (7) and *Ram Kishen* v. *Fakir Ali* (8), quoted by Mr. Tek Chand, seem to us not to establish that gentleman's contention. There all that could be said against the plaintiff was that, though he was present at the auction-sale of the property, he refrained from bidding for it. No argument is required to show that a case like that is in no way parallel to the present case.

For these reasons, we are satisfied that in this case the plaintiffs waived their rights, and we, therefore, accept the appeal and dismiss the plaintiffs' suit with costs.

Adpeal accepted.

(3) 7 A. 23.

(4) 37 P. R. 1908; 30 P. W. R. 1908; 39 P. L. R. 1908.

(5) 99 P. R. 1910; 8 Ind. Cas 1155; 42 P. L. R. 1911.

(6) 100 P. R. 1885.

(7) 78 P. R. 1881.

(8) 185 P. L. R. 1905.

PUNJAB CHIEF COURT.

CIVIL REVISION No 3321 OF 1910.

January 22, 1912.

Present:—Mr. Justice Chevis.

NIHAL CHAND—DECREE-HOLDER—PETITIONER.

versus

ABDULLAH—OBJECTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), *O. XXI, r.* 58 *—Simple money-decree—Attachment—Objection by transferee of property.*

Where property is attached in execution of a money-decree, a transferee of the property is entitled to prefer an objection to the attachment under Order XXI, rule 58.

Chand Kour v. *Mela Ram*, 8 P. R. 1897, followed.

Hukam Singh v. *Raghuabir Saran*, 27 A. 700, *Defholts* v. *Peters* 14 C. 631, *Himat Ram* v. *Khushal Jethi Ram*, 18 B. 98; *Sanwal Das* v. *Bismillah Begam*, 19 A. 480, distinguished and not applied.

Petition under section 70 (1) (*a*) (*b*) of Act XVIII of 1884, as amended by Act XXV of 1899, for revision of the order of the District Judge, Gujranwala, dated the 4th August 1910, affirming that of the Munsif, 2nd Class, Hafizabad, dated the 31st May 1910, decreeing claim.

Lala *Mool Chand*, for the Petitioners.

Khwaja *Zia-ud-Din*, for the Respondent.

JUDGMENT.—Nihal Chand, to whom Abdulla had pledged a house as security, sued and got a decree for the mortgage-debt with lien on the mortgaged property. In execution he applied for attachment and Mehr Din then lodged an objection on the strength of a sale by Abdullah to himself by a registered deed executed prior to institution of suit by Nihal Chand. The executing Court inquired into the objection and holding that the registred sale-deed must be preferred to the earlier unregistered mortgage-deed allowed the objection, find-

ing that the house was not liable to attachment.

Decree-holder applies for revision, and for him it is urged that an objection under Order XXI, rule 58, cannot be entertained in such cases. In support of this plea *Hukam Singh* v. *Raghubir Saran* (1); *Defholts* v. *Peters* (2); *Himat Ram* v. *Khuspal Jethi Ram* (3) and *Sanwal Das* v. *Bismillah Begam* (4) are cited. But these are cases where the decree is one for sale under sections 86-88, Transfer of Property Act, and so no attachment in execution was necessary. Here, however, the decree is not one for sale. The case seems on all fours with *Musammat Chand Kaur* v. *Mela Ram* (5) and following that ruling I hold that an objection under Order XXI, rule 58, does lie.

Then it is urged that no inquiry has been made as to whether the objector had notice of the earlier mortgage. But all that was pleaded by the decree-holder in the lower Court was a general plea that the earlier deed had the preference. So a general issue was framed as to which deed had the priority, the *onus* being placed on the decree-holder, whose deed, though earlier, was unregistered. He could in discharge of this *onus* have produced evidence to show that the vendor had notice of his mortgage, but he did not do so. I see no cause for reversing the decision of the lower Court. The application fails and is dismissed with costs.

Application dismissed.

(1) 27 A. 700.
(2) 14 C. 631.
(3) 18 B. 98.
(4) 19 A 480.
(5) 8 P. R. 1897.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1305 OF 1910.

January 26, 1912.

Present:—Mr. Justice Johnstone and Mr. Justice Rattigan.

Musammat NIHAL DEVI—PLAINTIFF—APPELLANT

versus

KISHORE CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Decree—Co-plaintiffs—Members of joint family—Death of one plaintiff—Widow brought on record—Appeal against such order dismissed—Widow's right to succeed to her husband's share held time-barred in separate litigation—Practice—Decree in favour of other co-plaintiffs excluding widow.

A., *B.* and *C.* who were members of a joint Hindu family sued for the recovery of a certain debt due to them jointly. During the pendency of the suit *C.* died. His widow *D.* obtained a succession certificate in respect of his estate and was brought upon the record of this suit as his representative. *A.* and *B.* appealed against the order substituting *D.*'s name for her husband but the appeal was dismissed in default. Subsequently, there was separate protracted litigation between *D.* on the one hand and *A.* and *B.* on the other, with regard to *D.*'s claim to succeed to *C.*'s share in the family property. It was finally held in that suit that *D.*'s claim to succeed to *C.*'s share was time-barred. *A.* and *B.* thereupon applied for removal of *D.*'s name, as representative of *C.* from the record. The Court simply filed this application. But when the Court passed the decree in the suit, it directed that the decree was only in favour of *A.* and *B.* and not in favour of *D.*:

Held, that until *D.*'s name was duly struck out, the decree should have been in favour of *D.* also as *C.*'s representative. The fact that *D.* may have no enforceable right against the other plaintiffs to share in the decree, could not affect her right as representative of *C.* to be recognized for the purposes of this suit as a joint decree-holder in such capacity. All the co-plaintiffs were entitled to a joint decree, leaving it open to them to adjust their respective claims subsequently.

Vithu v. *Bhima*, 15 B. 145, relied upon.

First appeal from the order of the District Judge, Forezepur, dated 15th August 1910, decreeing Rs. 16,258 in favour of plaintiffs Nos. 1 and 2 and not in favour of appellant for her $\frac{2}{3}$rd share.

Mr. *Broadway*, Assistant Legal Remembrancer, for the Appellant.

Bhagat *Govind Das*, for Kishore Chand and Kashi Ram, Respondents.

JUDGMENT.—Notices issued to the judgment-debtors-respondents other than Ude Singh have not been returned after service but it is unnecessary to adjourn the hearing on this ground as the appeal relates to a dispute purely between plaintiffs *inter se*, with which the judgment-debtors are in no way concerned. The appellant is *Musammat* Nihal Devi, the widow of Nathu Mal, who was the son of one Telu Mal, and the only respondents who are interested in this appeal are Kishen Chand and Kanshi Ram, the nephews of Telu Mal. It appears that in 1897 Telu Mal, Kishen Chand and Kanshi Ram jointly instituted a suit against Ude Singh and others for the recovery of Rs. 17,479-6-9 and that shortly after the institution of the suit, Telu Mal died. Thereupon Kishen Chand and Kanshi Ram applied

to the Court to have Nathu Mal, the son of the deceased, brought upon the record as the representative of the latter. The District Judge held that before this could be done, Nathu Mal must obtain a succession certificate but before he had had time to comply with that order, Nathu Mal himself died. His widow, *Musammat* Nihal Devi, obtained a succession certificate in respect of the estate of her deceased husband and thereafter applied to be brought upon the record of this suit as his representative. The District Judge, despite objections on the part of Kishen Chand and Kanshi Ram, directed, by order dated the 29th November 1901, that "*Musammat* Nihal Devi's name be substituted for her deceased husband, Nathu Mal." From this order the objectors appealed to this Court and on the date fixed for the hearing failed to put in an appearance. The learned Judge, before whom the hearing was to have been, noted that Mr. Ishwar Das appeared for *Musammat* Nihal Devi, but the appellants had not appeared either in person or by Counsel and that their appeal must, therefore, be dismissed in default. The learned Judge's order (which is dated the 12th June 1902), however, proceeded as follows:—"But in case of any subsequent application being made, I observe that the appeal is also shown to be groundless by the record. The proceedings of the 9th October to the 3rd November 1897 on the vernacular file seem to show that the intention of the Court was to enter the name of Nathu Mal as a plaintiff in place of his father, Telu Mal, now that Nathu Mal has died, there is nothing to object to an addition of his widow's name in his place." The appeal was accordingly dismissed, and as a result *Musammat* Nihal Devi's name remained on the record as the representative of Nathu Mal who was, in turn, the representative of Telu Mal, one of the original co-plaintiffs.

Subsequently, there was protracted litigation between *Musammat* Nihal Devi, on the one hand, and Kishen Chand and Kanshi Ram, on the other, with regard to the claim by the former to succeed, as the heir of her husband, to the latter's share in the family property. The history and details of this dispute will be found set out in the judgment of this Court which has been published as *Nihal Devi* v. *Kishore Chand*(1). We need not here recapitulate the findings of this Court as embodied in that judgment and it will suffice for our present purpose to say that in that case *Musammat* Nihal Devi's claims were held to be time-barred By the time when the said judgment was delivered, the present suit was ripe for decision, but before arguments were heard, Kishen Chand and Kanshi Ram applied to the District Judge for an order the practical object of which would have been to remove the name of *Musammat* Nihal Devi, as representative of Nathu Mal, from the record. To this *Musammat* Nihal Devi, as such representative, naturally objected, and it is common ground with appellant and respondents that the District Judge made no enquiry into the question but simply filed the applications of both parties. The District Judge thereafter proceeded to determine the subject-matter of the suit as between plaintiffs and the defendants, and found that a sum of Rs. 16,258-0-7 was due to the former from the latter, and passed a decree accordingly. He, however, added the following paragraph to his judgment:—

"This decree is not in favour of *Musammat* Nihal Devi, plaintiff, but in favour of the other plaintiffs only. In a recent case between her and plaintiffs it has been held up to the Chief Court [see *Nihal Devi* v. *Kishore Chand* (1)] that her late husband was a member of joint Hindu family with the plaintiffs and that her claim for a share in the family property is barred by time as well as on the said account."

It is to this paragraph and to her exclusion from a share in the decree that appellant *Musammat* Nihal Devi now objects, and after hearing arguments upon this question, we are of opinion that her objection has considerable force.

The plaintiffs in the present suit were (1) Telu Mal (2); Kishen Chand and (3) Kanshi Ram. On Telu Mal's death the District Judge (according to the order of Kensington, J., dated the 12th July 1902,) intended to bring Nathu Mal upon the record as the deceased's representative, but as Nathu Mal died before this could be done, the name of his widow was substituted instead. *Musammat* Nihal Devi thus came on to the record as the representative (through Nathu Mal) of Telu Mal, and in that

(1) 142 P. W. R. 1910; 97 P. R. 1910; 11 P. L. R. 1911; 8 Ind. Cas. 999.

capacity she remained on the record to the conclusion of the case. The other plaintiffs, no doubt, after the decision of this Court in the principal case, prayed the District Judge to remove her name from the record, but their prayer was not granted, and in view of the fact that she had been expressly recognized as the representative of Nathu Mal by this Court's order of the 12th June 1902, it obviously would not have been competent to the District Judge to strike out her name. In these circumstances, when the District Judge found that a sum of money was due to plaintiffs, it was clearly incumbent upon him to decree that amount in favour of the persons who were on the record as co-plaintiffs. Had he done so, the decree (so far as *Musammat* Nihal Devi was concerned) would have been in her favour merely as the person who was on the record as the representative of Telu Mal, one of the original plaintiffs. The learned Judge has, however, confused the claims, which she professes to have as the heir of Nathu Mal against the co-plaintiffs, with the claim which she had, as the duly appointed representative of a deceased plaintiff, against the debtors who were defendants in the suit. The result is that at the last moment and without giving *Musammat* Nihal Devi any opportunity of contesting his order by appeal or otherwise, he has practically struck out her name as the representative of Telu Mal, and has given a decree to the remaining plaintiffs who, as the record stands, did not represent the deceased plaintiff.

In our opinion this procedure was erroneous. It is clear from the judgment that *all* the plaintiffs (including Telu Mal, the deceased) were entitled to share in the amount decreed, and, therefore, unless and until *Musammat* Nihal Devi's name was duly struck out, the decree should have been in favour of her also as the representative of one of the plaintiffs. The fact that she herself may have no enforceable right against the other plaintiffs to share in the decree, cannot, we think, affect her right as representative of Telu Mal, to be recognised for the purposes of this case as a joint decree-holder in such capacity. As observed by the High Court of Bombay in *Vithu* v. *Bhimba* (2), the Court was "clearly wrong in adjudicating by his decree between the rival claims of the two co-plaintiffs on the record who, if successful as against the defendant, were entitled to a joint decree, which would leave it open to them to adjust their respective claims subsequently."

We accordingly accept this appeal and so far vary the decree of the District Judge as to direct that the decree shall be in favour of *Musammat* Nihal Devi, as representative of Telu Mal, deceased plaintiff, and the other plaintiffs jointly.

In so directing we expressly guard ourselves from adjudicating upon any right which *Musammat* Nihal Devi may, *in her personal capacity*, possess with respect to any share in the amount decreed. We merely hold that Telu Mal's estate is entitled to share in that amount and that, *for the purpose of this suit*, *Musammat* Nihal Devi (who is on the record as the representative, through Nathu Mal, of Telu Mal) *represents* that estate.

Respondents (Kishen Chand and Kanshi Ram) must pay the cost of this appeal.

Appeal allowed.

(2) 15. B. 145.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 80 OF 1910.

May 2, 1911.

Present:—Mr. Evans, J. C., and Mr. Piggott, A. J. C.

LALU RAM—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

Excise Act (XII of 1896), ss 25, 26, 27—Shops for sale of drugs closed by order of Collector—Suit by licensee—Jurisdiction of Civil Courts—Remedy of licensee.

The appellant obtained a farm including 90 shops for the sale of drugs. One of these shops having been closed by order of the Collector under instructions from the Excise Commissioner, the appellant sued the Secretary of State for loss arising from breach of contract:

Held, that the Civil Courts had no jurisdiction to entertain the suit and that the appellant's sole remedy was to rely on the Chief Revenue Authority for such compensation as that Authority thought fit to award.

Narayan Vanku v. *Sukharam Nagu*, 11 B. 519, *Ram Ayyar* v. *Vendachalla*, 14 M. 441 and *Beckford* v. *Hood*. 7 T. R. 620; 4 R. 527, referred to.

Appeal against the order of the Subordinate Judge, Unao, dated the 21st May, 1910.

LALU RAM *v.* SECRETARY OF STATE.

Messrs. *Hari Kishen Dhaon* and *Lachimi Narain*, for the Appellant.

Messrs. *Ghulam Mujtaba* and *Nagindra Nath Ghoshal*, for the Respondent.

JUDGMENT.—The appellant instituted this suit against the Secretary of State on the following allegations. He had obtained a farm for sale of drugs for the Unao District from the 1st October 1906 to the 31st March 1910 on payment of Rs. 2,37,000 in certain instalments. The farm included 90 shops as specified and one shop No. 10 at Ganga Ghat bridge was closed by order of the Deputy Commissioner dated the 5th September 1907 under instructions from the Excise Commissioner. In consequence of this breach of contract by the Secretary of State the appellant incurred a loss of Rs. 8,630 which he claimed, after giving the notice required by section 80, Act V of 1908.

The lower Court framed six issues and the sixth issue related to the jurisdiction of a Civil Court to entertain the suit. This was decided against the appellant. Hence this appeal.

We are of opinion that the decision of the lower Court was correct. The appellant obtained a lease in form No. 23 under section 25 (1) (*a*), Act XII of 1896. This is printed on page 81 A of the Excise Manual, Part II. In the fourth clause the farmer is prohibited from licensing retail shops other than those specified in the list annexed and no site can be changed without permission of the Collector. According to section 23, Act XII of 1896, the former is authorized to grant licenses for retail sale subject "to such reservations or restrictions as the Collector, with the sanction of the Chief Revenue Authority, may from time to time make or impose." Section 26 is as follows:—"The Collector, with the sanction of the Chief Revenue Authority, may cancel any farm granted under this Act." Section 27 empowers the Chief Revenue Authority to award such compensation to the former as it thinks fit in the event (*inter alia*) of any reservation or restriction made with respect to licenses within the terms of the farm. It is, therefore, clear that any person taking the farm of a district in these circumstances is entirely under the control of the Chief Revenue Authority and has to submit to any restrictions of the licenses, however arbitrary or capricious such restrictions may appear, and he has to rely on the Chief Revenue Authority to award such compensation as it thinks fit. These are the conditions under which he takes the farm and the learned Pleader who appeared for the appellant has throughout erroneously assumed that the Secretary of State has been guilty of a breach of contract. There has been no breach because the action of the Collector or Excise Commissioner, which in the eyes of the appellant appears so arbitrary, has not been contrary to the powers reserved to these officers by the Act.

The argument of the learned Pleader that the Act cannot take away any common law pre-existing right under which the appellant can appeal to the Civil Court for redress has no force.

The right to compensation in this particular instance is one expressly provided for by section 27 and if section 27 did not exist, the appellant would have no claim for compensation at all, however arbitrary or capricious the action of the Excise authorities may have been.

The learned Pleader in support of his arguments has relied on Maxwell on the Interpretation of Statutes, fourth edition, Chapter V, section 1, and has argued that in the absence of any express words the jurisdiction of a Civil Court in a case of this kind cannot be taken away. The authority which he cites recognizes certain exceptions and, as remarked on page 197, "where a new duty or cause of action is created by statute, and a special jurisdiction out of the course of common law is prescribed, there is no ouster of the jurisdiction of the ordinary Courts, for they never had any." The cause of action, if any, which arose in this case is due to the capricious conduct of the Collector in closing this shop and there is a special remedy provided by the Act to which the appellant submitted when he took a farm of the whole district. There are several English cases quoted on page 195 of the book which show that the ordinary jurisdiction of the Courts can be taken away not only by express words but by implication. "Thus, a provision that if any dispute arises between a society and

any of its members it shall be lawful to refer it to arbitration, ousts the jurisdiction of the Courts over such disputes." Similarly, in this case there is a special provision that a dispute between the farmer and the Revenue Authorities can only be decided by an award of the Chief Revenue Authority. It is conceded that the appellant has not attempted to obtain any such award.

The cases decided by Courts in India, *Narayan Venku* v. *Sakha Ram Nagu* (1) and *Ramayyar* v. *Vendachalla* (2), have also been cited.

In the Bombay case certain money was due to a farmer under the Bombay Abkari Act, and section 29 of that Act provides that a farmer can apply to the Collector to recover on his behalf any sums due to him from his sub-licensees and it was held that although section 4 of Act X of 1876 deprived the Civil Courts of jurisdiction in any such claim *against the Government* represented by the Collector, yet any person in a case of this kind subjected to an undue demand could recover the money wrongfully taken from him on behalf of the farmer in a Civil Court. This ruling obviously does not apply to the present case.

In the Madras case a dispute arose as to whether a suit by a landlord against his tenant to enforce the acceptance of a lease tendered by him could be entertained by a Civil Court. It was decided by a majority of the Bench that the Civil Courts had jurisdiction to entertain the case. The Revenue law as in force in Madras discussed in that case is not material to the present appeal, but we refer to certain remarks by the learned Judges on pages 444 and 445 of the report. The general rule laid down in *Beckford* v. *Hood* (3) was followed and that rule is stated to be as below: Where a statute creates a new offence or gives a new right and prescribes a particular penalty or special remedy, it can, in the absence of evidence of a contrary intention, be resorted to: but where a statute is confirmatory of a pre-existing right, the new remedy is presumed as cumulative, or alternative unless an intention to the contrary appears from some other part of the statute. As already pointed out, we cannot find any pre-existing right upon which this claim can be based in the absence of the provisions of Act XII of 1896.

We are satified that a Civil Court has no jurisdiction in this dispute which has arisen between the appellant and the Secretary of State. The appeal is dismissed with costs.

Appeal dismissed.

(1) 11 B. 519.
(2) 14 M. 441.
(3) 7 T. R. 620; 4 R. R. 527.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 953 OF 1911.

January 13, 1912.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Rattigan.

RAM NARAIN—DEFENDANT—APPELLANT

versus

Seth DURGA DAT AND OTHERS—PLAINTIFFS—RESPONDENTS.

Insolvency—Jurisdiction—Powers of Insolvency Court to decide question of fraudulent transfer of property in British India—Declaration of insolvency implying absence of fraudulent transfer—Opposing creditor bound by decision of Insolvency Court—Estoppel—Evidence Act (I of 1872). s. 41—Insolvent Debtor's Act (11-12 Vic. Cap. 21).

An Insolvency Court in British India has jurisdiction to dicide all matters incidental to those proceedings, including the question whether any property in British India has been fraudulently transferred by the petitioner before it.

Even where an Insolvency Court fails to make any declaration under the last paragraph of section 41 of the Evidence Act, the estoppel against an opposing crediter arises, as the estoppel is not limited to the provisions of section 41.

A. applied to the Bombay Insolvency Court under the Insolvent Debtor's Act to be declared an insolvent. *B.*, a creditor of *A.*, opposed the application on several grounds including the fraudulent transfer of property in Amritsar. The Bombay Court declared *A.* an insolvent and discharged him from all the liabilities in respect of debts or claims.

B. subsequently sued in the Amritsar Court for a declaration that the property was liable for his debt:

Held, (1) that the Bombay Court must be taken to have held that there was no fraudulent transfer of the property in suit.

(2) that as the parties were before the Bombay Court and *B.* accepted the jurisdiction of that Court by filing objections to the petition, *B.* was bound by the decision of the Bombay Court and could not subsequently raise the plea that the transfer of the property in suit was fraudulent and void.

Official Assignee of Bombay v. *Registrar Small Cause Court*, 45 P. R. 1910; 14 C. W. N. 569; 7 A. L. J. 357; (1910) M. W. N. 177; 11 C. L. J. 443; 68 P. W. R. 1910; 7 M. L. T. 417; 37 C. 418; 20 M. L. J. 432; 6 Ind. Cas. 273; 12 Bom. L. R. 395; *Sardar Mal* v. *Aranwayal Subhapathy*, 21 B. 205, *In re Ganesh Das Pana Lal*, 32 B. 198; 10 Bom. L. R. 77; *In re Rassul Haji Cassum*, 13 Bom. L. R. 13; 9 Ind. Cas. 344, relied upon.

First appeal from the order of the District Judge, Amritsar, dated 31st January 1909, decreeing plaintiff's claim.

Bhagat *Gobind Das*, for the Appellant.

Mr. *Beechey*, Rai Bahadur Lala *Sukh Dial* and Rai Sahib Pandit *Sheo Narain*, for the Respondents.

ORDER.—The first question for consideration is whether the orders of the Bombay High Court on the Insolvency side, dated the 18th December 1908 and the 27th May 1909, concluded as between the appellant and the respondents, the question whether the house in suit is the property of the respondent Tota Mal. That respondent applied to the Bombay Court, under the Insolvent Debtor's Act, 11-12 Vic. Cap. 21, to be declared an insolvent.

Jamna Das Fakir Chand, trading under the name of Lala Ram Narain, present appellant, opposing-creditor, opposed the application on several grounds, including fraudulent transfer of property, admittedly including the property in suit. After hearing Counsel for this opposing-creditor the Court declared the petitioner an insolvent entitled to the benefit of the Act and discharged him from all the liabilities in respect of the debts or claims established or which might by law be proved in Court in the matter of his insolvency from the date of filing his petition except debts due to three other creditors.

Had the Court not found that the property in suit had not been fraudulently transferred by the petitioner, it would presumably have refused to discharge him from his liability to the present appellant, and would have dealt with him under one of the sections of the Act as a fraudulent petitioner.

It must, therefore, be held that the Court found that there had been no fraudulent transfer of the property in suit.

Counsel for the appellant relied on *The British South Africa Company* v. *The Companhia De Mocambique*

Hari Ram v. *Kashi Ram* (2);

Ameer Ali and Woodroffe's Evidence Act, notes to section 41 at page 378.

In *The British South Africa Company* v. *The Companhia De Mocambique* (1) the principal question raised was whether the English Supreme Court of Judicature had jurisdiction to try an action to recover damages for a trespass to lands situate in a foreign country.

Herschell, L. C., said that it was not in controversy that prior to the Judicature Acts no such jurisdiction could have been exercised and held that the grounds upon which the Courts had until then refused to exercise jurisdiction in such actions were substantial and not technical, and that the rules of procedure under the Judicature Acts had not conferred a jurisdiction which did not exist before. The suit for damages for trespass to the lands in suit was dismissed.

In *Hari Ram* v. *Kashi Ram* (2) it was held that a suit to follow the purchase-money of a house in foreign territory, which had been sold by the order of a British Insolvency Court, on the ground that it was not the sole property of the insolvent and that a certain portion of it belonged to the plaintiff, was a suit "for the determination of any right to or interest in immoveable property" within the meaning of section 16 (*d*) of the Code of Civil Procedure and could be instituted only in a Court within the local limits of whose jurisdiction the house is situate. In Ameer Ali and Woodroffe's Evidence Act, notes to section 41 at page 578, it is stated that section 41 of the Evidence Act not only enumerates the different kinds of judgment *in rem*, but also enacts what their effect will be; that this effect is of a limited character and less extensive than that which is allowed at times to judgments *in rem* in English Courts, whose present tendency is, however, to narrow the effect of such judgments, making them binding for their proper purposes only, in accordance with the view which has been adopted by the Indian Legislature; that under the provisions of the section the judgments therein mentioned will operate *in rem* only in respect of those matters of which these judgments are declared to be conclusive proof, parties and privies alone being within the estoppel beyond this.

These authorities do not help the appellant, who was a party to the Bombay insolvency proceedings, while the present suit was instituted in the Court within whose jurisdiction the property in suit is situate, and the Bombay Court had jurisdiction to decide all matters incidental to those proceedings, including the question whether any property in British India had been fraudulently transferred by the petitioner before it.

The further contention that the Bombay

(1). (1893) L. R. A. C. 602; 6 R. 1; 69 L. T. 604; 36 L. J. Q. B. 70.

(2) 122 P. R. 1908.

Court did not make any declaration under the last paragraph of section 41 of the Evidence Act has no force, the estoppel against the appellant not being limited to the provisions of section 41. Counsel for the respondents cited *Sardar Mal* v. *Aranvayal Sabhapathy* (3); *In re Ganesh Das Pana Lal* (4); *In re Rassul Haji Cassum* (5) and *Caston* v. *Caston* (6).

In *Sardar Mal* v. *Aranvayal Sabhapathy* (3) it was contended that a creditor's petition in the Madras Insolvent Court disclosed no act of insolvency which could legally justify an adjudication under section 9 of the Indian Insolvents Act (11-12 Vic., Cap 21), that the adjudication order was, therefore, made by a Court not competent to make it within the meaning of section 44 of the Evidence Act, and that, consequently, both it and the vesting order were nullities and the Madras Official Assignee had no title to the attached property.

It was held that the order, although it might be erroneous and subject to reversal on appeal, was within the competency of the Madras Court, "competency" and "jurisdiction" being synonymous terms.

It was remarked that to hold that the Bombay Court could ignore the order of the Madras Court as being erroneous would be to "erect into a Court of Appeal" from the Madras Insolvency Court not only the Bombay Court but every Court in which the Official Assignee might sue or be sued.

In *In re Ganesh Das Pana Lal* (4) it was held that the Bombay Insolvents Court had jurisdiction to make an order under section 26 of the Indian Insolvents Act against a person residing outside the Bombay Presidency.

In *In re Rassul Haji Cassum* (5) it was held that, where the Official Assignee seized and retained property as the property of the insolvent, a third person who claimed the property as his own and had it in his possession when it was seized, could move the Insolvent Debtors' Court to investigate the question of ownership and to order restitution thereof, and that it was not obligatory on the third party to file a regular suit against the Official Assignee for the purpose of obtaining restitution.

In *Caston* v. *Caston* (6) it was held that the competency or jurisdiction of a Divorce Court could not possibly depend on whether a point which it decided had been raised or argued by a party or Counsel, and that the contention that wherever a decision was wrong in law or violated a rule of procedure, the Court must be held incompetent to deliver it, was obviously unsustainable.

Both sides relied on *Official Assignee Bombay* v *Registrar Small Cause Court* (7), but the decision of their Lordships of the Privy Council helps the respondents only. It was held that under the Indian Insolvents Act, when an adjudication was made by the High Court of Bombay, the estate of the debtor vested in the Official Assignee and he had to administer it, inasmuch as an order passed under section 27 of the Punjab Laws Act did not exclude the operation of the vesting order of the Bombay Court.

We have no hesitation in holding that inasmuch as the parties were before the Bombay Court and the appellant accepted the jurisdiction of that Court by filing objections to the petition, the latter is bound by the decision and cannot now raise the plea that the transfer of the property in suit was fraudulent and void. As above remarked, the estoppel is not based merely on the provisions of section 41 of the Evidence Act, and even if it could be held that the decision was not a judgment *in rem*, it was a judgment *inter partes* and binds the appellant. For these reasons we dismiss the appeal with costs.

This disposes of the appeal which is dismissed with costs, but the respondents' cross-appeal in respect of costs remains to be disposed of. Parties consent, to the 14th instant 10-30, A. M., being fixed. That date is fixed accordingly.

JUDGMENT.—We see no reason for relieving the defendant-appellant, Ram Narain, of any part of the successful plaintiff-respondent's costs and those costs should include Pleader's fees *ad valorem* on the value of the suit and appeal, Ram Narain alone

(3) 21 B. 205.
(4) 32 B. 198; 10 Bom. L. R. 77.
(5) 13 Bom. L. R. 13; 9 Ind. Cas. 344.
(6) 22 A. 270.
(7) 45 P. R. 1910; 14 C. W. N. 569; 7 A. L. J. 357 (1910) M. W. N. 177; 11 C. L. J. 443; 68 P. W. R. 1910; 7 M. L. T. 417; 37 C. 418; 20 M. L. J. 432; 6 Ind. Cas. 273; 12 Bom. L. R. 395.

defended the suit and he appealed. But for his action costs below would have been limited and there would have been no appeal. We allow the cross-objections and amend the decree to the extent of decreeing costs of the plaintiff-respondent including Pleader's fees *ad valorem* on the value of the suit and appeal against the defendant-appellant Ram Narain.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1057 OF 1909.

January 25, 1912.

Present:—Mr. Justice Johnstone and Mr. Justice Rattigan.

RAM CHAND AND OTHERS—DEFENDANTS APPELLANTS

versus

DEWAN CHAND—PLAINTIFF—RESPONDENT.

Will—Construction—Intention of testator—Hindu Law—Self-acquired property left to one daughter as owner and to the other daughter in the event of her decease—Absolute estate acquired by survivor.

A Hindu left a Will in respect of his self-acquired property by which he expressly excluded his collaterals from sharing in that property. The Will directed that the property should in the first instance devolve on the testator's widowed daughter, *A.*, who would be owner like himself but, that in case of *A.*'s death, the testator's married daughter, *B*, would be the owner of the property. *A.* pre-deceased *B.*:

Held, that the intention of the testator was to make provision for *A.* in the first instance for life in the event of her pre-deceasing *B.*, but she was to have absolute estate only if she survived *B.* In the event of *B.* surviving *A.* the Will conferred an absolute estate on *B.*

The aim and object of the testator was that the absolute owner of the property should be the daughter who survived the other.

A Will is not to be construed with literal strictness. The Courts are bound to look to all its provisions in order to see what the real intentions of the testator were. The Will must be read as a whole and regard must be had to the wishes of the testator to be gathered from the general tenure of the document.

Second appeal from the order of the Divisional Judge, Amritsar Division, dated the 9th July 1908, cofirming that of the District Judge, Amritsar, dated the 19th October 1907, decreeing plaintiff's claim.

The Hon'ble R. B. *Shadi Lal*, Lala *Tirath Ram* and Pandit *Ichhar Chand*, for the Appellants.

Lala *Laipat Rai* for Lala *Dwarka Dass*, for the Respondent.

JUDGMENT.—One Bissa Mal, *Khatri*, died on the 16th May 1907, leaving him surviving two daughters *Musammat* Durga Devi (a widow), and *Musammat* Hukam Devi, married to Babu Diwan Chand, plaintiff. It appears that Bissa Mal's wife died of plague on the 11th May and that on that date he and *Musammat* Durga Devi were also suffering from it. He, therefore, thought it advisable on the said date to make a Will regarding the disposition of his property, which consisted of a certain house in Amritsar and some ornaments all acquired by himself. In this Will he, in two places, expressly stated that his collaterals were to have no share in the property and that they had no rights thereto and he expressed his wish that the said property should in the first instance devolve on his daughter, *Musammat* Durga Devi. The Will then proceeds *jaisa ab main malik hun, waisa he bad mere marne ke Musammat Durga Devi malik hogi. Agar Durga Devi mazkur faut ho jawe gi to phir tamam jaidad ki malik aur kabiz Hukam Devi hogi.* Bissa Mal died on the 16th May and on the 18th May *Musammat* Durga Devi also succumbed. *Musammat* Hukam Devi contracted the disease and died on the 24th May 1907. Her husband, Babu Diwan Chand, now sues for possession of the said property on the ground that his late wife inherited it under the said Will as an absolute owner on the death of her sister *Musammat* Durga Devi. Defendants, who are the brothers of Bissa Mal, contested the claim on various grounds but plaintiff's claim was decreed by both the lower Courts.

Defendants applied to this Court on the revision side and their petition was admitted as a further appeal (under section 70 (1) (*b*) of the Punjab Courts Act) upon "the question as to the proper construction of the Will." This question has been argued at some length before us and we are asked by Mr. Shadi Lal for the appellants to set aside the decrees of the lower Courts on the ground that under the terms of the Will, an absolute estate was devised to *Musammat* Durga Devi as regards the house and absolute ownership in respect of the ornaments was bequeathed to her. *Musammat* Durga Devi admittedly survived the testator and the argument is that as

she obtained a vested right in the said property, and as under the terms of the Will she became absolute owner thereof, the Will could not further operate and that consequently, on her death, the succession to *her* property must be governed *ab intestato* by either Hindu Law or Customary Law (whichever is found to apply). In our opinion, this argument is fallacious and is based upon the erroneous assumption that *Musammat* Durga Devi became, under the terms of the Will, the absolute owner of the property, although she pre-deceased *Musammat* Hukam Devi. We concede that the words *jaisa ab main malik hun, waisa he bad mere marne ke Musammat Durga Devi malik hogi*, had they stood unqualified, would have conferred an absolute estate upon *Musammat* Durga Devi. But it must be remembered that the testator was most anxious to make it clear that his collateral relations were to have nothing to do with his property; that he was, on the other hand, desirous of providing for his two daughters and that his obvious intention was that provision should first be made for his widowed daughter, *Musammat* Durga Devi, who had no one to look to for maintenance, and that in the event of her death, his property should go to his other daughter, *Musammat* Hukam Devi, who had a husband living. In these circumstances, and especially in view of the express provision in his Will that, if *Musammat* Durga Devi died (*agar Musammat Durga Devi faut ho jawe gi*) by which expression he intended, we think, to indicate that if she died *before* her sister, *Musammat* Hukam Devi, the property was to devolve upon the latter, we are of opinion that his intention was to make provision for *Musammat* Durga Devi in the first instance for life in the event of her pre-deceasing her sister, but that she was to have an absolute estate only if she survived her sister. Similarly, we think that the testator's intention was to confer an absolute estate upon *Musammat* Hukam Devi in the event of her surviving *Musammat* Durga Devi. The Will must be read as a whole and in construing it we must have regard to the wishes of the testator to be gathered from the general tenure of the document.

He clearly did not wish his property to go to his collaterals and for this reason he tried to make due provision for one or other of his daughters becoming the absolute owner of the property. But that he did not intend to convey an absolute estate to *Musammat* Durga Devi, unless she survived her sister, is, we think, abundantly clear from the provision that on her death the property was to devolve on *Musammat* Hukam Devi (*cf.* as to this the decision of this Court in Civil Appeal No. 858 of 1905.) As Mr. Shadi Lal very rightly points out, if the property had been devised in absolute ownership to *Musammat* Durga Devi, the further provision that on her death it was to devolve upon her sister, would have been futile and we do not feel justified in ignoring this provision simply because the testator in an earlier part of the Will stated that after his death *Musammat* Durga Devi was to be just as much an owner of the property as he was. A Will is not to be construed with such literal strictness and we are bound to look to all provisions in order to see what the real intentions of the testator were.

In the present case it is clear that the testator intended his property to remain with his daughters and not to go to his collaterals; that he wished *Musammat* Durga Devi to enjoy it in the first instance; that (as *Musammat* Durga Devi was at the time suffering from plague) he thought it very probable that *Musammat* Hukam Devi would survive her sister and that he, therefore, provided for her succession in the event of his foreboding being realized; and finally that his aim and object was that the absolute owner of the property should be the daughter who survived the other. We hold, therefore, that the claim of the plaintiff has been rightly decreed by the lower Courts and we dismiss this appeal with costs.

Appeal dismissed.

RASHIK LAL *v.* RAM NARAIN.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No 355 OF 1911.

January 20, 1912.

Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.

RASHIK LAL—DEFENDANT—APPELLANT

versus

RAM NARAIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 39, applicability of—Mortgage—Consideration, part-payment of—Suit for foreclosure, maintainability of—Contract and conveyance, difference between.

In a suit upon a conditional mortgage a decree for foreclosure may be passed though the mortgagee had failed to pay the whole of the mortgage-money to the mortgagor.

Gokalchand v. *Rahman*, 59 P. R. 1907, disapproved of.

Bajrangi Sahai v. *Udit Narain Singh*, 10 C. W. N. 932; *Tatia* v. *Babaji*, 22 B. 176, *Subba Rau* v. *Devur Shetti*, 18 M. 126, referred to.

Per Karamat Husain, J.—There is a fundamental distinction between a contract and a conveynce, *i. e.*, a transfer of an interest in land, and for this reason the rights and duties of the parties to a contract are quite different from the rights and duties of the parties to a conveyance.

A mortgage under the Transfer of Property Act is a transfer of an interest in the land mortgaged and not a mere contract. No sooner a valid mortgage-deed is registered an interest in the property mortgaged vests in the mortgagee in the absence of a contract to the contrary, notwithstanding the fact that the mortgage-money has not been paid by the mortgagee to the mortgagor. The mere non-payment of the mortgage-money cannot have the effect of rendering the mortgage invalid.

A mortgage cannot be cancelled under section 39 of the Indian Contract Act, 1872.

Second appeal from the decision of the District Judge of Jhansi, dated the 19th January 1911.

Mr. *Mohan Lal Sandal*, for the Appellant.

The Hon'ble Mr. *Sunder Lal*, for the Respondents.

JUDGMENT.

CHAMIER, J.—This was a suit by the respondents upon a mortgage by way of conditional sale made in favour of their father, Cheda Lal, by the appellant, Rashik Lal, on August 29th 1898. The consideration for the mortgage consisted of a cash advance of Rs. 250, a sum of Rs. 750 due upon a previous mortgage, and a *Hundi* for Rs. 4,000 drawn by Cheda Lal in favour of the appellant upon a firm in Cawnpore. The *Hundi* was stolen from the appellant by a man in the service of Cheda Lal and the latter falied to make good the amount of the *Hundi* to the appellant. The respondents admit that the greater part of the consideration failed in this way. They have sued for recovery of the sum of Rs. 1,000 and interest thereon in accordance with the deed and for foreclosure in case of non-payment. The suit was resisted upon the ground that as the mortagagee had failed to carry out his part of the contract his sons were not entitled to enforce the mortgage according to its terms. This defence having been rejected by the Courts below, the mortgagor has appealed to this Court. He relies upon the decision of a Full Bench of the Punjab Chief Court in *Jalla* v. *Gehna* (1) and the decision of the Madras High Court in *Subba Rau* v. *Devur Shetti* (2). The respondents rely upon the decision of the Calcutta High Court in *Munshi Bajrangi Sahai* v. *Udit Narain Singh* (3), a number of decisions of this Court the last of which is that in *Baijnath Singh* v. *Raltu* (4), and two decisions of the Bombay High Court cited in the case last mentioned. The cases in this Court and in the Bombay High Court were all cases in which the purchaser of immoveable property had failed to pay part of the purchase-money and it was held that the sale was nevertheless a completed transaction and passed title to the purchaser. In this Court it has been held in many cases of the kind that a purchaser suing for possession of property who has not paid the whole purchase-money may be required to pay the balance before he is allowed to execute a decree for possession. The Bombay High Court have held distinctly that a vendor of immoveable property by a registered sale-deed is not entitled to resist the sale on the ground that part of the purchase-money has not been paid. There appears to be no distinction in principle between the case of a sale and that of a mortgage. The reasons for holding that where the ownership of immoveable property has been transferred by way of sale the seller cannot rescind the transaction because the purchaser refuses to pay the price promised but must sue for the same seem to apply with equal force to the case where an interest in immoveablo pro-

(1) 60 P. R. 1907; 76 P. W. R. 1907 (F. B.)
(2) 18 M. 126.
(3) 10 C. W. N. 932.
(4) A. W. N. (1908) 38; 5 A. L. J. 96; 30 A. 125.

perty has been transferred by way of mortgage and the mortgagee refuses to advance part of the money agreed to be advanced. I think, therefore, that the decisions of this Court and of the Bombay High Court support the contention of the respondents. The Calcutta High Court in the case cited gave a decree for foreclosure to a mortgagee though he had failed to pay the whole of the mortgage-money to the mortgagor. The decision of the Punjab Chief Court, no doubt, goes the whole length of the appellant's contention in the present case, but the learned Judges do not seem to have regarded the mortgage as a transfer of an interest in immoveable property or to have distinguished between a contract to mortgage and a completed mortgage. They seem to have decided as they did upon the broad ground that it is inequitable to allow a mortgagee to sue upon a mortgage where he has failed to advance part of money agreed to be advanced. The Madras decision rests upon the view that in such a case a mortgagor is entitled to rescind the mortgage and the Court seems to have held that the mortgage in question in the case had in fact been cancelled by the mortgagor. I am not prepared to say that the Court is bound in every case to enforce the mortgage *according to the letter* where the whole of the mortgage-money has not been advanced. For example, where the mortgagee sues for possession he may, I think, be required to pay the balance of the mortgage-money before he takes out execution of his decree and there may be other cases in which he may properly be put upon terms. In the present case there seems to be no reason for not passing a decree as prayed. Under the decree the appellant mortgagor will be given an opportunity of re-paying the amount which he received from the mortgagee. Even if the mortgagor in such a case is entitled to rescind the mortgage he can do so only upon re-paying the amount advanced to him. It was suggested in the course of the argument for the appellant that he had in fact rescinded the mortgage. There is no evidence of this. The communication relied upon so far from evincing a desire to rescind shows that he intended to enforce the mortgage. In my opinion he was not entitled to rescind and never made any attempt to do so. I agree that the appeal should be dismissed but I would extend the time for redemption to July 20th next.

KARAMAT HUSAIN, J.—On the 29th of August 1898 the defendant Rashik Lal executed conditional sale in favour of Chheda Lal the predecessor-in-interest of the plaintiffs to secure a sum of Rs. 5,000. He stipulated that he would pay the principal and interest on Kunwar Sudu Puno Sambat 1956 (*i.e.*, 18th October 1899) and would redeem the *zemindari* property, and that if he failed the property should be deemed to have been sold absolutely. The consideration was acknowledged to have been received as follows:—

	Rs.
Deducted	750
Received before execution of mortgage	125
Shall receive at registration	125
Received a *Hundi* drawn by Chheda Lal	4,000

The plaintiff brought an action for the recovery of Rs. 1,000 principal and Rs. 1,790-1-3 interest, or for the possession of the property sold conditionally. They alleged that the sum of Rs. 4,000 had not been paid.

The pleas in defence were that no consideration for the mortgage was paid by Chheda Lal; that the mortgage was obtained by fraud; that compound interest was barred by time, and that the plaintiffs were liable to pay damages in consequence of the loss suffered by the defendant on the ground of non-payment of Rs. 4,000. The suit was decreed by the Court of first instance. The defendant appealed and contended that the mortgage-deed was obtained by fraud; that the sum of Rs. 1,000 sued for was not advanced: that the mortgage contract was rescinded by the defendant; that the mortgage was unenforcable because of its breach by Chheda Lal; that compound interest was not to be awarded, and that the defendant was entitled to damages caused by the non-payment of Rs. 4,000.

The lower Appellate Court found on all the points raised before it against the defendant-appellant and dismissing the appeal confirmed the decree of the Court of first instance. In second appeal it is urged that as the sum of Rs. 4,000 was not paid the mortgage was invalid; that even if it was valid the defendant in consequence of

the non-payment of Rs. 4,000 rescinded it by his notice dated the 28th of September 1898; that he was entitled to do so under section 39 of the Indian Contract Act, 1872, see *Subba Rau* v. *Devur Shetti* (2); *Gokal Chand* v. *Rahman* (5); *Munshi Bajrangi Sahai* v. *Udit Narain Singh* (3), and that the whole of the mortgaged property cannot be foreclosed. There is no force in any of the points taken by the learned Vakil for the appellant. There is a fundamental distinction between a contract and a conveyance, *i. e*, a transfer of an interest in land and for this reason the rights and duties of the parties to a contract are quite different from the rights and duties of the parties to a conveyance. In the case before us I am concerned with one of those distinctions which is recognised in section 54 of the Transfer of Property Act.

In a sale, in the absence of any contract to the contrary, the ownership of the property sold passes from the vendor to the vendee as soon as the sale-deed is registered. Neither the delivery of possession nor the payment of the price is a condition precedent to the passing of the ownership. The latest case of this Court on the subject is *Baijnath Singh* v. *Paltu* (4).

"A mortgage, under section 58 of the Transfer of Property Act, is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advaced by way of loan on existing or future debt or the performance of an engagement which may give rise to a pecuniary liability." The definition shows that a mortgage under the Transfer of Property Act is a transfer of an interest in the land mortgaged and not a mere contract. It, therefore, follows that no sooner a valid mortgage-deed is registered an interest in the property mortgaged, in the absence of any contract to the contrary, vests in the mortgagee notwithstanding the fact that the mortgage-money has not been paid by the mortgagee to the mortgagor. The mere non-payment of the mortgage-money cannot have the effect of rendering the mortgage invalid. The remarks of Farran, C. J., in *Tatia* v. *Babaji* (6) are worth noticing. He says:— "I am not, however, as at present advised, prepared to assent to the train of thought which puts conveyances of lands in the *mofussil* perfected by possession or registration where the consideration expressed in the conveyance to have been paid has not in fact been paid, in the same category as contracts void for want of consideration. The radical distinction between a perfected conveyance and a contract does not seem to me to have been sufficiently borne in mind throughout the judgment." Of course, if there is a contract to the contrary in the mortgage-deed no interest in the property mortgaged vests in the mortgagee on the registration of the mortgage-deed, but in the mortgage-deed of the 29th August 1898 there is nothing to that effect. For the above reasons I would hold that the mortgage-deed dated the 29th of August 1898 was a valid mortgage. The next point is that the mortgagor by his notice dated the 28th of September 1898 rescinded the contract of mortgage on the ground that out of the consideration Rs. 4,000 were not paid by the mortgagee. The operative part of the notice is to the following effect: "You must return the *Hundi* to us or the money together with the loss suffered by us owing to the non-payment of Rs. 4,000. If you do not do so we shall sue you on the ground of your fraud, dishonesty and breach of contract." There is nothing in the notice as I read it to express any intention of rescinding the so-called contract of mortgage. It simply threatens to sue the mortgagee for breach of cantract. Supposing that it does convey the meaning contended for, I am of opinion that section 39 of the Indian Contract Act has no application, for the simple reason that it deals with contracts and mortgage when registered is not a contract but a transfer. In *Subba Rau* v. *Devur Shetti* (2) Muttu Sami Ayyar, J, observed:—"Under section 39 of the Contract Act the mortgagee was entitled to cancel the contract of mortgage on the ground that the mortgagee in contravention of his agreement incapacitated himself for performing it in its entirety"

The terms of the mortgage are not before me and I am, therefore, not in a position to say whether there was or was not a specific agreement between the mortgagor and the mortgagee that no interest in the property mortgaged would pass without the payment of the entire mortgage-money. If there was

(5) 59 P. R. 1907.
(6) 22 B. 176.

no such stipulation, then with due respect to the learned Judge I am unable to hold that section 39 of the Contract Act empowers a mortgagor to rescind a mortgage in which an interest in the property mortgaged has already vested in the mortgagee.

In *Gokal Chand* v. *Rahman* (5) it was held held by a Full Bench that in the absence of a specific contract postponing payment, failure to pay full consideration as agreed upon whether to the mortgagor or to a prior incumbrancer after said payment has been demanded by the mortgagor avoids the mortgage and destorys the mortgagee's lien and right to possession even on subsequent tender of the unpaid consideration, it being immaterial whether the non-payment has or has not caused inconvenience or loss to the mortgagor. The previous rulings of the Punjab Chief Court were conflicting and the Full Bench put an end to the conflict. No reason whatsoever is given for the rule laid down and the radical distinction between a contract and a transfer of an interest in land is totally ignored. With due respect, I am unable to accept the view taken by the Full Bench.

In *Bajrangi Sahai* v. *Udit Narain Singh* (3) Maclean, C. J., said:—"I do not for myself see why the mortgage which was registered is not a perfectly good mortgage to the extent of the money actually advanced. It is said that this view is inconsistent with that taken by the Madras High Court in the case of *Minakshisundram Pillai* v. *Ayyathorai* (7). But when we come to examine that case I do not think it is an authority for the proposition contended for. There the Court found in effect that the mortgagor had a right to cancel the contract and cancelled the contract and it was also found that the mortgagee had acquiesced in that cancellation for about 8 years. Whether there was any power in that case to cancel the contract is a question which we need not enter into. There is no such suggestion in the present case. There is no suggestion that the mortgagor has cancelled the contract or that he had power to do so. The Calcutta case of *Bajrangi Sahai* (3) is, in my opinion, no authority for the proposition that a mortgagor when the interest in the land mortgaged passes to the mortgagee has any power to cancel the mortgage. I may note that the reference to the Madras case is wrong. The correct reference is *Subba Rau* v. *Devur Shetti* (2). Section 4 of the Transfer of Property Act does not put an end to the vital distinction between a contract and a transfer of an interest in land for it only enacts that the chapters and sections of the Transfer of Property Act which *relate to contracts* shall be taken as part of the Indian Contract Act, 1872. But in a mortgage as soon as an interest in the land mortgaged vests in the mortgagee the transaction ceases to be a contract and becomes a transfer of immoveable property to which section 4 of the Transfer of Property Act does not apply.

The mortgage dated the 29th of August 1893 was a single transaction and the entire property mortgaged was subjected to every pie of the mortgage-money advanced, the mortgage of the entire property mortgaged was, in my opinion, therefore, perfectly good to the extent of the sum of Rs. 1,000 (one thousand) which, according to the finding of the lower Appellate Court, was actually advanced by the mortgagee. The plaintiffs are entitled to recover the sum of Rs. 1,000 with interest at the rate agreed upon. If the defendant fails to pay, they are entitled to foreclose the whole of the property mortgaged. For the above reasons, I would dismiss the appeal with costs including in this Court-fees on the higher scale. I extend the time for redemption to the 20th of July 1912.

BY THE COURT.—That the appeal will be dismissed with costs which in this Court will include fees on the higher scale. The defendants will have time to redeem up to the 20th July 1912.

Appeal dismissed.

(7) 18 M. 136.

GOPESSUR DUTT *v.* BISSESSUR DUTT.

(s. c. 16 C. W. N. 265.)

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL No. 33 OF 1911

July 18, 1911.

Present:—Sir Lawrence, Jenkins, KT., Chief Justice, and Mr. Justice Woodroffe.

In the goods of GOPESSUAR DUTT, DECEASED, JARAT KUMARI DASSI—PETITIONER—APPELLANT

versus

BISSESSUR DUTT—OBJECTOR—RESPONDENT.

Will—Probate—Suspicion to be removed before order—Suspicion to be inherent and not to arise from conflicting evidence—Proof of fact—Objection that more evidence might be adduced—Presumption against misconduct—Improbabilities—Clear evidence of reliable witnesses—Expert testimony, how to be taken—Document, proof of—Refusal to cross-examine—Document put in hands of witness—Right of adversary to see document—Succession Act (X *of* 1865), *ss.* 46, 48, 50—*Evidence Act* (I *of* 1872), *ss.* 3, 45, 101, 135.

The principle laid down in *Barry* v. *Bultin*, 2 Moore P. C. 480: 4. S. E. C. (o. s.) 175 and *Tyrrell* v. *Painton*, (1894 P. 151, 159; 6 R. 540; 70 L. T, 453; 42 W. R. 343, to the effect that whenever a Will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless the suspicion is removed, applies to cases where the suspicion is inherent in the transaction itself as put forward by the propounder, and not where it arises from a conflict of testimony and the question is which set of witnesses should be believed.

Jenkins, C. J.—Demonstration, or a conclusion at all points logical, cannot be expected, nor can a degree of certainty be demanded of which the matter under investigation is not reasonably capable.

If there is sufficient evidence of a fact, it is no objection to proof of it that more evidence might have been adduced.

Presumption against misconduct is among the probabilities to be taken into account in estimating the value of evidence, and this probability gains in strength where the character and position of the individual impugned is above reproach.

The mere improbability of this or that in a complex transaction cannot go for much against the clear and distinct evidence of witnesses of good general character.

Woodroffe, J.—Where expert testimony is given, the better course to follow is that the expert should hear the evidence as to which he is asked his opinion than that he should give his opinion on a copy of the deposition.

A Court cannot assume that a document is proved, from the refusal of opposing Counsel to cross-examine to it. The latter is entitled to wait until the Court ruled whether the document had been proved or not.

If the cross-examining Counsel, after putting a paper into the hands of a witness, merely asks him some questions as to its general nature or identity, his adversary will have no right to see the document; but if the paper be used for the purpose of refreshing the memory of the witness, or if any questions be put respecting its contents or as to the handwriting in which it is written, a sight of it may then be demanded by the opposing Counsel.

Appeal from the judgment of Chitty, J.

This was an application for Probate of a Will, which was dismissed on March 21st, 1910. The petitioner appealed.

Messrs. *Jackson*, *Zorab* and *B. L. Mitter*, instructed by Messrs. *Rutter & Co.*, Solicitors, appeared for the Appellant.

Messrs. *S. P. Sinha*, *S. R. Dass*, *B. C. Mitter* and *R. C. Bannerjee*, instructed by Messrs. *Gonesh Chander Chander & Co.*, appeared for the Respondent.

JUDGMENT.

JENKINS, C. J.—This appeal arises out of an application for Probate of an instrument bearing date the 13th Ashar 1316, or the 27th of June, 1909, and purporting to be the Will of Gopessur Dutt and to bear his signature.

Two questions arise: *First*, whether the signature to the instrument is that of Gopessuar Dutt, and, *secondly*, in case it is his signature, whether, when he placed it there, he was of sound mind.

Chitty, J., has decided against the Will on grounds which I will later discuss, and from his judgment the present appeal has been preferred.

Gopessur Dutt died in the early hours of the 28th of June 1909 at the age of 36 or thereabouts. He left a widow, the appellant Sreematy Jarat Kumari Dassi, who seeks to propound the instrument in dispute. There was one daughter who died in infancy, but apart from this there was no child of the marriage. Gopessur was one of three brothers, the other two, both younger than he, being Bissessur, the caveator and respondent, and Parmessur.

It is admitted by Counsel for the respondent, and is clear from the evidence, that Gopessuar and Bissessur were not on terms of friendship. The relations between Gopessur and Parmessur, however, were good; for some time after they parted from Bissessur they lived together in the garden house that had been allotted to them on partition; and though, shortly before his death, Parmessur had parted in mess and was building himself a separate house, this did not indicate any serious estrangement between these two brothers. Parmessur

died in the autumn of 1908, and a month after his death his widow gave birth to a little boy, to whom Gopessuar seems not unnaturally to have been attached. Gopessuar fell ill in March, 1909, and, while there may have been temporary periods of improvement, he was never restored to health, though he passed through the hands of many and variously qualified medical attendants. At first his trouble seems to have been appendicitis, later dysentery supervened, and he ultimately died of bowel trouble. His earliest attendant was Dr. Chatterjee, the family physician, who also brought in for consultation three doctors of repute, but they do not seem to have satisfied the patient, for in May he placed himself under the homœopathic treatment of Dr. P. C. Mazumdar, a practitioner of good repute and standing. Shortly after this, Dr. P. C. Mazumdar, on leaving Calcutta, placed Gopessuar under the treatment of his son, Dr. J. N. Mazumdar, and so things went on for ome time.

Then Gopessuar consulted a Kabiraj, but as dysentery appeared on or about the 18th of June, Dr. J. N. Mazumdar was again summoned, and he attended him up to his death.

On the 20th and 21st of June, Dr. D. N. Roy was called in for consultation, and here seems to have been a slight improvement in the patient's condition till the 25th when he was not so well. On the 26th he was seen both by Dr. P. C. Mazumdar, who had returned to Calcutta, and by Dr. J. N. Mazumdar. On the Sunday morning they both saw him. On the evening of Sunday, the 27th Dr. P. C. Mazumdar visited him about 5 or 5-30. Shortly after this, about 8 or 8-30 o'clock, Gopessur is alleged to have executed the Will now propounded. Then he is said to have slept, but the pain becoming intense, Dr. J. N. Mazumdar was sent for. He was, however, unable to come, and in his palce Dr. Gosswami visited the patient, and remained with him until his death, about 1 or 2 o'clock on the morning of the 28th. The same day the cremation took place, and on return from it, the widow, according to her evidence, handed over to her brother, Shambhu Nath Sen, the Will and certain drafts, which had been entrusted to her by her husband, and on the 29th in the morring they were delivered by him to Mr. Rutter, the family attorney, whose assistant he was.

On the 11th August, 1909, the widow filed her petition for Probate through Mr. Rutter. Bissessur, however, entered a caveat and on the 20th of August he affirmed an affidavit in its support.

In the 5th paragraph of the affidavit he said:—"That I have no personal knowledge as to whether the said alleged Will is the last Will of the said deceased or as to whether it was duly and properly or at all executed by the said deceased or duly and properly attested as required by law, and if it was executed by the said deceased under what circumstance it was done, and whether the said deceased was in a disposable frame of mind and body, but, as far as I have been able to ascertain from inquiries made, so far I verily believe that the said alleged Will of the said deceased, dated 27th June ,1909, is not and cannot be the Will of the said deceased."

The proceedings then took the form of a regular suit; witnesses were examined on commission and in Court, and after a prolonged hearing of 24 days the case terminated adversely to the applicant.

I must here digress for a moment to express my disapproval of the way in which this litigation was needlessly prolonged, notwithstanding the endeavours of the learned Judge to keep those who appeared before him within proper limits.

The caveator's grounds of objection I have read, but, notwithstanding the restrained and even languid terms in which they were formulated, the contest has been conducted with unusual bitterness.

Thus, the cross-examination of the petitioner on commission covers upwards of 80 printed pages, the cross-examination of other witnesses occupies in one case upwards of 40 printed pages, in another 17, in another upwards of 20, in another upwards of 50, and in another 19.

I have read through the whole of this cross-examination and I can find no justification for its length. Then there is another matter to which I would allude, as it is not without its bearing on the case.

The hearing began, but was not completed, before the Xmas vacation of 1909. Before the vacation the petitionor had called all her witnesses and she was described by the

Judge as having closed her case. The cross-examination of the last of her witnesses was almost at a close, and indeed so nearly at an end did it seem to the Judge that when the cross-examination had to be postponed on account of the witness's illness, the learned Judge proposed to Counsel for the caveator that he should in the interest of expedition open his case. The suggestion was scouted, and was even met with a threat on the part of Counsel which might as well have been left unuttered. And so the cross-examination of this witness was taken up on the re-opening of the Courts. But in the interval much had happened; fresh Counsel had been retained for the caveator, and two of the petitioner's servants had been won over to the caveator's side under circumstances to which I will later allude. And when the cross-examination was taken up, in place of the few questions that the learned Judge had anticipated, the cross-examination was pursued through three more days. Not only that, but an application was made on behalf of the caveator with a hardihood little short of astounding to have the petitioner's witnesses re-called, including even the petitioner herself whose previous cross-examination had been dragged out to the length I have described. The learned Judge rightly refused this application, but the judgment states, as the record shows, that, on the day when fresh Counsel appeared for the caveator, his case assumed an entirely fresh complexion. Now the case made was left in no doubt; the Will was denounced as a forgery. Babu Shambhu Nath Sen, an attorney of this Court of some years' standing, was said to have forged Gopessur's signature, and the petitioner herself to have been a party to and have had a hand in the forgery. And yet when the case first came before Chitty, J., he could get no definite reply when he made the very reasonable inquiry what the caveator's case really was, and when the learned Judge specifically inquired whether a charge of forgery was made, the boldest reply he could elicit was: "It amounts to that." When Counsel for the caveator rose to present his client's case before this Court I thought it right to ascertain what his case really was, but the diffidence of December had to some extent re-asserted itself. Ultimately the following statements were made by Counsel and were duly recorded: "I give up the allegation that the signature was forged by Shambhu Nath." "I say the date placed below Gopessur is in Jarat's handwriting; but I don't know when or whether she knew Gopessur had not written his name." "I say Shambhu Nath was a party to forging this Will. I make a charge of forgery against Shambhu Nath and the petitioner."

I propose here to examine the judgment under appeal. The key to the decision is, I think, this: there are a number of circumstances which in the opinion of the learned Judge create suspicion: the occasion for suspicion has not been removed: therefore, the Will has not been proved.

In so handling the case the learned Judge professed to be guided by *Tyrrell* v. *Painton* (1). As I understand that decision, it laid down no new principle, but it merely applied a well-established principle to an exceptional set of circumstances. That principle was enunciated in *Barry* v. *Butlin* (2), where it was said, "the rules of law according to which cases of this nature are to be decided do not admit of any dispute so far as they are necessary to the determination of the present appeal, and they have been acquiesced in on both sides. These rules are two: The *first*, that the *onus probandi* lies in every case upon the party propounding a Will, and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable testator. The *second* is, that if a party writes or prepares a Will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true Will of the deceased."

The effect of this decision is tersely stated by Lord Davey, as he afterwards became, in *Tyrrel* v. *Painton* (1), where he said, "The principle is that wherever a Will is prepared under cirumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought

(1) (1894) P. 151, 159; 6 R. 540; 70 L. T. 453; 42 W. R. 343.

(2) (1838) 2 Moore P. C. 480; 4 S. E. C. (o. s) 175,

not to pronounce in favour of it unless the suspcion is removed."

The suspicion to which allusion is made must, I think, be one inherent in the transaction itself, and not the doubt that may arise from a conflict of tesimony which becomes apparent on an investigation of the transaction.

Now, while I willingly concede the value to us of these decisions, it must not be forgotten that the law is laid down for us in clear and imperative terms by Acts of the Indian Legislature, and it is by the provisions of those Acts that we must be guided. Gopessur was a Hindu, and the law applicable to any Will alleged to have been executed by him is to be found in the Hindu Wills Act which incorporates the sections of the Succession Act to which I will refer.

By sectoin 46 of the Succession Act it is provided that every person of sound mind and not a minor may dispose of his property by Will. In Explanation 4 to this section it is said that no person can make a Will while he is in such a state of mind, whether arising from drunkenness, or from illness, or from any other cause, that he does not know what he is doing. A light is thrown on the meaning of the section by the illustrations appended to it.

By section 48 it is provided that a Will or any part of a Will the making of which has been caused by fraud or coercion or by such importunity as takes away the free agency of the testator is void.

Section 50 prescribes the rules for the execution of unprivileged Wills and enjoins (among other things) that the testator shall sign the Will; that his signature shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will, and that it shall be attested by two or more witnesses.

So much, then, for the conditions necessary for a valid Will. Next we have to see how the existence of those conditions is to be established. For this I turn to the Evidence Act which declares by section 3 that a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought under the circumstances of the particular case to act upon the supposition that it exists. The disproof of a fact is similarly treated. It appears to me that the learned Judge has required a higher standard of proof than the law prescribes. Thus, at one place, he says, "but even so it cannot be said that there is no doubt regarding Gopessur's possession of the requisite mental activity at the point of time in question:" again, in discussing the signature on the Will, he says, "it is, therefore, impossible to express a decided opinion on this point:" and he ultimately formulates his attitude towards the problem before him in these words: "The question is,—'s the evidence of the witnesses whom she has called to support her case so unimpeachable, so absolutely trustworthy in itself, as by its own merits to dispose of all objections and allay all doubt and suspicion?" But the materials on which Courts have to pronounce are necessarily imperfect: for, apart from the inherent uncertainty of human affairs, the presentment of them to a tribunal is ordinarily the outcome of faulty observation, defective memory, inaccurate description and natural bias, and even that is blurred here by the intervention of interpretation.

Demonstration or a conclusion at all points logical cannot be expected nor can a degree of certainty be demanded of which the matter under investigation is not reasonably capable. Accepting the external test which experience commends, the Evidence Act, in conformity with the general tendency of the day, adopted the requirements of the prudent man as an appropriate concrete standard by which to measure proof.

The Evidence Act is at the same time expressed in terms which allow full effect to be given to circumstances or conditions of probability or improbability, so that where, as in this case, forgery comes in question in a civil suit, the presumption against misconduct is not without its due weight as a circumstance of improbability, though the standard of proof to the exclusion of all reasonble doubt required in a criminal case may not be applicable [Cf. *per* Willes, J., in *Cooper* v. *Slade* (3) and *Doe d Devine* v. *Wilson* (4)].

I have dealt with this topic in some detail as, at the first blush, it would almost

(3) 6 H. L. Cas. 746 (1858); 27 L. J. Q. B. 449; 4 Jur. (N. S.) 791; 6 W. R. 461.

(4) 10 Moore P. C. 502 at p. 531 (1855).

appear as though we were asked to dissent from the learned Judge's appreciation of the evidence, and that I should hesitate to do in the absence of very strong circumstances justifying such a course. What we have to see in this case is whether, after considering the matters before us, the Court ought to believe the two main facts alleged by the petitioner, or to consider them so probable that a prudent man ought, in the circumstances of this particular case, to act upon the supposition that they are true. These two facts alleged are, *first*, that Gopessur was of sound mind at the time of the alleged execution of his Will, and *secondly*, that he in fact duly executed his Will.

First, I will deal with the problem whether he was mentally capable of making the Will propounded, bearing in mind that for this purpose it is on the petitioner to establish affirmatively that he was at or about 8 or 8·30 on the evening of the 27th of June 1909 of sound mind and not in such a state of mind from illness or any other cause that he did not know what he was doing (section 46 of the Indian Successien Act). If the story of the preparation of the Will be accepted, a lower standard of capacity would be requisite, *Perera* v. *Perera* (5) ; still I propose to discuss the evidence in the first place without reference to the view that Gopessur had a prior knowledge of the contents of the alleged Will.

Now the evidence on the part of the petitioner consists of the testimony of the three doctors who were in actual attendance on Gopessur, the two attesting witnesses, Gopessur's Sircar and the petitioner. To this is opposed the evidence of the caveator, his nephew Gora Chand Mullick, two servants, who were in Gopessur's service but left in the course of this suit in circumstances which invite comment, and a doctor who never saw the deceased.

Now I take first the three medical men who attended the deceased, Dr. P. C. Mazumdar, Dr. J. N. Mazumdar and Dr. S. N. Goswami. Not a word has been said against the probity of these three gentlemen, nor has it been suggested that they have any bias in favour of the petitioner.

Indeed, it ultimately came out in the course of the evidence that prior to their giving evidence, all three had been approached from the caveator's side, and it was contended that it must have become known to him or his legal advisers what they were prepared to say, and this has been made a matter of comment by Counsel for the petitioner, in view of the serious charge of forgery involved.

Dr. P. C. Mazumdar is a well-known doctor in Calcutta, and he attended Gopessur in the early part of his illness; he then went to Darjeeling, and he renewed his attendance on Saturday, the 26th of June, 1909, On that day he saw him once at 3 P.M. and on the following day, Sunday, he saw him twice, at 9 A.M. and 6 P.M. These times are no doubt approximate, but they are sufficiently accurate for the purpose in hand.

On both days he found Gopessur very weak, but he declares that "Gopessur's brain was in no way affected by the disease." On the Sunday evening, he says, the patient was a little better as regards his stools

Then he says (pp. 197 and 198 of the paper-book):—"I was with him 5 or 6 minutes on Sunday evening. I spoke to him, questioned him about his condition. He gave answers. The answers were intelligent answers." "After seeing him I left the room and went downstairs. Some one accompanied me, Shambhu and one of the servants. That is Shambhu there; Prannath was the servant. I had a conversation with these two. They asked me about the state of the patient. Then I said the condition of the patient was very serious and they asked me also whether they can make a Will. They wanted to make a Will, Shambhu was asking me whether they could make a Will. Whether the patient is to make a Will. I said yes he can. You can make a Will. English is not my tongue."

"They inquired if the patient could then make a Will. I said he could. Nothing further was said."

"In my opinion his mental condition was such that he could make a Will then. I say so from what I had observed immediately before."

"I think I told them that the patient might survive 2 or 3 days. That is my opinion."

(5) (1901) A. C. 354; 84 L. T. 371; 70 L. J. P. C. 46.

In cross-examination not a question was put to this witness as to Gopessur's mental condition. This, however, was elicited, *first*, that he did not tell the patient or his friends there was any immediate danger of his dying that night, and *secondly*, that the patient was sitting up some time and lying down also.

Dr. J. N. Mazumdar saw even more of Gopessur, for he was in daily attendance from June the 19th to the 27th. He describes him as very much more prostrate than on the previous occasions when he had attended him. He says (page 201 of the paper book) :—

"For a few days from the 19th he seemed to improve. Then he began to get worse and worse.

"On the 25th he was not so well. Up to the 25th he appeared to be getting better. On the 26th he was worse and on the 27th he was very bad. On the 27th I think I saw him in the morning. I went with my father and had a talk with Gopessur. His mind was quite clear. During this week I did not notice his mind getting cloudy, not that I know of. I was sent for about midnight of the 27th, I could not go. I told him to take Doctor Goswami."

In the cross-examination of this witness, too, there is a similar reticence on the question of his mental capacity.

The third of the medical men, Dr. S. N. Goswami, only saw Gopessur once ; that was about midnight of the 27th, and he remained with him to his death.

His description is as follows (page 199 of the paper-book) :—"He was lying in his bed suffering very much. I found it is from old dysentery he is suffering. I spoke to him. He answered. He was conscious. He gave me intelligent answers. He told me what he was suffering from. I asked him what was troubling him. He said he was suffering from an intense pain in the abdominal region. He said all he wanted me to do was to relieve that pain. I told him I would try my best to do so. I gave him medicine. It did not relieve him. He wanted to smoke once. He said he wanted *hooka*. I said, no, you can't have *hooka* now. I gave him medicine 2 or 3 times. I was there some time. He was complaining of his troubles generally. I can't remember prticularly what he said."

"I was there when he died."

"I remaind with him till he died. It was about an hour after I went there or more."

"At first his mind was clear, but was falling off very fast. He became unconscious before he died. I can't exactly say how long, about half an hour or so."

Here, too, there was no cross-examination as to Gopessur's mental state.

This abstention on the part of cross-examining Counsel, which certainly cannot be ascribed to any reluctance to use this method of eliciting information, valuable or valueless, becomes the more remarkable, if, as the petitioner maintains, it must have been ascertained what the views of the three doctors were.

I pause here to say that though these three witnesses may be experts their evidence in this case has not been that of experts but of men who had observed relevant facts, and whose evidence derives an enhanced value from the circumstance that they had favourable opportunites, peculiar facility and obvious incentive for accurate observation, and that their training would fit them to appreciate and describe what they observed.

At this point it will be convenient to consider the evidence of the medical man who was called by the caveator by way of counterblast.

He is Col. Pilgrim, also a medical man of repute in Calcutta, but without the advantage of having seen Gopessur. He comes before the Court as an expert pure and simple, and without discussing the argument as to the characteristics of this type of remunerated witness, or determining how far he is merely to be regarded as a man who is paid a retainer to make a sworn argument, it is impossible to get away from the fact that he labours under a disadvantage to which his medical brethren, if the difference of schools permits this description, were not subject. They saw the patient, he did not. The learned Judge seems to have read the expert's evidence as supporting his own view that the evidence of the three doctors was meagre and unsatisfactory in the extreme.

But it is important to see what was the question that elicited from the expert the reply to which the learned Judge apparently alludes.

GOPESSUR DUTT *v.* BISSESSUR DUTT.

This is the question that had such momentous consequences:

"How would you describe the clinical picture such as it is that is presented by the evidence of the three doctors?

A. "Meagre and incomprehensible."

But as I read the evidence of the three doctors they did not profess to paint a "clinical picture," whatever that may mean, but as plain honest men to give a true and plain account of Gopessur's mental condition on or about the 27th of June 1909 as it appeared to them. Had they been required to paint clinical pictures for the expert's purposes I see no reason to suppose they would have been incapable of responding to the demand.

To clinch the matter, Counsel put this question to his expert:

"Q. Upon the meagre and incomprehensible clinical picture presented by the evidence of the doctors, are you able to form a clear, satisfactory and convinced opinion as to the mental condition of the patient during, say, the last 8 hours of his life?

A. No, I am not.

Q. Or during the last 8 or 10 days of his life?

A. No, I am not."

So much the worse for the expert; but I fail to see how this discredits the evidence of facts given by the three doctors.

Before leaving the medical evidence, it is necessary that I should deal with a comment of the learned Judge who says, "It may also be noticed in this connection that Dr. D. N. Roy, who saw Gopessur after the relapse in consultation with Dr. J. N. Mazumdar and who is said to have given advice as to the capacity of Gopessur to make a Will on 20th June, has not been called. His evidence would, in my opinion, have been most valuable, and I cannot understand why it was omitted." Now nothing can be clearer than that, if there is sufficient evidence of a fact, it is no objection to proof of it that more evidence might have been adduced.

But, apart from this, I do not fully appreciate the learned Judge's comment. To begin with, Dr. D. N. Roy only saw Gopessur on the 20th and 21st, and so he was not in a position to give direct evidence as to his mental condition on the 27th; in other words, like Col. Pilgrim, he could only have expressed an opinion. The "clinical picture" of which the caveator's Counsel and expert were in quest could not have been filled in by him, and he, as they, would have found there that which was "meagre and incomprehensible" when he essayed to speak as an expert.

I, therefore, fail to see how his evidence could have been "most valuable." But more than this, for what it may be worth, the cross examination of Dr. J. N. Mazumdar by the caveator's Counsel elicited information that it was Dr. D. N. Roy's view on the 21st that as Gopessur seemed to be better that day, there was no particular hurry about making a Will, but as the case was bad he should make one.

The evidence of the three doctors is supported by that of the petitioner and the other witnesses called on har behalf but in the view I take, it is not necessary that I should examine their evidence in any detail at this stage. I, however, find it difficult to follow the learned Judge's comment on Biswanath Sen's absence from the witness-box, or the expectation that he would have given valuable evidence as to Gopessuar's condition on the 26th. Biswanath is a brother of the petitioner and Shambhunath and claims to be a creditor of the estate to the extent of Rs, 5,500 and, a few pages earlier in the judgment, a comment is made on him which makes me doubt whether, if he had been called, the learned Judge would in fact have regarded his evidence as valuable in the view he has taken of the case.

I now turn to the evidence of the caveator's witnesses as to Gopessur's mental condition. The first witness was Gora Chand Mullick, the caveator's nephew.

There can be no doubt that he has warmly espoused and keenly supported his uncle's cause, and that he has a strong bias in his uncle's favour. Consciously or unconsciously, he has heightened the colour; if his evidence be credited, then Gopessur was practically in a state of coma that the doctors failed to observe, and on a careful consideration of his evidence, I cannot avoid the conclusion that he has gravey exaggerated Gopessur's debility. Bissessur the caveator presents an equally gloomly picture. His interest is obvious, but, beyond that, he unfavourably impresed the Judge, who further commented on the way he had been kept back and ha

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not entered the witness-box until a late stage of the case. Why he should have been kept back does not appear, but the adverse comment it invites is so obvious that it is difficult to understand how Counsel came to overlook it. I may point out that though Counsel has a discretion in such matters the Court is not powerless (Evidence Act, section 135).

The two other witnesses Nityananda Thakur and Jogessur Kahar were justly treated by Chitty, J., as undeserving of credit. Not only is their evidence inherently improbable, but the circumstances under which they were procured are calculated to create neither confidence nor approval.

The conclusion then to which I come, on the best consideration I have been able to give to the case, is that on the 27th of June, at the the time when Gopessur was alleged to have executed the Will, he was of sound mind, and that, though very feeble and debilitated, he was capable of knowing what he was doing and of exercising a judgment as to the proper mode of disposing of his property.

Then, was the instrument now propounded in fact executed by Gopessur ?

The evidence is this: in support of the affirmative there is, first, the direct evidence of Shambhunath and Hem Chander Neogi, the attesting witnesses, and of the petitioner and Prannath Sur, who all claim to have been actual eye-witnesses of the execution. Next, there is the testimony of Mr. Rutter, who deposes to his belief that the signature to the Will is in the handwriting of Gopessur.

In opposition to its execution, there is the evidence of Gora Chand Mullick and the caveator Bissessur Dutt that in their belief the signature is not that of Gopessur, and the evidence given by them and Nityananda Thakur and Jogessur Kahar that it was impossible for him to have executed the document.

Then, over and above this evidence which has a direct bearing on the question at issue, there are the rival contentions as to the probabilities and improbabilities of the case, and in particular as to the truth or falsehood of of the story as to the preparation of the drafts on the 20th of June.

This summary of the evidence invites one broad comment. On the petitioner's side there is the evidence of eye-witnesses, which, if contrary to the fact, admits of no explanation but that it is a tissue of deliberate and concocted falsehoods. Indeed, it was the case presented to us on behalf of the caveator that the story of the drafts was so obviously and palpably false that it was incumbent on us to go beyond the learned Judge and to hold affirmatively that "Shambhunath and Prannath conspired to give false evidence," and the learned Counsel went on to say "as I present my case, I have to ask the Court to accept this view."

The line of reasoning really came to this, that the story of the drafts so clearly pointed to concerted perjury that it would be wrong to believe the evidence of the petitioner's witnesses as to the execution of the Will.

Though the case made before Chitty, J., that Shambhunath actually forged Gopessur's signature has been abandoned here, still, as I have already pointed out, it is contended that he and the petitioner had a hand in the forgery. The gravity of this charge cannot well be exaggerated, and this becomes the more apparent when the position of the persons thus charged is realized.

Babu Shambhu Nath Sen is an attorney of this Court, enrolled as such in 1904, and his general good character and the respectability of his family is not questioned.

Shambhunath is, and ever since his enrolment has been, in the employment of Messrs. Rutter & Co., a firm of repute. Mr. Rutter, the head of that firm, is a gentleman held in high esteem, and indeed, in the course of this case, it has been distinctly said by Counsel for the caveator that "no question is raised as to Mr. Rutter's veracity." Mr. Rutter describes Shambhu as a trusted servant of his.

The petitioner is a lady of position, the deceased's widow. The other witnesses are of humble social position : still they have characters which no doubt they value. Though, perhaps, it may be going too far to say that the presumption of innocence is so strong even in a Civil case as to cast on him who alleges forgery the whole burden

of proof, still the presumption against misconduct is among the probabilities to be taken into account in estimating the value of evidence, and this probability gains in strength where the character and position of the individual impugned is, apart from the particular case, above reproach.

Now the evidence of Shambhunath, Hem Chandra Neogi, the petitioner and Prannath is distinct, that Gopessur signed the propounded instrument on the evening of the 27th of June. Their testimony is supported by Mr. Rutter, who states it as his belief that the signature on the instrument is Gopessur's. His acquaintance with the deceased's signature is not questioned. Had matters rested there it is difficult to see how the grant of Probate could have been withheld. In saying this I do not overlook, and for this purpose I do not seek to controvert, though I refrain from affirming, the unfavourable comment passed by Chitty, J., on Prannath. Even if he be left out of consideration there still remains ample evidence of execution.

I do not understand the learned Judge to have been unfavourably impressed by Shambhunath's demeanour, or by that of Jogendra Nath Sur or Hem Chander Neogi. Certainly, he has not recorded any remark respecting the demeanour of any of these witnesses while under examination in manner provided by Order XVIII, rule 12 of the Code.

As to the petitioner's demeanour or the manner in which she sustained the ordeal to which she was subjected, the learned Judge is in no better position to form an opinion than this Court. The learned Judge's criticism on these witnesses is as follows: Hem Chander Neogi, he says, is "merely a servant on Rs. 15 a month", but for all that he may be a truthful witness and it is to be noted that he is a servant not of the petitioner, but of Parmessur's family, so that the Will is to the detriment of those he serves.

Jogendra Nath Sur, the learned Judge says, is interested to a large extent and is a man of no position or means. His interest, however, is not under the Will, but as a creditor, while the estimate of his position and means is unduly depreciatory. This at any rate seems clear, that he was a friend of the deceased, and the friendship was of long-standing.

The evidence given by Shambhu Nath and the petitioner is depreciated by the learned Judge not from its inherent demerits, or the unworthiness of these witnesses, but it is said that, as Prannath and Jogendra Nath Sur are not witnesses of truth, "this must reflect back on the petitioner and Shambhu Nath." This is a doctrine to which I am unable to subscribe in the circumstances of this case.

What then is the evidence led in opposition?

First, we have Gora Chand Mullick's declaration that he does not believe the words "Gopessur Dutt" in the alleged Will to be in Gopessur's handwriting.

Prior to this he had said he was acquainted with Gopessur's handwriting, but when he was shown Exhibit D, he said: "I have got to compare it with other handwriting." But, notwithstanding this statement, and in spite of the other signatures not being shown to him, he asserted his belief in the terms I have indicated. In cross-examination he was able to go further for he then asserts, "I also say this Will is not his Will. I am prepared to swear it is not his signature." Later he says, "It was not his intention to make a Will like this Will. The signature is not like the signature of his hand. From all these circumstances I say it is not his signature."

Perhaps, too literal an interpretation should not be placed on his declaration that before he came into the box, neither Mr. Kar nor any one else asked him about the signature of the Will. This is a common form among witnesses of a certain type, and possibly Gora Chand should be given the benefit of this somewhat equivocal concession. But Gora Chand is not a man for half measures: not only does he gain sufficient confidence to make his unqualified statement regarding the Will and the signature, but he is able to ascribe the Bengali date under the signature to the petitioner. He betrays too much zeal.

Then comes Bissessur who in the witness-box is prepared to pledge his oath that the signature at the foot of Exhibit D, the propounded instrument, is not his brother's signature. This confident assertion has to be contrasted with his behaviour when he was

shown the instrument by Mr. Rutter on the 19th of July, and with the attitude taken up in the affidavit supporting his caveat.

Surely, if the signature is the manifest forgery that Bissessur now declares, he would have denounced it as such on the 19th of July, and he would have formulated his opposition in more emphatic terms. He was a witness who did not impress the learned Judge, and his statement that the signature is not his brother's is not, in my opinion, of any value.

Then there is the evidence which aims at showing Gopessur was incapable of executing a Will on the 27th. This proceeds from Gora Chand Mullick, Bissessur Dutt, Nityananda Thakur and Jogessur Kahar. I have already dealt with the evidence of these witnesses so far as they purport to describe his mental condition; their version of his physical incapacity is equally unconvincing. Nityananda and Jogessur seek to negative any opportuntiy or possibility of executing a Will on the evening of the 27th, but I do not regard these witnesses as deserving of any credit. This view accords with the learned Judge's appreciation of their evidence; it is supported by the general character of their testimony, and is justified by the mode in which they came to be ranged on the caveator's side.

In my opinion, of the evidence directly bearing on the question whether Gopessur executed his Will on the 27th June as alleged by the petitioner, there is a distinct preponderance in favour of its execution. Is there then anything in the probabilities of the case that disturbs this preponderance? To answer this it must be seen what are the facts and considerations that have to be taken into consideration in estimating these probabilities. We start with the fact that there was an estrangement between Gopessur and Bissessur, who alone opposes the Will, and that Gopessur was at least anxious that Bissessur should have no interest in his property.

On the other hand, he was on terms of affection with his wife, who had, moreover, as far as one can judge, nursed and attended him with devotion in his distressing illness. There was, therefore, nothing in the state of the family or his feeling that would suggest it was improbable he should make an absolute disposition of his property in his wife's favour, and, in so saying, I do not forget the little boy, Parmessur's posthumous son, to whom he doubtless was attached, though not as extravagantly devoted as the caveator would have us believe. Then we have the undoubted fact that on Tuesday, the 29th of June, the alleged Will passed into the custody of Mr. Rutter bearing the signature that is now denounced as a forgery. Our attention has been called to that signature, though not to the photographic enlargements, and it has been suggested the D, the "u," and the crossing of the "t t" should arouse suspicion. It is a matter of common knowledge that forgeries commonly, I do not say always, present certain appearances which are indicative of their origin. Counsel, when questioned as to this, was unable to suggest that this signatnre exhibited any of these marks. I do not say that this is in any sense conclusive, but, at any rate, it justifies the view that when the document came into Mr. Rutte'r possession, and that was comparatively speaking within a short time after Gopessur's death, it did not present those appearances which are commonly associated with a forged signature.

Then there is Bissessur's behaviour on the 19th of July, and the ordinary presumption against misconduct which I think the petitioner is entitled to ask should be ranged among the probabilities in favour of her story.

And now I come to the probabilities which the caveator asserts weigh with overwhelming force against the validity of the Will. *First*, I will take up the story of the preparatieu of the drafts and the propounded instrument, Exhibits B, C and D. What is said by the caveator is this:—this story is so bound up with the actual issue in the case that if it be disbelieved, it creates an insurmountable improbability in the caveator's way and more than that, it would be impossible to act on the evidence of those involved in it, that is to say, of the petitioner, Shambunath and Prannath when they speak to the execution of the Will.

The story presented by the petitioner is this. On the night of the 18th of June Gopessur suffered a relapse and on the 19th Shambhunath was sent for. In the evening Gopessur told him he wanted to consult him about his Will. Nothing further, however, was said that night. On the next day, i.e.,

Sunday, the topic was renewed and Shambhunath's version is as follows:—

"(To the Court—He said stop here to-night, we will have a talk to-morrow). The next day was Sunday the 20th June. After our meals myself and Prannath remained with Gopessur, Gopessur told me to make a Will for him. To that I questioned why you are eager to make a Will. To that the answer was "As there was a relapse he had better make a Will", and the second reason he said that he had on several occasions heard from me that, in case of his dying intestate, his properties would go to his brother, and said that you know our respective feelings towards each other, meaning himself and Bissessur. So by the Will he wanted to exclude his brother. Then I inquired what kind of Will do you want to make. He said first thing he wants to give everything to his wife, and also give her power to adopt and give certain legacies. Having heard that I told him to send a carriage to Mr. Rutter and he will do everything. To that he said 'Let me prepare the Will and afterwards I shall go to Mr. Rutter to his office any other day, and get it attested by him and Mr. Rutter junior, and leave my Will with them.' Then again he pressed me for the Will.

"(To the Court—To make the Will for him).

"To that I said one thing you ought to consider now. You are going to give your properties to your wife and give her power to adopt. In case she does not adopt and dies intestate, whom do you want your estate should go to, as in that case the properties which you are giving to your wife would go to her parent's line. To that he answered I have no children. She is my wife. I want to give her everything. I am not coming after my death to see how my wife deals with the properties. Hearing that I said you can write down your intentions on paper and that will be your Will, only you are to see that an executor or executrix is appointed and that you sign it in the presence of two persons who must also witness it. Then he ordered his Sircar Prannath to bring paper and writing materials and he dictated his intentions and Prannath wrote. That was in my presence. This was about 12 noon. As there were certain interlineations, Gopessur asked Prannath to fair copy it and said in fair copying you make the last para. the third one and the third one the last para.

(Shown document).

"This was the first copy that Prannath wrote. The third para. contains the legacies, he wanted that at the end so as to fill in the names and amounts of legacies at the time of execution. This contains what I heard Gopessur dictated correctly.

"After it was written out, the testator read it. He said it was all right. Just then Gopessur's friend Jogendra Nath Sur came in. Jogendra was a neighbour of Gopessur. They had known each other from boyhood I think. I saw Jogendra with Gopessur since Gopessur's marriage. Jogen went into the room (myself and Prannath both were there), and Gopessur told him the same reasons as to relapse and said that he was going to make a Will and handed over the paper to him, the first draft written out by Prannath, to read, saying that this contains the same provisions as he used to tell Jogen. Jogen Babu read it out.

"(To the Court—He read it aloud. We all heard). And then Gopessur told him to fair copy it, asking him to alter the paras. as I have already said. As there was no paper in the room Prannath was going to bring paper from the *Daftarkhana* in the adjoining house which was the Thakurbaree, but Gopessur said you both better, meaning Jogen and Parnnath, go there, and write out. They went away. About half an hour after they came back. I was all along with Gopessur, and Jogen handed over both the papers to Gopessur. The original draft and the fair copy written out by Jogen. He read both, Gopessur read both.

(Shown document).

"This is the fair copy I refer to. It was handed to Gopessur in my presence. It's in Jogen's handwriting.

"During the time Prannath and Jogen were away, I don't recollect anything.

"After reading both the papers Gopessur gave me the fair copy (Exhibit C) to look at. On seeing I said this would not do as there was much space between the several paragraphs, and he inquired how it was to be written. I said there ought not to be any space so let it be written out again without any space. To that Gopessuar directed Prannath to re-write it at night and give him the next morning, and gave both the papers

to Prannath. He said there was no use of hurrying now, you can write at night, and give me the next morning, so that Gopessur would execute it in the presence of the doctors when they came. I stayed with Gopessur in this garden-house that night. He asked me to stop that night also. I had also my father's permission when he turned up that night. Dr. J. N. Mazumdar came that night. He said the patient is much better now, and hoped to give him rice next morning—Monday morning. On Sunday my father was there in the morning, but came away when the doctors left in the morning, then again my father and mother both went up there a little before dusk I think, and I came away after the doctor left. I remained there that night.

"Next morning (Monday, 21st June), at about 8 o'clock, Prannath brought all the three papers, the original draft, the fair copy and the copy he had written out the previous night, and gave them to Gopessur in my presence. Gopessur saw them. He read them and said that he was feeling much better so let the execution of the Will be postponed now, and said, as soon as he was well and allowed out for drives, he would come to Mr. Rutter at his office and execute the Will there, and told Prannath to keep the three papers in the almirah, and Prannath kept them there. The almirah was closed, Gopessur handed over the key which was attached to his *Har* (golden chain) he wore. He handed both key and chain, and Prannath opened the almirah and kept the papers there and handed the key and chain back. It was about 8 A. M."

For the caveator it was asserted before us that this is a false case, and that those of the petitioner's witnesses who have deposed to it have conspired to tell a false story, and this assertion is based not on any definite sworn testimony to the contrary, but on the inherent incredibility of the story, and the inference invited by an examination of the documents.

It it said, it is incredible that Shambhunath should have preserved the attitude of aloofness he professes, seeing that the purpose for which he was invited was to assist in the preparation of the Will, that the Will itself points to the handiwork of a lawyer and not of a layman, and that the story as to the preparation of the three documents (Exhibits B, C and D), more particularly when regard is had to their appearance, is not worthy of acceptance.

I am disposed to think the assistance rendered by Shambhunath in the preparation of the Will has been minimized and it is this that has furnished the caveator with his most potent controversial weapon of attack, and if, at first sight, this would seem to imply a lack of candour on his part, a closer examination shows that he has dissociated himself from that which is formal, not that which is of real and essential importance in the Will. Thus he, in effect, admits, without any attempt at concealment, that the mention of an executrix in the Will may be fairly attributable to him, and that he had a hand in placing the absolute interest of Jarat beyond question. And, after all, these are the two matters in which he might be said to have an interest, these are the matters of substance. The power to adopt was, if anything, to his detriment while the pecuniary legacies are of no serious moment. Much has been made of the phraseology and form of the Will, and it is in this connection that Mr. Mohini Mohan Chatterjee, an attorney of this Court, has come forward to lend his support to the caveator's case . He is described, and has been treated by Mr. Justice Chitty, as an expert, and his evidence had a manifest influence on the learned Judge. In the view I take of this gentleman's evidence I do not consider it necessary to discuss in detail the relevancy or irrelevancy of its different parts, or his title to give the evidence he did as an expert: it suffices for me to say that I do not attribute to his testimony the importance that the caveator claims for it. Our attention has been drawn to words and phrases which, it is said in the light of Mr. Chatterjee's evidence, could only have owed their appearance to Shambhunath but it is not unreasonably answered that, if this was the caveator's case, then it is to be regretted that these points were not put to Shambhunath, and it is appropriately pointed out that he was cross-examined by a learned and experienced Counsel in every way equipped, possibly as well equipped as Mr. Chatterjee, for the purpose of estimating whether the words and phrases were as preg-

nant of suspicion as Mr. Chatterjee would have the Court believe. Thus, the caveator's Counsel would see something sinister in the fact that the widow is merely authorized and not directed to adopt, and yet he is constrained to admit that, in law, the result is the same. Next, he would see something even more sinister in the fact that the widow takes an absolute interest whilst no effective legal provision is made for the adopted son. It is difficult to appreciate with exactness what the train of reasoning here is : whether the omission points to the presence, the absence, or the abuse of legal assistance, and the learned Counsel did not succeed in elucidating this point. But be that as it may, it was conceded that the mere fact that an absolute interest was given to the widow was not in itself supicious, and it could not well be otherwise contended in the light of common knowledge, and, indeed, what it may be worth it may be remarked that the Privy Council in *Dowlat Koer* v. *Ramphul Dass* (6) upheld a Will propounded by a widow in whose favour a similar disposition had been made. So it must be on the absence of an adequate provision for the adopted son that comment is made. Now it is outside my present purpose to construe the Will so far as it relates to the adopted son's right, but I am by no means sure that the author of the document may not have thought that the adoption, apart from special provision, might detract from the widow's right in favour of the adopted son, for he expressly declares that the adopted son shall not be competent to put forward any manner of claim in respect of the testator's properties during the life-time of the wife. I do not propose to discuss the legal effect of the provision, but the words appear to me to suggest an impression in the person responsible for them, that the adoption in itself might create a right in the adopted son. This may have been a misimpression, and, if so, it is one into which a layman rather than a lawyer would have been misled and in any case I fail to trace Shambhunath's hand in it. So much for the caveator's contentions based on the internal evidence furnished by the words, phrases and provisions of the alleged Will.

This brings me to a topic on which, before us, the caveator's Counsel has principally directed and concentrated his attack, that is to say, the actual preparation of the documents B, C, D, as disclosed by the evidence. The whole story, it is urged, is incredible. Thus, it is said that it is ridiculous to suppose C was rejected because of the wide spaces between the paragraphs, and that this is merely a device for bringing Jogendra Nath Sur into the plot. I cannot agree with this. I think the explanation of the rejection is eminently reasonable, when it is borne in mind that the proposal was that C should be executed as a Will. Then it is said that in view of the fact that both C and D are alleged to have been drafted in the *daftarkhana* no satisfactory explanation of the difference in the ink is given, for that vouchsafed by Shambhunath is improbable. But if an explanation was desired, it should have been sought of the only man who could give it. Prannath alone knows the conditions under which he wrote out Exhibit D, but he was not questioned on this point. Then it is asked why was Mr. Rutter not instructed to appove the drafts, why was he not invited to attest the Will, why was the Will not executed in the presence of the doctors? No doubt had any of the precautions indicated in these questions been observed, much trouble would have been saved, but I cannot regard the failure to observe them as creating any serious improbability. The truth is, superstition and caprice are not foreign to the execution of a Will, and the reluctance that results from seeing in a Will a "remembrancer of death" is not without its influence on the behaviour of intending testators. Then it is said Gopessur was *in extremis*. If by this is meant that he was *in articulo mortis*, and that he was testamentarily incapable, the answer is that this contention is against the weight of evidence: if it is meant that the Will is alleged to have been executed in circumstances which call for a vigilant scrutiny of the evidence, my reply is that to the best of my ability I have endeavoured to perform that duty. Then how do matters stand if the preparation of Exhibits B, C and D be looked at from the petitioner's point of view? We start with this that I am convinced these documents were in existence on Tuesday, the 29th of June, and were handed to Mr. Rutter on the morning of that day.

(6) 25 C. 459; 25 I. A. 21; 2 C. W. N. 177.

GOPESSUR DUTT v. BISSESSUR DUTT.

This is the conclusion at which Mr. Justice Chitty also arrived. The petitioner's version, if true, affords a reasonable explanation of how the three documents came into existence, and yet, at the same time, the circumstances which explain their peculiarities, depending as they do on the curious and trivial chances of actual events, are not such as a forger would be likely to forecast or invent. More especially is this so if, as the caveator would have us suppose, the documents were prepared while Gopessur was in a moribund state or afterwards. I do not propose to examine the possibilities of this theory in detail, but it is not without its difficulties. The time at the disposal of the schemers was not long, while their undertaking was complex. Gopessur died in the early hours of Monday, documents were in Mr. Rutter's possession on the following Tuesday morning. From this period must at least be deducted the time occupied in the funeral ceremony, that is to say, from 6 or 7 in the morning, when the party started for the *ghat* till their return at 12 or 1. In the available time much had to be done; the story requiring the preparation of the three drafts had to be composed or sketched, at any rate, in outline by some one, the three documents had to be prepared with the interlineations, erasures and variations that they exhibit, the two writers and Hem Chander Neogi had to be procured and convinced, there was the attestation clause to be added by Shambhunath, and the attestation by him and Hem Chander, there was the admirable imitation of Gopessur's signature to be effected, and the widow's addition of the Bengali date. Leaving out all such hindrance to despatch as the feelings evoked by Gopessur's death might be expected to create, this would be no mean performance on the part of this confederation of forgers.

Though the caveator is not bound by the theory advanced in his interests, I have not thought it necessary to discuss other possible but unpropounded theories. On the other hand, as favouring the view that the drafts were prepared on the 20th, we have the fact that the advisability of a Will was discussed when the doctors came on the 20th, while Mr. Rutter declares that he heard of the two general provisions of the Will two or three times before the documents were brought to him. To escape from this important statement, the learned Judge says, "Mr. Rutter's memory may be deceiving him on this point," while before us it has been suggested, not that Mr. Rutter was not told about the two general provisions, but that he must have been so told after the documents had been handed over to him.

But if this is the caveator's case, it is a pity it was not put to Mr. Rutter while he was in the witness-box, he could have dealt with it. For my part, I can see no sufficient reason for not accepting Mr. Rutter's statements in the sense in which he made it, and, if so, it unquestionably lends considerable support to the petitioner's case that the documents were prepared before Gopessur's death.

I have discussed these three documents Exhibits B, C and D in considerable detail as the caveator so largely rested his case on what he contended was the obvious falsehood of the story.

The conclusion to which I come is, that the story of the three documents is in the main true, and though Shambhunath may not have been so detached as the evidence would make out, I hold that Exhibits B, C and D were written out as the witnesses describe, and that Gopessur was responsible for them, and knew and understood their contents. His mental capacity at that time had not been questioned, so that had it been necessary it would have been open to the petitioner to rely on the doctrine recognized in *Perera* v. *Perera* (5).

It now only remains for me to express the view I take of the whole case. The weight of evidence, in my opinion, is strongly in the petitioner's favour, both as to Gopessur's mental condition and the fact of execution. Though there are matters on which there is room for doubt, I am unable to regard the probabilities as opposed to the case made by the petitioner, rather otherwise. Moreover, the mere improbability of this or that in so complex a transaction as that under consideration cannot go for much against the clear and distinct evidence of witnesses of good general character, and, after all, probability and improbability of the type with which we are here concerned is apt to become a matter of speculation and predilection, for different persons act differently in similar circumstances and much of that which has been

classed as improbable in this case comes to little more than a failure to observe a higher standard of precaution and to do the wisest and safest thing under the circumstances.

The conclusion then to which I come is that Gopessur did sign Exhibit D on the evening of June the 27th, as alleged by the petitioner, that he intended by so signing to give effect to the writing as his last Will, and that at the time he was of sound mind and capable of exercising a judgment as to the proper mode of disposing of his property, and that he knew what he was doing. No dispute was raised before us as to the legality of the attestation.

The judgment of Chitty, J., should, therefore, be reversed, and a grant of Probate made to the petitioner, Sreematy Jarat Kumari Dassi. The costs of suit and appeal throughout must be borne by the respondent, Bissessur Dutt.

WOODROFFE, J.—A considerable number of decisions have been cited upon the question of the nature of the proof required in the case of Wills. In my opinion a reference to them is unnecessary, for I am not aware that a Probate case is in any respect singular as regards the application of the general principles of proof. Those general principles have been stated in the Evidence Act to be as follows:—

"Whoever desires any Court to give any judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." (Evidence Act, section 101). In this case we are asked to give judgment as to the existence of the Will propounded and as to the legal rights which follow such a conclusion. Section 3 shows the meaning of proof to be that the fact (in this case the Will) is proved when the Court, after considering the matters before it, either believes it to exist or considers its existence so probable that a prudent man ought under the circumstances of the particular case to act upon the supposition that it exists. Each case must, therefore, be determined on its own facts.

Upon, however, the decisions cited I would observe that the rule in *Tyrrell* v. *Painton* (1) applies, in my opinion, to cases where the circumstances of suspicion arise from the nature of the case as put forward by the propounder. In such cases the propunder must remove the suspicions which his own case creates. Where, however, the alleged suspicion against a Will arises from facts which form parts of the impugnant's case then the Court must see whether the facts which are said to give rise to the suspicion are proved or whether the plaintiff's case is proved. The rule, therefore, does not apply where the question is simply which set of witnesses should be believed [*Shama Charan Kundu* v. *Khettromoni Dasi* (7)]. In the present case the defendants put forward (though in an uncertain way and at a late period of the case) a charge of forgery. This the learned Judge has found to be not established.

Of the defendants' eight witnesses the first and last are formal. The learned Judge does not accept the caveator's evidence, nor that of the two former servants. He does not, at one passage at least, confider Colonel Pilgrim's evidence necessary for his decision, though on other points he does refer to it. The bulk of Colonel Pilgrim's evidence was irrelevant. He stated that he was unable to pronounce an opinion either as to the cause of death or as to the physical and mental condition of the alleged executant. This admission substantially disposes of his evidence. Other portions of his testimony are inadmissible as being mere advice to the Court on the evidence and outside the opinion rule, or if admissible in form, are not, in the present cirumstance, of value or relevant. This testimony appears to have been given not after hearing the evidence but on a copy of the disposition. It has been objected that this itself makes the evidence inadmissible. I do not agree, though I think the better course to follow where expert testimony is given is that the expert should hear the evidence as to which he is asked his opinion. There remain the two witnesses Mohini Mohan Chatterjee and Gora Chand Mullick. As regards the first it was contended that he was not expert. It is, however, quite clear in my opinion, that he is expert on questions relating to the Bengali language which is his own (including Bengali legal terms) and Sanskrit which he has studied. It is essential, however, to distinguish the rule of quali-

(7) 27 I. A. 10; 4 C. W. N. 501; 27 C. 521.

fication founded on the experience of the witness and that which permits him to advise the Court with an opinion. Every witness must be fitted or expert in the matter upon which he gives his supposed knowledge. In some cases, *viz.*, where the witness is "expert" in the narrower sense, his competency must be specially shown. The question, however, whether besides deposing to facts he is to be permitted to express his opinion is another matter. In each case, therefore, it must be asked, is the matter one upon which the witness is sufficiently qualified by experience; and if he is, is it a matter upon which the witness is permitted to assist the Court with his opinion? This must be (section 45, Evidence Act) a matter of foreign law, science and art, handwriting or finger impressions. It would be relevant in this case to prove by the evidence of persons who knew him that the testator was of limited education and without literary and legal attainment and then that the alleged Will was written in literary Bengali and contained terms of a peculiar literary or tenchical legal character, and on these facts to invite the Court to say that the Will was not written by the deceased. His evidence, however, in parts goes beyond this and where it does is inadmissible as where he was asked to express an opinion as to the literary skill and culture and legal knowledge of the deceased. The learned Judge states that this evidence raises a grave doubt whether the Will was the exclusive composition of the alleged testator as the petitioner's witnesses assert. As regards Gora Chand Mullick, the learned Judge, after stating that he is a partisan of Bissessur and that portions of his evidence are hard to believe, says that he is inclined to think that his story as to the deceased's physical condition is substantially correct. These two are practically the only conclusions (though it may be doubted whether they amounted even to that) which are held to be establised by the defendant's evidence.

The question then became simply this: Had the plaintiff under these circumstances made out his case? The learned Judge has held that he has not, because he thinks that there are elements of doubt and suspicion which have not been removed.

Before dealing with this there are two points of evidence which arise upon the defendant's case as to which I desire to express my opinion. As regards Bissessur the learned Judge points out that he abstained from going into the witness-box until all his witnesses other than the experts and formal witnesses had given evidence. The Court might and, I venture to say under the circumstances of this case, should have directed that the caveator be examined earlier, if not (as would have been proper) in the first place. The Court has always power to do this under section 135 of the Evidence Act.

Next, in re-examination of the witness Gora Chand, an unproved copy of a statement briefed to Counsel of his evidence was put into his hands and he was asked whether it correctly represented the substance of what he had told the caveator's attorney. The question, though objected to, was allowed and answered affirmatively. It is not necessary to consider whether it was admissible as the document itself was subsequently rejected. I would observe, however, that the Court could not assume that the document was proved from the refusal of opposing Counsel to cross-examine to it. The latter was entitled to wait until the Court ruled whether the document had been proved or not. A question has arisen in connection with this as to the right of Counsel to inspect a document which opposing Counsel has put in the hands of a witness. The rule on this point appears be correctly stated in Taylor on Evidence, 1452, as follows:—"On the whole the practice seems to be that if the cross-examining Counsel, after putting a paper into the hands of a witness, merely asks him some questions as to its general nature or identity his adversary will have no right to see the document, but that if the paper be used for the purpose of refreshing the memory of the witness or if any questions be put respectieng its contents or as to the hand writing in which it is written (as in the case, *Peck* v. *Peck* (8), cited to us in argument) a sight of it may then be demanded by the opposing Counsel.

Proceeding then to the propounder's case we have the following facts: The Will is not an unofficious one. The deceased had no children living. The evidence clearly establishes that he was on very bad terms with his brother Bissessur and desired to exclude his taking any portion of his estate.

(8) 21 L. T. 670; 18 W. R. 295.

He was on good and probably affectionate terms with his brother Parmeswar who is dead and was possibly fond of his child. The latter, however, is provided for, having succeeded to his father's estate. If the alleged conversation between Shambhu Nath Sen and J. N. Mazumdar is admissible, a matter which is open to doubt, it is of too vague a character to establish any intention to benefit Parmeswar's son. There is no suggestion that the deceased was not on good terms with his wife to whom he left his property. It has been found that there is nothing improbable in such a disposition. Mr. Rutter says that about a week before deceased's death he had heard that the testator was going to make a Will and that he had heard from Shambhu Nath Sen of the two general provisions of the Will The medical evidence (the veracity of which is not impeached) also proves preparations for a testamentary disposition. Mr. Rutter, who was the solicitor of the family and whose credit it is admitted is beyond attack, swears that the signature on the Will is that of the deceased and that the Will and the two drafts were in his possession on the Tuesday following the death of the testator. There is other evidence as to the signature which is strongly supported by the attitude which the caveator assumed on this point. Though he now alleges the Will is a forgery he did not set that up in his affidavit of 20th August 1909, though in the previous month he had seen the Will at Mr. Rutter's office when he says he at once detected that it was not his brother's signature. He says that Mr. Rutter asked him if he had any doubts with regard to the signature upon which the witness said, "I told him how could I tell him?" The affidavit is silent on the point.

The propounder's medical evidence establishes the mental capacity of the deceased. In my opinion the cross-examination of these witnesses which was very brief does not challenge their evidence as to the physical or mental condition of the deceased. It was not open then for the caveator to contend that their evidence was meagre or unsatisfactory on points which their cross-examination in no way challenged. It was argued that it was not good policy to cross-examine the doctors even though they had prior to suit been approached by or on behalf of the caveator who admits them to be persons of respectability anxious to speak the truth. One might have understood this argument where the credit of the witness was doubtful but this is not impeached. An omission to cross-examine is not intelligible on the assumption that there was a desire to elicit the truth. We have it then that there is the Will containing provisions of a probable character, the intention to make and the general provisions which were disclosed to a witness whose credit is not impeached, which bears a signature which by the same witness as by others is shown to be that of the deceased who by the testimony of medical witnesses (whose respectability is not impugned) was of sound and disposing mind. All this is most powerful evidence to support the evidence of preparation and actual execution of the Will. The main attack here has been against the evidence as to the preparation of the draft on the 20th. It is contended that the evidence that the deceased dictated it without assistance except such as Shambhu Nath Sen admits is untrue and that in fact the draft was the composition of the latter witness who denies this from fear that it might be suggested that he had exercised undue influence over the deceased for the benefit of his sister. It is possible that the witness, Shambhu Nath Sen, may have understated the assistance which he gave to the deceased but that fact alone, even if it were established and he had been (as he was not) directly cross-examined on the point, would not, in my opinion, under the circumstances of the case, be sufficient to displace the strong inferences in favour of the Will which arise from the rest of evidence in the cause. If, as I find, the signature is that of the deceased and the latter was when he affixed it of sound mind and knew what he was doing the details as to the mode in which the Will was actually prepared are in this case of secondary importance.

It is noteworthy that objection was taken to Mr. Rutter stating what Shambhu Nath had said to him prior to the death of the deceased relative to the preparation of the Will, and that on the 7th January 1910 a suggestion was made to him in cross-examination that there was then in his office a deed of gift by the deceased's widow in favour of Parmeswar which was to be executed if Probate was granted, a suggestion which is only consistent with there having been a Will

KARIM KHAN v. SALAMUDDI.

which gave the property absolutely to her. There is no caveat entered from Parmessur's branch of the family though it is charged that the alleged forged Will defeats the alleged intention of the deceased to benefit it. Hem Chander Negi one of the attesting witnesses is employed by that branch of the family.

It is further suggested that the attorney, Shambhu Nath Sen, who it is charged took the principal part in the alleged forgery of the Will, told Dr. J. N. Mazumdar that the deceased's nephew was to be benefited under the Will which he was about to forge and which when produced in fact excluded the nephew. These and other suggestions, the nature and (on points) absence of cross-examination, and the time and mode in which the defence has been presented indicate very clearly to me that the caveator has no definite case, and the charges he now makes fail. On the other hand, for the reasons I have stated I am of opinion that the propounder has established the Will.

I agree, therefore, in decreeing this appeal and in the order passed thereon.

Appeal allowed.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 928 OF 1909.
January 29, 1912.
Present:—Mr. Justice Coxe.
KARIM KHAN—DEFENDANT No. 1—APPELLANT
versus
SALAMUDDI AND ANOTHER—PLAINTIFFS AND JELAKHA BIBI—DEFENDANT No. 2—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), ss. 29, 30—Sale by guardian without permission of Judge—Benefit of minor—Transaction honest—Whether sale liable to be set aside—Civil Procedure Code (Act XIV of 1882), s. 440—Next friend other than certificated guardian—Leave of Court—Notice to guardian—Defective service of notice - Unimportant irregularity.

Under sections 29 and 30 of the Guardians and Wards Act, 1890, the sale of a minor's property by his guardian without the permission of the Court is voidable, and is liable to be set aside even if it had benefited the minor and was a perfectly honest transaction.

Where a Court appointed a person other than the certificated guardian of a minor, who acted adversely to the minor's interest, as the minor's next friend in a suit in which the guardian was also a party, but service of the formal notice under section 440 of the Civil Procedure Code of 1882 upon the guardian was defective:

Held, that it was merely an unimportant irregularity and that the minor was properly represented.

Midnapur Zemindary Co. Ld. v. *Gobinda Mahto*, 8 C. L. J. 31, referred to.

Appeal from the decree of the District Judge of Tipperah, dated February 15th, 1909, modifying that of the Munsif of Comilla dated February 15th, 1908.

Babu *Shashadhar Roy*, for the Appellant.

Babu *Gunada Charan Sen*, for the Respondents.

JUDGMENT.—I am concerned in this appeal with the interests of the plaintiffs Nos. 1 and 2. When they were minors, the defendant No. 2 was their certified guardian and she sold the property in suit to the defendant No. 1 without the permission of the District Judge. The defendant No. 2 is the mother of the plaintiffs Nos. 1 and 2 and the defendant No. 1 is the brother of their father. The plaintiffs have now sued to have this sale set aside and for recovery of possession, and this has been decreed by the lower Appellate Court.

The defendant No. 1 appeals. On his behalf it has been argued that the sale benefited the minors and was a perfectly honest transaction and that the Court should have held that it was binding on them.

It is perfectly clear, however, that the sale contravened the provisions of section 29 of the Guardians and Wards Act, 1890, and is, therefore, voidable under section 30. The terms of the section are perfectly simple and must necessarily be observed by the Courts.

Secondly, it is argued that the plaintiff No. 1 ought not to have been allowed to appear for the plaintiff No. 2. The plaintiff No. 2 is still a minor and the defendant No. 2 is still the certified guardian and it is argued that the suit should fail under section 440 of the old Civil Procedure Code.

The first Court, however, gave permission to the plaintiff No. 1 to appear for the plaintiff No. 2. The order runs as follows:—"The defendant No. 2 is the certificated guardian of the plaintiffs Nos. 1 and 2. The plaintiff No 1 has become major and wants to act as the next friend of the plaintiff No. 2 on the

MANIKKA MUDELIAR v. DEVASI KAMANI PILLAI.

ground that the defendant No. 2 has acted adversely to the interest of the minor. I grant his prayer."

It appears that notice of the application of the plaintiff No. 1 to appear for the plaintiff No. 2 was not served on the defendant No. 2 till very much later, if indeed it was served at all. On this point it is difficult to reconcile the findings of the Munsif. In the order-sheet of the case he says that he cannot accept a certain petition as legal proof of the service of notice as proved under section 440; but, from his judgment, it would seem that the legal proof of service was furnished when the arguments in the case had been heard. It is not disputed, however, that the defendant No. 2 was a party to the suit, nor is it alleged that she was unaware of the proceedings.

From Order No. 16 of the Munsif, it would appear that the defendant No. 2 contested a certain affidavit of the plaintiffs on the ground that the defendant No. 2 had left the station for home on the preceding day when the case was still going on. The defendant No. 2 was, therefore, clearly aware of the suit and it is equally clear that she never objected to the representation of the plaintiff No. 2 by plaintiff No. 1, nor is there the least reason to suppose that she was unaware that she was acting on the 2nd plaintiff's behalf. That being so, and formal permission having been given, rightly or wrongly, by the Munsif to the plaintiff No. I to act for the plaintiff No. 2, I do not think it will be possible hereafter for the plaintiff No. 2 to contend that he was not properly represented, or to attack the decision in this case on that ground. The representation of the plaintiff No. 2, therefore, seems, in my opinion, to have been sufficient and if the service of formal notice on the defendant No. 2 was defective it can only be regarded, in the circumstances of the present case, as an unimportant irregularity. I may refer in this connection to the case of *Midnapur Zemindari Company. Limited* v. *Gobinda Mahto* (1).

Thirdly, it has been argued that, under section 64 of the Contract Act, more should be given to the defendants than has been allowed by the learned District Judge. The sum of Rs. 100 was allowed, as that was the sum received by the guardian of the minors. The learned Pleader for the appellant has been unable to show me what benefit, within the meaning of section 64 other than this sum of Rs. 100, has been received by the plaintiffs from the defendant No. 1 the return of which can possibly be claimed under this section.

Moreover, considering the relationship of the parties, the defendant No. 1 cannot have been unaware that the defendant No. 2 was the certified guardian and, that being so, he is certainly not entitled to any special indulgence, considering that the provisions of the Guardians and Wards Act were deliberately disregarded.

The points taken in the appeal, in my opinion, fail and the appeal must be dismissed with costs.

Appeal dismissed.

(1) 8 C. L. J. 31.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 81 OF 1911.

January 17, 1912.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

MANIKA MUDELIAR—APPELLANT

versus

DEWASI KAMANI PILLAI AND OTHERS—RESPONDENTS.

Vakil—Power to compromise—Vakil exceeding power—Compromise prejudicial to client.

Where the Vakil of a party to a suit entered into an agreement with the opposite party which settled none of the matters in dispute between his client and his adversary, but left his client to fight the whole matter in a fresh litigation, meantime surrendering suit property to the former:

Held, that the Vakil acted improperly and the agreement of compromise was not valid.

Appeal against the order of the District Court of South Arcot, dated 17th January 1911 in A. S. No. 273 of 1910, presented against the decree of the District Munsif of Chidambaram, in O. S. No. 742 of 1909.

Mr. *P. V. Doraiswamy Mudaliar*, for the Appellant.

Mr. *T. Ramanathan*, for the Respondents.

JUDGMENT.—We entirely agree with the District Judge that the Vakil for the 2nd defendant had no authority to enter into an agreement which settled none of the matters in dispute between his client and the plaintiff, but left his client to fight the whole matter out in a fresh litigation, surrendering possession of the property meanwhile to the plaintiff. We

think he had power to enter into a compromise, but not to enter into the agreement in question. The Vakil appears to have acted improperly in doing so. We dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL NO. 915 OF 1909.
January 29, 1912.
Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice N. Chatterjea.
SATYA SRI GHOSHAL AND OTHERS—PLAINTIFFS—APPELLANTS
versus
KARTIK CHANDRA DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Presumption—Whether presumption can be made in favour of what offends legal principle—Debutter *lands*—Shebait—*Presumption of permanent tenancy.*

A presumption in favour of a transaction assumes its regularity : it cannot be made in favour of that which offends legal principles.

Therefore, a presumption of permanant tenancy cannot be applied to *debutter* property, for to create a new and fixed rent for all time would be a breach of duty in a *shebait* and is not presumable.

Shibessuree Debia v. *Mothooranath Achrajee*, 13 M. I. A. 270, at p. 275; 13 W. R. 18 (P. C.), relied upon.

Appeal from the decree of the Sub-Judge of 24-Perganahs, dated November 28th, 1908, reversing that of the third Munsif of Alipur, dated July 31st, 1908.

Dr. *Rash Behari Ghose* and Babu *Mohini Mohan Chatterji*, for the Appellants.

Babus *Nil Madhab Bose*, *Shib Chandra Palit* and *Surendra Chandra Sen*, for the Respondents.

JUDGMENT.

JENKINS, C. J.—This second appeal arises out of a suit to eject the defendants from a piece of land in Kidderpore on the ground that they are monthly tenants to whom due notice to quit has been given. The lower Appellate Court, reversing the decree of the Court of first instance, has dismissed the plaintiffs' suit with costs holding that the defendants have a permanent tenancy.

From this decree the plaintiffs have appealed. It cannot be said in the light of the decided cases that there are no materials to justify the lower Appellate Court's view; but it has to be borne in mind that the conclusion rests not on direct proof but on presumption.

The presumption in favour of a permanent tenancy implies that there is ground for inferring that the tenure was always intended to be and always was hereditary, or that it acquired that character by subsequent grant. But a presumption in favour of a transaction assumes its regularity: it cannot be made in favour of that which offends legal principle. It is this that prevents our accepting the view of the lower Appellate Court as final, for it would seem that the property to which the presumption has been applied is *debutter*.

If it was *debutter* at the time the tenancy originated, then this would affect the applicability of the presumption, for to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time would be a breach of duty in a *shebait* and is not, therefore, presumable. [*Shibessuree Debia* v. *Mothooranath Acharjee* (1)]. It should, therefore, be seen whether at the origin of the tenancy the property had acquired its *debutter* character and on this will depend the applicability of the presumption.

In the course of the argument before us the appellants have relied on the use of the words *Bharatia* : we cannot pronounce an opinion as to the weight it should carry, but it will be for the lower Appellate Court to consider its bearing as one of the factors in the case.

We reverse the decree of the lower Appellate Court, and send back the appeal for re-hearing in the light of the foregoing remarks,

The costs in this Court and those incurred elsewhere up to this stage will abide the result.

Appeal allowed ;
Case remanded.

(1) 13 M. I. A. 270 at p. 275; 13 W. R. 18 (P. C.)

ASHUTOSH CHATTERJEE *v.* SUDHINDRA CHANDRA MOULIK.

CALCUTTA HIGH COURT.
CIVIL RULE No. 4314 OF 1911.
December 1, 1911.
Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice N. Chatterjea.
ASHUTOSH CHATTERJEE—PETITIONER
versus
SUDHINDRA CHANDRA MOULIK AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), Sch. I, Appendix E, Form 29—Sale in execution—Bid considered highest by Nazir conducting sale—Re-opening of bids by order of Court—Higher bid obtained and bidder declared purchaser—Legality of procedure.

Certain property was put up for sale in execution, and the petitioner offered a bid of Rs. 9,000 which the Nazir, who was conducting the sale, treated as the highest. Immediately afterwards it was represented to the Court that other persons were willing to bid Rs. 15,000. The Court thereupon directed that the sale should proceed, and the result was that the opposite party bid Rs. 15,000 and was declared to be the purchaser:

Held, that there was sufficient warrant for the procedure adopted by the Court, in the third of the conditions of sale which are adopted as a part of the proclamation of sale, Form No. 29, Appendix E of Schedule I of the Civil Procedure Code of 1908, and that in the interests of justice the High Court should not interfere.

Rule against the orders of the Sub-Judge of Nadia, dated July 10th and 19th, 1911.

Messrs. *S. P. Sinha*, *H. N. Sen*, Babus *Dwijendra Nath Mukherjee* and *Charu Chandra Dey*, for the Petitioner.

Babus *Mahendra Nath Roy*, *Bipin Behari Ghose*, *Mohini Mohan Chatterjee* and *Peari Mohan Chatterjee*, for the Opposite Party.

JUDGMENT.

JENKINS, C. J.—This is an application which has for its substantial purpose the setting aside of a sale in execution which was effected under the following circumstances. On the 10th of July 1911, the property was put up for sale in execution, and there was a bid of Rs. 9,000 by the petitioner. At the time when he made that bid, it was the highest, and the result was that the Nazir who was conducting the sale treated him as the highest bidder. Immediately afterwards, those interested in the sale discovered what had been done. They at once raised an objection, because it was believed that there were others who were willing to bid no less than Rs. 15,000 for the property. Accordingly, the Judge was approached, with the result that on the very same day he directed that the sale should proceed and that the next bid above Rs. 9,000 should be Rs. 15,000. I am not much concerned with the actual form of his order. Substantially, he considered that there ought to be a continuation of the sale for the purpose of seeing whether, as had been represented to him, there were people willing to give Rs. 15,000. The Rs. 15,000 was bid, and on the basis of that bid the opposite party on the present application was declared to be the purchaser. It is to the re-opening, as it has been called, of the sale and to the opposite party being declared to be the purchaser that the petitioner objects, and it is with a view to setting aside those transactions that this Rule has been obtained in the form in which it is issued.

The application to us is under section 115 of the Code of Civil Procedure, which not only limits our jurisdiction but vests us with complete discretion and we have to consider really whether this is a case in which we ought to interfere in the interests of justice. In my opinion, we should not. I am satisfied on the affidavit that it is the practice in the Court of Naddia for the Court ultimately to approve of the highest bid. It is suggested that there is no warrant in the terms of Order XXI for such a procedure. But I am by no means sure that there is not sufficient warrant for it in the third of the conditions of sale, which are adopted as a part of the proclamation of sale. I think the words of the third condition are such as to explain how the procedure is that which has been adopted in this case.

I think, therefore, that, as a matter of substance, the learned Judge considered that he was exercising the discretion vested in him under the general procedure of the Court, based possibly on the third condition, and that, in view of all the circumstances of the case, it would be inappropriate for us to interfere. We must, therefore, discharge the Rule with costs, hearing fee, three gold *mohurs*.

N. CHATTERJEA, J.—I agree.

Rule discharged.

SHEONANDAN SINGH v. DEO SARAN SINGH.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEALS NOS. 2481, 2602 TO 2611 OF 1908.
August 8, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

SHEONANDAN SINGH—DEFENDANT—APPELLANT

versus

DEO SARAN SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and Tenant—Ijardar—*Purchase of occupancy-holding*—Status *of tenant inducted into land by* ijardar *parchaser*—*Bengal Tenancy Act* (*VIII of* 1885), *ss.* 22, *sub-s.* (3), 49—*Ejectment.*

If an *ijardar* purchases an occupancy-holding he acquires it as a non-occupancy holding. If he settles a tenant, he must be taken to have settled in his character as purchaser and not in his character as *ijardar*, and, therefore, the tenant will be an under-*raiyat*, and liable to be ejected after his tenancy has been terminated by a notice to quit under section 49 of the Bengal Tenancy Act.

Appeal from the decrees of the first Sub-Judge of Patna, dated August 6th, 1908, reversing that of the third Munsif of Bankipur, dated October 3rd, 1907.

Babus *Umakali Mukherjee* and *Ganesh Dutt Singh*, for the Appellant.

Babu *Karunamoy Bose*, for the Respondents.

JUDGMENT.

S. A. No. 2481 OF 1908.

The substantial question in controversy between the parties to this appeal relates to the status of the defendent-appellant. The plaintiffs-respondents allege that the defendant is an under-*raiyat* and seek to eject him after service of notice to quit in accordance with the provisions of section 49 of the Bengal Tenancy Act The appellant contends that his status is higher than that of an under-*raiyat*, and he is consequently not liable to be ejected.

It is not disputed that the land in the occupation of the defendant is included in a *raiyati* holding. The *raiyat* had executed a mortgage in favour of one Gajadhar Prosad. He had also defaulted to pay rent to his superior landlord, Dawar Hossain, who was the *ticcadar*. The result was that Dawar Hossain sued him for rent, obtained a decree and purchased the holding in execution thereof. Subsequently, the mortgagee sued to enforce his security and joined the purchaser at the sale for arrears of rent as a defendant. The latter unsuccessfully contended that the mortgage had been extinguished by the rent-sale. The matter was then settled between the parties and as two-thirds of the mortgage-debt was satisfied a decree was made by consent for realisation of the remainder. The position, therefore, was that the mortgagee became entitled to sell one-third of the land of the holding; and it is asserted on behalf of the defendant-appellant, but the statement is disputed on behalf of the plaintiffs-respondents, that it was agreed that this sale should take place subject to the prior rent-charge. The point, however, is immaterial for the purpose of the decision of the question raised before us. The mortgagee enforced his decree and purchased the property He subsequently transferred the property purchased of which he had obtained possession after partition. The plaintiffs allege that the defendant was placed in occupation of the land by the mortgagee-purchaser, and is consequently an under-*raiyat* liable to be ejected. The defendant contends that he was placed in occupation of the land for the first time by the purchaser at the sale for arrears of rent and, therefore, he occupied the status of a *raiyat*. In our opinion, whichever view may be adopted, the defendant cannot successfully claim to occupy a higher position than that of an under-*raiyat*. If he was inducted into the land by the purchaser at the mortgage-sale, he was obviously an under-*raiyat*, because the holding which had been mortgaged was an occupancy-holding and the purchaser thereof consequently acquired the status of a non-occupancy-*raiyat*. A sub-tenant of such a purchaser cannot, obviously, claim a higher status than that of an under-*raiyat*. If, on the other hand, it is assumed that the defendant was first inducted into the land by the purchaser at the sale for arrears of rent his position is no way improved. No doubt, sub-section (3) of section 22 of the Bengal Tenancy Act provides that a person holding land as an *ijardar*, or farmer of rents, shall not, while so holding, acquire a right of occupancy in any land comprised in his *ijara*, or farm. The scope of the clause might at first sight seem ambiguous, and, as a matter of fact, in the case of *Ramrup Mahto* v. *Manners* (1), it was ruled that the term "acquire" did not include a case of "purchase." The Legislature, however, subsequently intervened, and to remove

(1) 4 C. L. J. 209.

all possible doubt, amended the sub-section by the introduction of the words "by purchase or otherwise" after the term "acquire" [(*Raghubar Mahto* v. *Manners* (2)]. Assume, therefore, for a moment that a person holding land as an *ijardar*, is not entitled while so holding to acquire by purchase a right of occupancy in any land comprised in his *ijara*. The result is that if an *ijardar* purchases an occupancy-holding he acquires it as a non-occupancy-holding. In the case before us, Dawar Hossain, who was an *ijardar* when he purchased the holding at the sale in execution of the decree for rent obtained by him, could not claim to have acquired an occupancy-holding He must be taken to have settled the land with the defendant in his character as purchaser and not in his character as *ijardar* His character as purchaser conferred upon him the status of a *raiyat* and consequently the defendant cannot in this view claim any status higher than that of an under-*raiyat* From whatever point of view, therefore, the status of the defendant may be examined, he must be deemed an under-*raiyat*. He is, therefore, liable to be ejected after his tenancy has been terminated by a notice to quit under section 49 of Bengal Tenancy Act. A copy of the counter-foil of the notice has been produced before us and it cannot be disputed that the notice was in strict compliance with the provisions of section 49. The conclusion follows that the tenancy of the defendant has been terminated and he is not entitled to remain in occupation of the holding. The decree of the Subordinate Judge must, therefore, be affirmed and this appeal dismissed with costs.

This judgment will govern the other Appeals Nos. 2602 to 2611 of 1908. But, as the respondents have not entered appearance in these appeals, they will be dismissed without costs.

Appeals dismissed.

(2) 13 C. L. J. 568; 11 Ind. Cas. 389.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 982 OF 1909.

November 28, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

AMBALAM PAKKIYA UDAYAN—APPELLANT

versus

RIGHT REVEREND J. M BATHE, S. J., D. D., AND OTHERS—RESPONDENTS.

Trusts—Dedication of property to a Church—Secession of trustees from the faith of the Church—Right to recover properties from the secessionists—Change of trust in accordance with the new faith of the trustees—Recantation, effect of, on the right to trusteeship—Evidence Act, (*I of* 1872), *s.* 57—*Matters of public history—Law governing temporal rights in Roman Catholic Churches—Right to remove trustee who has seceded from faith—Absence of prayer for removal—Amendment of plaint—Right to recover moveables—Limitation—Civil Procedure Code* (*Act XIV of* 1882), *s.* 30.

Plaintiffs, alleging that the suit properties were dedicated to the Roman Catholic Church, sued for their recovery from defendants, who were formerly Roman Catholics, but who seceded from the Roman Catholic faith and had become members of the Syro-Chaldean Church Plaintiffs alleged that they had the management and control of the Church properties. Leave was obtained to implead the defendants as representing all the Christians of the village. The defendants denied the plaint allegations.

It was found that the properties were dedicated to the Roman Catholic Church and that defendants seceded from the Roman Catholic faith:

Held, (1) that the defendants could not claim to have the trusts of the institution altered so as to convert the Church into and for changing worship according to the tenets of the Syro-Chaldean faith;

Bishop Mellus v. *Vicar Apostolic of Malabar*, 2 M. 295, referred to.

(2) that certain letters of the Jesuit Fathers, though admissible strictly to prove facts of history, could not be used under section 57 of the Evidence Act to prove where certain missionaries were living or when they died;

(3) that the Cannon Law should be invoked as a guide in deciding questions respecting temporal rights in Roman Catholic Churches;

(4) that a single trustee cannot recover possession of properties appertaining to the trust from another trustee by evicting him, though he may be entitled to maintain a suit in ejectment against a stranger on behalf of the trust;

(5) that the defendants, by their secession from the faith of the Catholic Church, were liable to be removed from the office of trustee;

Mariam Pillai v. *Bishop of Mylapore*, 17 M. 447, referred to.

(6) that a recantation by the defendants would not render them fit to hold the responsible office of trustee;

(7) that, even in the absence of a specific prayer for removal of defendants from the office of trustee, the Court could decree removal by directing an amendment of the plaint;

AMBALAM PAKKIYA UDAYAN *v.* J. M. BATHE.

(8) that when the Court allows a plaintiff to sue some persons as representing themselves and others, having the same interest in the subject-matter of the suit, the consent of the defendants on record is not necessary to enable the Court to do so.

Andrews v. *Salmon*, (1888) W. N. 102, referred to.

(9) that, as the right to the properties of the trust goes with the right to the office of trustees, plaintiffs' claim for moveables was not barred by limitation.

Gnana Sambanda Pandara Sannadhi v. *Velu Pandaram*, 23 M. 271; 27 I. A. 69 (P. C.) and *Gosami Sri Girdhari* v. *Lalji Gosami*, 17 C. 3; 16 I. A. 137 (P. C.), referred to.

Second appeal and memorandum of objections against the decree of the District Court of Madura, in A. S. N. 409 of 1908, presented against the decree of the Subordinate Judge of Madura East, in O. S. No. 34 of 1906.

Messrs. *T. R. Ramachandra Aiyar*, *T. R. Krishnaswami Aiyar*, and *M. Subramaniya Aiyar*, for the Appellant.

Messrs. *J. L. Rosario* and *K. R Subramania Sastri*, for the Respondents.

JUDGMENT.—The suit in this case was instituted by the Bishop of Trichinopoly and the Vicar of the Church of Three Kings in the village of Pallithaman in the District of Madura for a declaration that the Church and its properties have been dedicated to and stand impressed with trusts for the worship of God in accordance with the doctrines and discipline of the Roman Catholic Church, that the 2nd plaintiff is the trustee of the Church and its properties subject to the supervision and control of the 1st plaintiff and for possession of the same from the defendants, who, unlawfully, took possession about the year 1902 or 1903. The defendants are Christians of the village who, according to the plaintiff, were formerly Roman Catholics but who seceded from their allegiance to the Roman Church about the year 1902 and became members of the Syro-Chaldean Church. The plaintiff alleges that the defendants never had any rights of management over the Church or its properties while they were in communion with the Church of Rome. Leave was obtained to implead the defendants as representing all the Christians of the Pallithamam village. The defendants denied that the Church was ever dedicated to worship according to Roman Catholic doctrines or that the villagers ever were followers of Roman Catholicism or that the Romish Priests ever officiated in tthe Church. They also denied the plaintiff's right of supervision and management and pleaded that the villagers themselves were the trustees and managers. They admitted that they were using the incomes of certain lands set out in Schedule .l of the plaint for the expenses of the Church, but denied that the lands themselves belonged to it. They contended that the claim for the recovery of certain moveables mentioned in the plaint was barred by limitation. The Subordinate Judge, who tried the suit, found that the Choir of the Church was constructed under the directions of Father Bertrand, a Roman Catholic Priest, about the year 1839 and that it was dedicated for Roman Catholic worship. He held that the Vicar was entitled to manage the Church and its properties under the supervision of his ecclesiastical superiors and passed a decree for possession as prayed for except of the lands which, he held, were not proved to belong to the Church, though the income was utilized for the Church. He came to the conclusion that the defendant's contention that they never were Roman Catholics was absolutely false, and that they seceded from Romish allegiance about the year 1902. The District Judge confirmed the decree of the Subordinate Judge except with regard to the moveables, the claim to which he held to be barred. The 1st defendant preferred the second appeal and the plaintiffs have filed a memorandum of objections with respect to the lands and the moveables. The case has been argued at great length for the appellant, but we have come to the conclusion that the findings of the lower Courts as to the nature of the trusts to which the Church and its properties were dedicated must be upheld. We also accept the finding of the lower Courts that the Christians of Pallithamam were not the only persons entitled to worship in the Church, and that the Christians of other surrounding villages were also entitled to do so. On this finding, it is not contended for the appellant that the defendants would be entitled to have the trusts of the institution altered so as to convert the Church into one for carrying on worship according to the tenets of the Syro-Chaldean faith. The decision in *Bishop Mellus* v. *The Vicar Apostolic of Malabar* (1) would admittedly not be applicable to such a state of things. It is contended that the findings

(1) 2 M. 295.

mentioned above are not legally sustainable. The admission of a number of documents put in for the plaintiffs as evidence is impeached as contrary to the rules of evidence. It is urged that Exhibits A and G, which are printed letters of the Jesuit Fathers, were admitted without any sort of legal proof and used as evidence of facts which are not matters of public history. This argument is, in part, well founded. The Subordinate Judge observes that Exhibit A series, consisting of printed letters of the Priests of the Jesuit Mission in the Madura District dated about 75 years ago, are books of reference under section 57 of the Evidence Act, and that they may be relied on with reference to the matter of the history of Christianity and especially of the Roman Catholic Mission, which is surely a matter of public interest. The rule of law, as stated, may not be open to exception, but, in applying it, he did not restrict himself strictly to their admission to prove facts of 'public history.' The letters of the Jesuits were regarded in the Ramnad partition case as evidence of the history of the Madura District and of the Ramnad *zemindari*, but it would be going too far to hold that they could be relied on to prove where certain particular Missionaries were living or when they died. The Court can dispense with evidence only of what may be regarded as notorious facts of public history. See Taylor on Evidence, 10th Edition, Volume II, para. 1785, and Wigmore on Evidence, Volume III, section 1699. With regard to B and C series and some other documents, the principal objection urged is that they should not have been received, as there was no satisfactory explanation for the non-production of their originals, but we are of opinion that this is a matter in which much weight should be attached to the opinion of the Court trying the suit in the first instance, and we should be slow to reject evidence admitted by that Court after satisfying itself that the party adducing secondary evidence was not in a position to produce the originals. There was evidence that the plaintiffs were not aware where the originals of these documents were, if they were in existence at all. There was nothing to show that this statement was incorrect. We must hold that the Subordinate Judge was not wrong in admitting them. Although we are of opinion that the letters A series were used to prove facts which they could not legitimately be used to prove, we do not think we should interfere with the findings of the lower Courts on that account as they were referred to only to prove that certain Missionaries were living at Pallithamam when the Church was being built and interested themselves in its construction. We do not think that the exclusion of these letters would have affected the conclusion arrived at by the lower Courts. It is further contended that evidence does not show that the Church in question came into existence for the first time in 1839, that there is no evidence what ritual was being followed before that year and that, therefore, the use of it for worship according to the Syro-Chaldean form cannot be condemned as contrary to the original trusts of the institution. But when it is found that for a period of more than 60 years before the defendant's secession, the Roman Catholic form of worship prevailed, the *onus* is undoubtedly on the defendants to establish by satisfactory evidence that the Church was Syro-Chaldean at the inception, and of this there is admittedly not a shred of evidence. We must, therefore, hold that the declaration that the Church was dedicated to the worship of God according to Roman Catholic ritual and that it is subject to the jurisdiction of the Bishop of Trichinopoly was rightly granted.

We have now to deal with the question of the right to the management of the Church and its properties. Mr. Ramachandrier Aiyar, for the appellant, strongly contends that the decision of this question must depend upon the proof of the usage with reference to the particular Church and that the lower Courts have not rested their finding on the usage of the institution, but upon the rights of the ecclesiastical authorities according to the Canon laid down. The learned Pleader, in our opinion, is not correct in the position taken up by him that the right of management could not be established except by proof of usage. With regard to a Hindu religious foundation, usage is what determines the right of trusteeship, in the absence of any direct evidence to prove the rules established by the founder, but it must be remembered that the Hindu Law prescribes no special rules with respect to the management of religious institutions.

AMBALAM PAKKIYA UDAYAN v. J. M. BATHE.

There is no reason for holding that the Canon law cannot be invoked as a guide in deciding questions respecting temporal rights in Roman Catholics Churches. It is, no doubt, the case that in some Churches on the West Coast the parishioners have more or less control over the management of the properties, but we are not concerned with the question how far the Canon law may be modified by the usage of any particular Church in this country. Our attention has not been drawn to any authority in support of the broad proposition contended for by the appellant. On the evidence, too, the Subordinate Judge found that the plaintiffs were in possession of the Church and its properties till Feburay 1902 and were then dispossessed by the defendants. The keys of the Church building itself were in the custody of an officer styled Koil Pillay and he was appointed by the Vicar. We can find no reason for not accepting that finding. The moveable properties of the Church must also be held to have been in the Vicar's possession till February 1902. With respect to the funds of the Church, consisting chiefly of fees and offerings derived from worshippers, the plaintiff's witnesses admitted that they were kept and expended by three of the parishioners, but said that they did so with the permission and under the control of the Vicar. The Subordinate Judge apparently accepted this statement though he does not expressly say so. The District Judge's finding is not very clear on this point. He considered it unnecessary to decide whether the Vicar was the sole trustee or not, as he was of opinion that the Vicar, who was at least one of the trustees, was entitled to sue for the recovery of the properties of the trust He considered that the defendants used probably to exercise some sort of control over the Church funds and that they might have some right in the trusteeship. The Judge is mistaken in his view that a single trustee is entitled to recover possession of the properties apppertaining to the trust from another trustee by evicting him though he may be entitled to maintain a suit in ejectment against a stranger on behalf of the trust.

The position of the defendants is not quite clear. They do not say that they are entitled to elect certain of their members, and if so, how many, to manage the trust along with the Vicar. But we think that the defendants by their conduct have, in any event, disentitled themselves to hold the office of trustee. They have seceded from the Roman Catholic religion and repudiated the trusts of the institution. There can be no doubt that they could have no answer to a suit for their removal: See *Mairam Pillai* v. *Bishop of Mylapore* (2). Even if they offered to return to their allegiance to the Romish Church, it would not be possible to accept their recantation to the extent of holding them to be fit to hold the responsible office of trustee. It is contended that, as the plaintiffs have not asked in their plaint for the removal of the defendants from the trusteeships, we ought not in this suit to direct their removal. We think we might hold that a complete repudiation by a trustee of the trusts on which he is bound to hold the properties committed to his charge for the benefit of others would work a forfeiture of his office so as to entitle the Court to decree his eviction from the properties in his possession No authority to the contrary has been cited at the hearing. The plaintiffs are desirous of avoiding further litigation for getting a relief which they are undoubtedly entitled to We consider it unnecessary to decide definitely whether there is any substance in the technical objection of the appellant, as we are prepared to direct an amendment of the plaint by the addition of a prayer for the removal of the defendants from the management of the trust property, if necessary.

It remains to notice an argument of Mr. Ramachandra Iyer that the defendants on the record refused to defend the suit on behalf of the other Christians of the village of Pallithamam and that the decree is, therefore, not binding on the whole community of Christians in that village. But, under section 30 of the Code of Civil Procedure, the Court has the power to allow a plaintiff to sue some persons as representing themselves and others having the same interest in the subject-matter of the suit. The consent of the defendants on record is not necessary to enable the Court to do so. In *Andrews* v. *Salomen* (3) Kay, J., made the necessary order though the defendants actually on record objected. If a different view

(2) 17 M. 447.
(3) (1888) W. N. 102.

RAM PAL SINGH v. NANDLAL MARWARI.

were held, it would be in the power of parties to prevent a plaintiff from availing himself of the benefit of section 30, Civil Procedure Code.

We dismiss the second appeal with costs. We direct the plaint to be amended in the manner mentioned above.

The memorandum of objections relates to the claim to the lands described in Schedule II to the plaint and to the moveables. The District Judge, disagreeing with the Subordinate Judge, dismissed the claim for moveables on the ground that it was barred by limitation. We entirely fail to see how the plea of limitation could be upheld when the defendants admitted that the properties belonged to the Church and claimed to hold them as trustees and set up no right of their own to them. The right to the properties of the trust must go with the right to the office of trustees. See *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (4) and *Gossami Sri Girdhariji* v. *Raman Lal's Gosami* (5). The claim must, therefore, be allowed and the Subordinate Judge's decree for the moveables restored.

With respect to the land, both Courts have held that they do not belong to the Church, but the facts found or admitted are inconsistent with this conclusion. It is admitted that the entire income has always been utilised for the Church, which is very good evidence that the lands belong to it. It is further admitted that the Government Revenue has been paid out of the Church revenues, and that in the accounts kept by the defendants (Exhibit V), the lands are described as belonging to the Church. The 1st defendant in his evidence and one of his witnesses admitted that they belonged to the Church. The District Judge was under the impression that the plaintiffs were bound to prove some deed of endowment dedicating them to the Church or their actual possession of the lands. This is clearly wrong. The fact that the *patta* is in the name of the 1st defendant who does not claim it as his own, is no evidence of any title in the villagers. The defendants have no evidence to prove their title and the facts admitted necessarily prove both title and legal possession in the Church. The decrees of both Courts must, therefore, be modified by directing that the plaintiffs be put in possession of the lands claimed in the plaint. The plaintiffs are entitled also to mesne profits from the date of plaint to this date and further mesne profits up to the date of delivery of possession. The Subordinate Judge will hold an inquiry into the question of the amount of mesne profits and pass a decree for the amount he may find the plaintiffs entitled to. The plaintiffs are entitled to the costs of the memorandum of objections also.

Appeal dismissed.

(4) 23 M. 271; 27 I. A. 69.
(5) 17 C. 3; 16 I. A. 137.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEALS NOS. 424 AND 446 OF 1909.

November 29, 1911.

Present:—Mr. Justice Stephen and Mr. Justice Coxe.

RAM PAL SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

NANDLAL MARWARI—DECREE-HOLDER—RESPONDENT.

Limitation — Execution Proceeding — Acknowledgment of debt—Insolvency petition—Setting out debt the subject-matter of execution proceedings—Saving of limitation—Limitation Act (XV of 1877) s. 19.

Under the last part of explanation (1) to section 19 of the Limitation Act, it is not necessary that the acknowledgment under the section should be addressed to the person entitled to the property in respect of which the acknowledgment is made.

Therefore, where a judgment-debtor filed, within three years before an application for execution, a petition of insolvency in which he set out a list of his debts including the one which formed the subject-matter of the execution proceedings:

Held, that the statement in the insolvency petition was an acknowledgment under section 19 of the Limitation Act, and that the application for execution was not barred.

Moni Ram Seth v. *Seth Rupchand*, 33 C. 1047, at p. 1058; 4 C. L. J. 94; 8 Bom. L. R. 501; 10 C. W. N. 874; 1 M. L. T. 199; 3 A. L. J. 525; 16 M. L. J. 300; 2 N. L. R. 130, referred to.

Appeals from the orders of the Additional Sub-Judge of Monghyr, dated July 12th, 1909.

Babus *Jogesh Chandra Roy* and *Khetra Mohan Sen*, for the Appellant.

Babus *Sarat Chandra Roy Chowdhury*, for Babu *Joy Gopal Ghosha*, and *Manmotha Nath Mookherjee*, for the Respondent.

JUDGMENT.—This is an appeal from an order made by the lower Court on an application in an execution-case. The only point

we have to consider is whether the execution proceedings were barred by limitation. An application for execution in respect of a certain debt was made on the 9th September 1905. The next application that was made was on the 27th April 1909. The question is whether this second application was barred by the provisions of the Limitation Act. The point before us is whether an application of insolvency which was made on the 14th May 1909 contained such an acknowledgment of the liability as to bring the case under section 19 of the Limitation Act. The judgment-debtor filed a petition of insolvency in which he set out, in compliance with the statute, a list of his debts. The debt which forms the subject-matter of the execution proceedings was mentioned in that petition. Under the last part of explanation (1) to section 19 it is not necessary that the acknowledment under the section should be addressed to the person entitled to the property in respect of which the acknowledgment is made. This seems to prevent the only argument that can be raised under the section, namely, that the acknowledgment was not made to the creditors. Whether it was in fact made to the creditors or not we need not consider, for the terms of the section amply cover the statement in the insolvency proceedings. Such authority as is quoted in the matter seems to rest on English cases which we need not consider here, as we have to consider the terms of the Indian Limitation Act. This construction of section 19 seems to be referred to in the case of *Moni Ram Seth* v. *Seth Rupchand* (1) decided by the Privy Council. We hold, therefore, that the lower Court is right in deciding that the second petition for execution of the decree was not barred, as the petition of insolvency contained a sufficient acknowledgment to keep alive the decrees.

The appeal is, therefore, dismissed with costs.

This judgment governs Appeal from Original Order No. 446 of 1909. In each of these appeals the hearing fee is assessed at one gold *mohur*.

Appeals dismissed.

(1) 33 C. 1047 at P. 1058; 4 C. L. J. 94; 8 Bom. L. R. 501; 10 C. W. N. 874; 1 M. L. T. 199; 3 A. L. J 525; 16 M. L. J. 300; 2 N. L. R. 130.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 256 OF 1911 AND CIVIL RULE No. 3037 OF 1911.

December 1, 1911.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice N. Chatterjea.

RASHMOHINI DASI, EXECUTRIX TO THE ESTATE OF LATE TARA CHAND BISWAS—JUDGMENT DEBTOR—APPELLANT

versus

DEBENDRA NATH SINGHA ROY—DECREE-HOLDER—RESPONDENT.

Landlord and Tenant—One suit for arrears of rent of several tenures—Decree in such suit, effect of—Execution of such decree—Special procedure in Bengal Tenancy Act.

It is competent to a landlord to bring one suit for the total rents of several tenures held by the same tenant and no objection can be taken to the decree passed in the suit. But the special procedure prescribed in the Bengal Tenancy Act cannot be adopted in executing such a decree which must be executed as an ordinary decree under the Civil Procedure Code.

Appeal from the order of the Sub-Judge of Nadia, dated May 27th, 1911.

Babus *Mohendra Nath Roy* and *Surendra Nath Guha*, for the Appellant and Petitioner.

Babu *Hara Prosad Chetterjee*, for the Respondent and Opposite Party.

JUDGMENT.—The question raised in this appeal is whether a decree for arrears of rent obtained by respondent against the appellants can be executed under the special procedure prescribed in the Bengal Tenancy Act.

The record of the rent-suit was sent for and is before this Court. It appears from the plaint that there are two *durpatni* tenures, one in respect of the 13 annas share of the *patni* and the other in respect of the 3-annas share. Separate rents and instalments are fixed in respect of each *durpatni* which, moreover, are not proportionate to each other and the tenures are referred to in the plaint itself as 'both the *jamas*.' The mere fact that the total rents of the two tenures are claimed in one suit cannot have the effect of consolidating the two tenures into one.

It is true the decree refers to a *durpatni* but the question whether there were two separete tenures or there was only one, becomes material only when the decree is sought to be executed under the special provisions of the Bengal Tenancy Act. It is competent to a

landlord to bring one suit for the total rents of several tenures held by the same tenant and no objection can be taken to the decree passed in this case.

It is clear upon the authorities that when one decree is obtained in respect of two or more separate tenures the special procedure prescribed in the Bengal Tenancy Act cannot be adopted in executing such a decree. Such a decree must be executed as an ordinary decree under the Civil Procedure Code.

The order of the Court below is accordingly set aside. The decree-holder, of course, will be at liberty to execute the decree as a decree for money under the provisions of the Civil Procedure Code.

We make no order as to costs. The Rule is discharged,

Appeal allowed.
Rule discharged.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 268 OF 1910.

January 29, 1912.

Present:—Mr. Justice Stephen and Mr. Justice D. Chatterjee.

CHAG MULL AND ANOTHER—APPELLANTS

versus

JAI NARAIN AND ANOTHER—RESPONDENTS.

Provincial Insolvency Act (III of 1907), ss. 3, 37, 46—Civil Procedure Code (Act XIV of 1882), Chap. XX, ss. 588, 589—Order—Setting aside transfer of insolvent's house—Appeal—Deputy Commissioner of Darjeeling.

An order of the Deputy Commissioner of Darjeeling setting aside a transfer of an insolvent's house and shop, is appealable to the District Judge and not to the High Court.

Appeal from the order of the Deputy Commissioner of Darjeeling, dated March 10th, 1910.

Babu *Khetra Mohan Sen*, for the Appellants.

Babu *Probodh Chandra Mukherjee*, for the Respondents.

JUDGMENT.

STEPHEN, J.—This is an appeal from an order of the Deputy Commissioner of Darjeeling dated the 10th of March 1910, made under section 37 of the Provincial Insolvency Act, 1907, setting aside a transfer of his house and shop made by the second respdonent Nazir Khan to the appellants Chag Mull and Suraj Mull.

The facts of the case, so far as we need consider them, are as follows: On the 17th November 1908 the respondent transferred the premises in question to the appellants in order to avoid execution proceedings in a suit brought by them. Six or ten days later, it does not matter which, the respondent filed his petition in Insolvency. This he did under the Insolvency section of the Civil Procedure Code of 1882, as Darjeeling is a Scheduled District under the Insolvency Act, which was not then in force there. The present Civil Procedure Code was applied to Darjeeling on the 5th January 1909, and the Provincial Insolvency Act on the 25th January 1909. The respondent was adjudged an insolvent on the 27th May 1909 by the District Judge who appointed a Receiver, and transferred the case to the Deputy Commissioner on the 12th June 1909. On the 9th July the first respondent filed a petition to the Receiver to have the transfer in question set aside, and it was set aside, as we have said, on the 10th March 1910.

A preliminary objection is taken to this appeal on two grounds:—

(1) that no appeal lies in this case;

(2) that the proper parties are not before the Court because the Receiver is not joined.

The first of these grounds must prevail for the following reasons. The Insolvency proceedings were, no doubt, commenced under Chapter XX of the Civil Procedure Code, 1882. The whole of this Code was repealed, as far as Darjeeling was concerned on the 5th January 1909 when the present Civil Procedure Code came into force. Thereupon, under section 6 of the General Clauses Act, if any person had acquired or incurred any right, privilege, obligation or liability on the filing of the second respondent's petition, legal proceedings in respect thereof might have been continued as if neither the Civil Procedure Code, nor the Insolvency Act, which also repeals Chapter XX of old Code, had been passed. Without inquiring whether any such right had been acquired and so forth, it is enough to say that this was not done, as the District Judge certainly acted under the Insolvency Act when he adjudged the second respondent an insolvent on the 27th May and no appeal has been lodged against this order. If this is so, there can be no doubt that the appeal in this case lies to the District Court and not to us by

MOHORAM SHEIKH CHAPRASI v. TELAMUDIN KHAN.

force of section 46 of the Insolvency Act; as the case was tried by the Deputy Commissioner, as being a Court subordinate to the District Judge, invested with jurisdiction under section 3. The Deputy Commissioner had under section 3 concurrent jurisdiction with the District Court, but if the same meaning is applied to the expression Subordinate Court in sections 3 and 46 that will not prevent an appeal lying from one Court to another; especially as no Court subordinate to the District Court has any jurisdiction except under the provisions of section 3. We hold, therefore, that no appeal lies in this case, and it becomes unnecessary for us to consider further questions that have been raised in this case.

We make no order as to costs.

D. CHATTERJEE, J.—A good deal of learned discussion has been made in this case as to whether the provisions of the new Act have any and what application: but it is not necessary to go into that discussion for deciding the preliminary objection. For, if the old law applied, the order of the Deputy Commissioner was appealable to the District Judge under sections 583 and 589 of the old Code. See *Sitharama v. Vytilinga* (1); *Debi Prasad v. Jamna Das* (2); *P. S. Sami Aiyar v. Ayilam Gramon Vythi Pattar* (3); and if the new Act applied, an appeal lay to the same Court under section 46 of the new Act.

This appeal is, therefore, incompetent in either case and it is not necessary to go into any other question. The appeal must be dismissed.

Appeal dismissed.

(1) 12 M. 472.
(2) 23 A. 56.
(3) 19 M. L. J. 68; 4 M. L. T. 455; 4 Ind. Cas. 617.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 1084 OF 1909.
July 17, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

MOHORAM SHEIKH CHAPRASI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

TELAMUDDIN KHAN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Landlord and Tenant—Permanent tenancy—Inference from facts—Question of law—Civil Procedure Code (Act V of 1908), s. 100—Evidence Act (I of 1872), s. 90—Document—Presumption of genuinneess—Authority of executant of lease to execute document.

Where it is established that the original tenant and his successor have been in occupation of land for over sixty years, that the rent has never been varied, that the tenancy has been treated by the landlord as heritable, and that the land was let out for residential purposes.

Held, that the inference is legtimate that the tenancy in its inception was permanent and that it was not essential that there should be permanent structures on the land, although their existence would be a very important factor:

Held, also, that the question is really a mixed question of fact and law: the question is one of fact to this extent that the High Court will not interfere with the findings as to the length of the tenancy, the fixity of rent and other matters; but in so far as the Court is invited to draw an inference as to the nature of the tenancy from the facts found, the question is one of law.

William Grant v. Mrs. *Robinson*, 11 C. W. N. 242; 5. C. L. J. 178, relied upon.

Obiter dictum.—The provisions of section 90 of the Indian Evidence Act merely establish that an ancient document was executed by the persons whose signatures it purports to bear; but that cannot and does not prove the authority of the executants to bind the landlord.

Ubilock Rai v. *Dallial Rai*, 3 C. 557 and *Uggrakant Chowduri* v. *Hurro Chundra Shiklar*, 6 C. 209, relied upon.

Appeal from the decree of the Sub-Judge of Pabna and Bogra, dated March 24th, 1909, reversing that of the Additional Munsif, Pabna, dated June 6th, 1908.

Babus *Kishori Lal Sarkar* and *Harish Chandra Roy*, for the Appellants.

Babu *Shyama Charan Roy*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the defendants in an action in ejectment. The case for the plaintiffs respondents is that the defendants who were tenants-at-will were in occupation of the disputed land, that their tenancy has been terminated by a proper notice to quit and that they nevertheless refused to vacate the land. The defendants resisted the claim substantially on two grounds, namely, *first*, that they held under a permanant lease granted to their predecessors on the 23rd May 1848; and, *secondly*, that if the lease was not established, there were circumstances from which the Court could draw the inference that the tenancy in its inception was of a permanent character. The Court of first instance found in favour of the genuineness of the lease and dismissed the suit. Upon appeal, the Subordinate Judge has declined to give the defendants the benefit of the lease

MOHORAM SHEIKH CHAPRASI v. TELAMUDDIN KHAN.

for two reasons. He holds, *first*, that it is doubtful whether the lease is genuine, and, *secondly*, that if it is genuine, it is not proved to be binding upon the landlords inasmuch as, on the face of it, it appears to have been executed by a person whose authority has not been established. The Subordinate Judge then proceeds to hold that, although the defendants have proved that they have been in occupation of this land for many years at a uniform rate of rent and although the property has descended from the original tenant to his daughter, these circumstances are not sufficient to justify an inference that the tenancy in its inception was of permanent character, because the defendants have not proved that they raised substantial structures on the land. In this view, the Subordinate Judge has reversed the decision of the original Court and made a decree for ejectment.

In support of the appeal, it has been contended that the decision of the Subordinate Judge is erroneous and on both the branches of the case reference has been made to a number of judicial decisions bearing upon the questions discussed. In our opinion, there is no room for serious controversy that the decision of the Subordinate Judge cannot be supported.

In so far as the first branch of the case is concerned, as we have already stated, the Subordinate Judge has not explicitly found that the lease is not genuine. He suspects its genuineness and does not come to any specific finding; but he held that it was not binding upon the landlords, because the authority of the executant was not proved. This view of the Subordinate Judge is clearly erroneous. On the authority of the decision in *Ubilock Rai* v. *Dallial Rai* (1) and *Uggrakant Chowdhuri* v. *Harro Chunder Shickdar* (2) the Subordinate Judge has held that the provisions of section 90 of the Indian Evidence Act merely establish that the document was executed by the persons whose signatures it purports to bear; but that cannot and does not prove the authority of the executants to bind the landlord. This view is unquestionably sound. But it must be remembered that the landlords did not suggest in either of the Courts below that the lease was not binding upon them, because it had been executed on behalf of their predecessors by a person who had no authority to bind them in their transaction. The question was not raised for very obvious reasons. No doubt, the lease was originally granted on behalf of the landlords who were at the time infants; but upon attainment of majority, they ratified the transaction, recognised the predecessor of the defendants as their tenant and for many years accepted rent from him at the rate mentioned in the lease. Under these circumstances, it was not open to them to repudiate the transaction as wholly unauthorised. No question, therefore, arises in this case as to the authority of the executants to bind the landlords. In this view, it would be necessary for us to remand the case to the Subordinate Judge for a specific finding upon the question of the genuineness of the lease. It is needless, however, to adopt this course, because we are of opinion that the appellants are entitled to succeed upon the second branch of the case.

In so far as the second branch of the case is concerned, if we assume for a moment that the lease of the 23rd May 1848 has not been proved to be genuine, the position is that the origin of the tenancy is unknown. It has been established that the original tenant Juggernath was in occupation up to the time of his death in 1834. Juggernath was thus in possession for at least 36 years upon payment of a small rent which was never varied in his life-time. Since his death, his daughter, the second defendant, has been in occupation for at least 20 years up to the commencement of this suit. It has not been suggested on behalf of the landlords that the rent was ever varied during this period when the successor in-interest of the original tenant was in occupation. We have, therefore, four facts firmly established in the case: *first*, that the original tenant and his successor have been in occupation of the land for over 60 years; *secondly*, that the rent has never been varied; *thirdly*, that the tenancy has been treated by the landlord as heritable; and, *fourthly*, that the land was let out for residential purposes. Upon these facts we are of opinion that the inference is legitimate that the tenancy in its inception was permanent [*Durga Mohan Das* v *Rakhal Chandra*

(1) 3 C. 557.
(2) 6 C. 209.

Roy (3); *Tarukpodo* v. *Shyama Churn* (4); *Prosuno* v. *Rattan* (5); *Govinda Chundra* v. *Ayinuddin* (6); *Juhooree Lall* v. *Dear* (7); *Nubodoorga* v. *Dwarka Nath* (8); *Dunne* v. *Nobo Krishna Mookerjee* (9); *Caspersz* v. *Kedar Nath Sarbadhikari* (10), *Nabu Mondul* v. *Cholim* (11); *Beni Madhab* v. *Jai Krishna* (12)].

The learned Vakil for the respondent has, however, contended that the question of the nature of the tenancy is one of fact and that it is not open to us in second appeal to interfere with the conclusion of the Subordinate Judge upon this part of the case. In support of this view, he has placed reliance upon the cases of *Dulhin Golab Koer* v. *Balla Kurmi* (13); *Gungadhar Shikdar* v. *Ayinuddin Shah Biswas* (14) and *Durga Mohan Das* v. *Rakhal Chandra Roy* (3). It may be conceded that there are possibly expressions in some of these judgments which lend some apparent support to the contention of the respondent. But it is fairly clear from the decision of the Judicial Committee in the case of *Ram Gopal* v. *Shams Khaton* (15) and *Nabakumari Debi* v. *Behari Lal Sen* (16) that the question is really a mixed question of fact and law. No doubt, the question is one of fact to this extent that we are not in a position to interfere with the findings of the Subordinate Judge as to the length of the tenancy, the fixity of rent, and other similar matters. But, in so far as the Court is invited to draw an inference as to the nature of the tenancy from the facts found by the Subordinate Judge, the question is undoubtedly one of law. [*William Grant* v. *Mrs. Robinson* (17)]. Much reliance was, however, placed by the learned Vakil for the respondent upon the decision in *Smith* v. *General Motor Calcutta Company* (18). That case is clearly distinguishable. There the question arose whether the relation between the parties to the suit was that of master and servant or of bailor and bailee. The House of Lords, in affirmance of the decision of the Court below, held that the question was one of fact and not of law. It was observed that it was not argued by the parties that, upon the admitted facts, as a matter of law, the relation of the parties was that of master and servant or bailor and bailee. One of the parties relied upon certain circumstances which unquestionably support the view that the relation between the parties was that of bailor and baillee, while his opponent relied upon other circumstances which supported the position that the relation between the parties was that of master and servant. As Lord Atkinson put it, there was thus a conflict of evidence and the Court was called upon to discover upon the evidence the true relation between the parties. Here the question is whether, upon the facts which have been found by the Court below, it can legitimately be held that the tenancy in its inception was of a permanent character. There can be no doubt, that in view of the decision of this Court in the cases of *Dinendra Narain Roy* v. *Tituram Mukerjee* (19), *Winterscale* v. *Sarat Chandra Banerjee* (20), and of the Judicial Committee in the cases of *Gopal Lall*, v. *Tilluck Chand* (21), *Dhunpat Singh* v. *Gooman Singh* (22); *Ram Chunder Dutt* v. *Jughesh Chunder Dutt* (23), *Satya Saran Ghosal* v. *Mohesh Chandra Mitter* (24), *Upendra Krishna Mandul* v. *Ismail Khan Mahomed* (25), *Nil Katan Mandal* v, *Ismail Khan Mahomed* (26) and *Nabakumari Debi* v. *Behari Lall Sen* (16), the inference is irresistible that the tenancy in its inception was of a permanent character. The Subordinate Judge himself, indeed, would have arrived at the same conclusion but for the error into which he fell when he assumed that to bring a case within this rule,

(3) 5 C. W. N. 801.
(4) 8 C. L. R. 50.
(5) 3 C. 696; 1 C. L. R. 577.
(6) 11 C. L. R. 281.
(7) 23 W. R. 399.
(8) 24 W. R. 301.
(9) 17 C. 144.
(10) 5 C. W. N. 858.
(11) 28 C. 896.
(12) 7 B. L. R. 152; 12 W. R. 495.
(13) 25 C. 744; 2 C. W. N. 580.
(14) 8 C. 960.
(15) 20 C. 93; 19 I. A. 228.
(16) 34 C. 602; 6 C. L. J. 122; 11 C. W. N. 865; 4 A. L. J. 570; 9 Bom. L. R. 846; 17 M. L. J. 397; 2 M. L. T. 433.
(17) 11 C. W. N. 242; 5 C. L. J. 178.
(18) (1911) A. C. 188; 80 L. J. K. B. 839; 9 S. E. C. (N. S.) 163.
(19) 30 C. 801.
(20) 8 C. W. N. 155.
(21) 10 M. I. A. 183 at p. 191; 3 W. R. (P. C.) 1.
(22) 11 M. I. A. 433; 9 W. R. (P. C.) 3.
(23) 12 B. L. R. 229; 19 W. R. 353.
(24) 12 M. I. A. 263; 2 B. L. R. (P. C.) 23; 11 W. R. (P. C.) 10.
(25) 32 C. 41; 8 C. W. N. 889.
(26) 32 C. 51; 8 C. W. N. 895.

it was essential to establish that there were permanent structures on the land. But the decision of the Judicial Committee in *Nabakumari Debi* v. *Behari Lal Sen* (16) shows conclusively that although the presence of permanent structures on the land may be a very important factor, it is by no means essential to establish that the tenancy in its inception was of a permanent character. The decree of the Subordinate Judge cannot consequently be supported.

The result is that the appeal is allowed, the decree of the Subordinate Judge set aside, and that of the Court of first instance restored with costs in all the Courts.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 465 OF 1910.

August 15, 1911.

Present:—Mr. Rafique, A. J. C.

Saiyed JAFAR HUSAIN—PLAINTIFF—APPELLANT

versus

Musammat HUSAN ARA BEGAM—DEFENDANT—RESPONDENT.

Muhammadan Law—Shia—*Husband and wife—Restitution of conjugal rights, suit for—Cruelty as defence—Jurisdiction of Civil Court—Legal cruelty, criterion of—Husband charging wife with murder and prostitution.*

The Civil Courts of India have succeeded to the duties which under the Muhammadan Law were discharged by the *Kazi* or at his instance by the umpires, and hence the Courts have the same jurisdiction.

Cruelty on the part of a husband is a good and valid defence to a suit by him for restitution of conjugal rights, even where the parties are Muhammadan *Shias*.

Buzlur Raheem v. *Shamsun-nissa Begam*, 11 M. I. A. 551; 8 W. R. 3 (P. C.), referred to.

The plea of cruelty would be allowed only in a case where the evidence establishes legal cruelty such as is demanded by the English Law in a suit for judicial separation. There must be actual violence of such a character as to endanger personal health or safety, or there must be a reasonable apprehension of it.

Buzlur Raheem v. *Shams-un-nissa Begam*, 11 M. I. A. 551; 8 W. R. 3 (P. C.); *Muhammad Abdul Rahman* v. *Taslim-un-nissa*, 2 A. L. J. 608; *Dadaji Bhikaji* v. *Rukmabai*, 10 B. 301, relied upon.

A husband transferred some of his wife's property during her minority to his brothers. On attaining majority, the wife obtained a decree for possession of the property against her husband and his brothers. In execution of her decree for costs, she got a warrant of arrest issued against her husband.

The brothers of her husband raided her house and beat her. The husband was living with his brothers; and he and his brothers were heirs to his wife. The husband in a letter charged his wife with the murder of her child and for prostitution. In a suit by the husband for restitution of conjugal rights with his wife:

Held, that there was ground for apprehension of danger to the health and safety of the wife;

(2) that the object of the husband was not to resume happy connubial relations but to get his wife in his power with no friendly motive to her;

(3) that the facts established legal cruelty on the part of the husband and consequently his suit for restitution of conjugal rights must be dismissed.

Jaun Beebee v. *Sheikh Moonshee Beparee*, 3 W. R. 93; *Huseni Begam* v. *Muhammad Rustam Ali Khan*, 29 A. 222; 4 A. L. J. 60; A.W. N. (1907) 27; *Begam* v. *Khuda Bakhsh*, A. W. N. (1892) 77, relied upon.

Binda v. *Kaunsilla*, 13 A. 126; *Purshotamdas Manekial* v. *Bai Mani*, 21 B. 610; *Dadaji Bhikaji* v. *Rukmabai*, 10 B. 301, distinguished.

Appeal against the order of the Subordinate Judge, Sultanpur, dated 30th July 1910, reversing that of the Munsif of Musafir Khana, dated 6th June 1910.

Mr. *Wazir Hasan*, for the Appellant.

Messrs. *Samiullah Beg* and *G. H. Thomas*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for restitution of conjugal rights brought by the plaintiff-appellant in the Court of the Munsif of Musafir Khana on 21st of September 1909. The suit was instituted against *Musammat* Husan Ara Begam, the lawfully married wife of the plaintiff-appellant, and against *Musammat* Rahmani Bibi, the adoptive mother of the respondent. *Musammat* Husan Ara Begam and Syed Jafar Husain the appellant are first cousins. The father of *Musammat* Husan Ara Begam was the Mukhtar of *Musammat* Rahmani Bibi and lived at her house. *Musammat* Rahmani having no children brought up *Musammat* Husan Ara Begam as her daughter and married her to the plaintiff-appellant. It was alleged in the plaint that the respondent used to occasionally visit *Musammat* Rahmani Bibi and for the last time went there two years ago with the permission of the appellant and has refused to return to her husband's house ever since. It was further stated in the plaint that *Musammat* Rahmani threw obstacles in the way of the return of the respondent to her husband's house.

Musammat Rahmani Bibi in her defence denied the allegations made against her and said that she did not prevent the respond-

JAFAR HUSAIN v. HUSAN ARA BEGAM.

ent from going to her husband. The chief defence to the suit was made by the defendant-respondent. She resisted the suit on the following grounds:—

(1) that she had been divorced by the appellant;

(2) that no decree for restitution of conjugal rights could be passed until payment of Rs. 2,500, the amount of her dower;

(3) that the Court had no jurisdiction to entertain the suit as he lived in Unchgaon beyond the tetritorial jurisdiction of the Court;

(4) that her return to her husband's house involved danger to her safety, and

(5) that in case a decree is passed, certain conditions detailed in para. 15 of the written statement should be attached to the decree.

The Court of first instance decreed the claim.

On appeal, the learned Subordinate Judge reversed the decree of the first Court on the ground that there was reason to hold that the return of the respondent to her husband's house would endanger her safety, if not life.

In appeal before this Court the finding of the learned Subordinate Judge is challenged.

The learned Pleader for the appellant has taken three objections to the decree of the first Appellate Court, namely,—

(1) that cruelty is no defence under the Shia Law in a suit for restitution of conjugal rights;

(2) that the only cruelty that can be recognized is the legal cruelty which would under the English Law support a suit for judicial separation;

(3) that the evidence in the present case does not prove such legal cruelty.

In support of the contention that cruelty of any kind is no defence to a suit for restitution of conjugal rights under the Shia law, reliance is placed on *Sharaya*, pages 298 and 299. It is further argued that the first case in which legal cruelty was recognized to be a good defence in a suit for restitution of conjugal rights between the Muhammadans is the case of *Munshi Bazlur Raheem* v. *Shamsun-nissa* (1). That case was decided according to the Sunni Law and the other cases which followed accepted the principle laid down in the case of *Munshi Buzlur Raheem* (1). There is no reported case in which the parties being admittedly Shias, the Shia Law was applied. I think that the contention of the learned Pleader is not sound.

The passages referred to in the *Sharaya* are translated in full in Baillie's Imamia Law, pages 87 to 89. A perusal of the *Sharaya*, or of its English translation made by Baillie, would show that cruelty to a wife is no more permitted by the Shia Law than the Sunni Law.

In fact in case of the '*nashooz*' (disobedience) of a wife the husband cannot beat her severely. If he does so he is liable to censure by the Kazi: *Vide* Baillie, page 87. The Kazi or the umpires appointed by him would under the Shia Law take cognizance of a dispute due to the cruelty of the husband. The following passage at page 88 of Baillie's Imamia Law describes the procedure to be adopted by the Kazi: "When there is *nashooz* on the part of husband and wife and reason to apprehend actul rupture the Judge should appoint two umpires, one from among the relatives of the husband and the other from among those of the wife, to decide as may be best in the case. It is lawful, however, that these umpires be not of the family of either or that one of them be of the family of one party and the other stranger to both. These persons should, according to the most authentic doctrine, be sent, not merely as agents but with the powers to decide between the parties as Judges. If they agree as to measures of accommodation, they can give them effect without reference to the consent of the parties. Except that though the umpires should agree as to the necessity of a separation between them, this cannot be effected without the husband's consent, if it is to be by a *talak* or a divorce: or without the wife's agreeing to a compensation, if it is to be by *khoola* or release." It is clear from this passage that the umpires, if they agree, as to measures of accommodation, can give effect to them without reference to the consent of the parties. The only condition attached to the validity of the decision of the umpires is that if they direct a divorce they must get the consent of the husband or if they decide

(1) 11 M. I. A. 551; 8 W. R. 3 (P. C.)

upon a *khula* they must get the consent of the wife or the husband. In case of disagreement between husbaud and wife due to the ill-treatment of the latter, the umpires may refuse to compel the wife to return to her husband. There is nothing in the Imamia Law against the umpires passing such an order. But it may be said that such a power can be exercised by the umpires alone and not by the Kazi or the Judge. The civil Courts of this country have always afforded remedies for the evils incidental to married life and suits for restitution of conjugal rights, as also defences to such suits, have frequently been entertained by them. They have taken up the duties which, under the Muhammadan Law, were to be discharged by the Kazi or at his instance by the umpires and hence have the same jurisdiction. The writers on Anglo-Muhammadan Law have recognised that cruelty is a good defence to a suit for restitution of conjugal rights.

Sir Rowland Wilson in his book on Anglo-Muhammadan Law, at page 149, says that "actual violence of such a character as to endanger personal health and safety or a reasonable apprehension of such a violence will justify the wife in leaving her husband and afford an answer to a suit for restitution of conjugal rights."

Mulla in his book, at page 123, says that "cruelty, when it is of such a character as to render it unsafe for the wife to return to her husband's dominion, is a valid defence to such a suit."

Mr. Ameer Ali, in his book on Muhammadan Law, discusses the question at length in the chapter relating to Conjugal Domicile and Restitution of Conjugal Rights. He says that "the Muhammadan Law lays down distinctly that a wife is bound to live with her husband and to follow him wherever he desires to go . . . . . But the obligation of the woman, however, to live with her husband is not absolute. The law recognizes circumstances which justify her refusal to live with him. For instance, if he has habitually ill-treated her, if he has deserted her for a long time, or if he has directed her to leave his house or even connived at her doing so, he cannot require her to re-enter the conjugal domicile or ask the assistance of a Court of justice to compel her to live with him. The bad conduct or gross neglect of the husband, is, under the Muhammadan Law, a good defence to a suit brought by him for restitution of conjugal rights." (Vide Ameer Ali, Vol. 2, pages 462,463 and 464). It may be said about the passages quoted from Mulla and Wilson that they are based either on Sunni Law or the case of *Buzlur Raheem* v. *Shams-un-nissa Begam* (1). He (Syed Ameer Ali) is a Shia, and he mentions in his book the points of difference between the two systems of law (Hanafia and Imamia) wherever there is a difference. If cruelty on the part of the husband were no valid defence in the Shia Law, he would surely have called attention to it. On the contrary, he distinctly says that cruelty on the part of a husband is a good and valid defence in a suit by him for restitution of conjugal rights. The first objection of the appellants fails and is rejected.

The next point urged for the appellant is that the only kind of cruelty that can be recognised as a defence for a suit for restitution of conjugal rights is the one admitted by the English Law in a suit for judicial separation. It is said that the conduct of the husband complained of must be such as to have caused danger or reasonable apprehension of danger to life, limb or health. There must be either actual violence directly from the husband or an apprehension of it from the husband himself. If the actual or the apprehended violence cannot be directly traced to the husband, the plea of cruelty must fail. The learned Pleader for the appellant, in support of his argument, relies on the following authorities:—

Munshi Bazlur Raheem v. *Shams-un-Nissa Begum* (1); *Muhammad Abdul Rahman* v. *Taslim-un-Nissa* (2) and *Dadaji Bhikaji* v. *Rukmabai* (3).

"The passage relied upon in the case reported in *Munshi Bazlur Raheem* v. *Shams-un-Nissa Begam* (1) is to be found at page 611 and is as follows:—

"The Muhammadan Law, on the question of what is legal cruelty between man and wife, would probably not differ materially from our own, of which one of the most recent expositions is the following:—"There must be actual violence of such a character as to endanger personal health or safety, or there must be a reasonable apprehension of it." "The Court', as Lord Stowell said, in

(2) 2 A. L. J. 608.
(3) 10 B. 301.

JAFAR HUSAIN v. HUSAN ARA BEGAM.

Evans v. *Evans* (4), 'has never been driven off this ground'." In the case of *Mohammad Abdul Rahman* v. *Taslim-un-Nissa* (2) the following proposition was enunciated:—"In a suit for restitution of conjugal rights the Court will not be justified in refusing a decree to the husband unless there is reasonable apprehension of bodily hurt on the part of the wife at the hands of her husband. All the cases of cruelty justifying a wife in refusing to live with her husband refer to direct acts on the part of the husband against the wife."

The parties to the Bombay case were Hindus. In that case the defence was based on the principles of Hindu Law and though reference was made to Muhammadan Law the case cannot be said to be relevant. The contention of the appellant is so far correct that the plea of cruelty would be allowed only in a case where the evidence establishes legal cruelty such as is demanded by the English Law in a suit for judicial separation. It remains to be seen whether the respondent has by her evidence made out a case of legal cruelty. It appears that the parties to this appeal were married in 1889 when the respondent was a minor. Mr. Inayet Husain, her father, died some time ago when she was only 16 years old. On the death of Mr. Inayet Husain the appellant took possession of his property and got the mutation of names effected in his name, though the heir to Mr. Inayet Husain was *Musammat* Husan Ara Begum, his daughter, the respondent. The plaintiff-appellant sold a portion of his father-in-law's property and mortgaged some to one of his brothers. *Musammat* Husan Ara Begam on attaining majority instituted a suit for the recovery of her father's property wrongfully taken possession and disposed of by her husband, the appellant. She obtained a decree by compromise on 30th of June 1904: *Vide* Exhibit 2. On the 9th of August 1904, she filed an application for the execution of her decree for the delivery of the possession of the property and the recovery of costs: *Vide* Exhibit A14. The possession was delivered to her through Court. In execution of her decree for costs some moveable property was attached to which an objection was made by Fazal Husain, the father of the appellant, on 20th of June 1905: *Vide* Exhibit A15. In September 1904, the plaintiff-appellant filed an application to be declared insolvent presumably to avoid the execution of decree for costs against him. On 15th September 1906 the brother of the appellant raided the house in which *Musammat* Rahmani and *Musammat* Husan Ara Begam were living in Sultanpur and beat them. A criminal charge was brought against the brothers of the applicant in which the latter gave evidence for his brothers stating that the charge was brought out of spite and was quite false. The brothers of the appellants were convicted on 9th of November 1906, *Vide* Exhibit A7 and Exhibit A8. On 20th of March 1907 the respondent filed an application for the execution of a decree for costs against her husband. She praved for the issue of warrant of arrest. The warrant was issued on the 13th of April 1907: *Vide* Exhibit A9 and A10.

A second application was made for execution of the decree for costs on 2nd September 1907. The last application for execution of the decree for costs was made on 7th of July 1909 by the arrest of the appellant for the restitution of conjugal rights. These facts go to show that the relations between the husband and the wife are anything but friendly. The object of the appellant in instituting the suit does not appear to be to resume happy connubial relations, but to get the respondent in his power with no friendly motive to her. But it is argued for the appellant that the motive of the appellant should not be taken into consideration in the disposal of this appeal. The appellant refers to the following cases, *Binda* v. *Kaunsilla* (5), *Purshotamdas Maneklal* v. *Bai Mani* (6). The following passage in the Allahabad case is relied upon:—"Under the English Law if a wife does not prove that she was justified in withdrawing from cohabitation either by proving her husband's adultery or cruelty the Court will pronounce her under the obligation to return. Nor has the Court any discretionary power to refuse a decree in a suit for restitution of conjugal rights on the ground that the suit was instituted by the petitioner not in order that he might regain the society of his wife but for collateral objects; the petitioner in a suit for restitution of conjugal rights is entitled to a decree, unless he is proved to have committed a matrimonial offence, which should be ground

(4) 1 Hagg. Con. Rep. 37.

(5) 13 A. 126.

(6) 21 B. 610.

for a judicial separation." This rule, upon which the English Law is based, principally on the authority of *Scott* v. *Scott* (7), was applied by Sergent, C.J., to the case of Hindus in *Dadaji Bhikaji* v. *Rukmabai* (3), where the learned Chief Justice said :—"It may be advisable that the law should not adopt stringent measures to compel the performance of conjugal duties, but as long as the law remains as it is, Civil Courts, in our opinion, cannot with due regard to consistency and uniformity of practice (except, perhaps, under the most special circumstances) recognize any plea of justification other than the marital offence by the complaining party."

In the Bombay case it was held, where the Court found that there was no cruelty, but that the suit was brought by the husband as a counter-move to defeat the claim of the wife for separate maintenance and a considerable time after she had ceased to live in his house and because on the last occasion when she returned to live with him she left the house crying, that the suit of the husband must be decreed. In these cases it was admitted that no personal violence actual or apprehended had been proved. In the present case I think that there is sufficient evidence to show that there is ground for apprehension of danger to the health and safety, if not the life, of the respondent. The plaintiff-appellant admittedly lives with his brothers. He has no separate house. Ghulam Ali, his brother, who was convicted of assault on the respondent in 1906, is prosecuting this case for the appellant. The plaintiff-appellant and his brothers are the heirs of *Musammat* Husan Ara Begam. If she is compelled to return to the house in which Ghulam Ali is living there can be no doubt that her safety and perhaps her life would be in danger. Moreover, one of the letters written by the plaintiff-appellant to his wife charges her with the murder of her child and with prostitution : *Vide* Exhibit A4. In my opinion, such charge would amount to legal cruelty. This view is supported by the following cases *Jaun Beebee* v. *Sheikh Moonshee Beparee* (8); *Huseni Begum* v. *Muhammad Rustam Ali Khan* (9). In the case reported in the *Jaun Beebee* v. *Sheikh Moonshee Beparee* (8) it was held that a charge of adultery by a Muhammadan against his wife will be sufficient answer to his claim for restitution of conjugal rights. In the case of *Huseni Begum* v. *Muhammad Rustam Ali Khan* (9) the same view was taken. It was said in that case that where a husband apparently only brought his suit for restitution of conjugal rights on account of his wife having filed another suit against the husband's father, and in his plaint the husband accused his wife of immorality of the most serious kind which he totally failed to substantiate, the Court would be justified in refusing him relief. The litigation between the parties to this appeal, the charges brought by the appellant against his wife, in support of which there is no evidence, the actual violence committed on her by the appellant's brothers, leave no room for doubt that her return to her husband's house would be dangerous to her safety. In the case of *Begam* v. *Khuda Baksh* (10) it was held that in a suit for restitution of conjugal rights brought by the husband, the suit ought not to be decreed when it appears that there is imminent danger of the wife being subjected to bodily violence if compelled to return to her husband.

For these reasons, I decline to interfere in the decree passed by the first Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

(7) 34 L. J. P. and M. 23
(8) 3 W. R. 93.
(9) 29 A. 222; 4 A, L. J. 60; A. W. N. (1907) 27.
(10) A. W. N. (1892) 77.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No 499 OF 1910.
August 21, 1911.

Present:—Mr. Evans, J. C., and Mr. Lindsay, A. J. C.,

Chaudhri Saiyed WAZIR MOHAMMAD—PLAINTIFF—RESPONDENT

versus

HAR PRASAD—DEFENDANT—RESPONDENT.

Transfer—Non-transferable right conferred by decree—Restriction against alienation imposed by Legislature—Restriction imposed by decree or contract—Distinction—Waiver of condition—Consent—Attestation of deed—Abandonment—Transferor cannot plead invalidity of transfer—Transfer of Property Act (IV of 1882), s. 6 (h) and (i), scope of.

The interests which are declared inalienable by section 6 (*i*) of the Transfer of Property Act are particular interests which have been created by statutes enacted to regulate the relations between

WAZIR MUHAMMAD *v.* HAR PRASAD.

landlord and tenant. An interest conferred by a decree is not covered by section 6 (*i*).

The transfer of a non-transferable right in land conferred by a decree does not fall within the scope of section 6 (*h*) of the Act.

There is an essential distinction between restrictions on transfers imposed by the Legislature and restrictions imposed by contract or decree. The general policy of the law is to promote the free alienation and circulation of property and to discourage the introduction of restrictions calculated to interfere with the fulfilment of these objects.

In cases where the Legislatnre deems it expedient to fetter the privilege of free alienation, the prohibition, founded upon considerations of public interest, must be treated as absolute.

But no such force can be attributed to a restriction which has its origin in an agreement of the parties or a decree of Court. The contract or decree does not purport to affect the rights and interests of any one but the parties themselves, it merely regulates the relations of the parties *inter se*.

Consequently, where there is a decree settling the rights of two parties, which contains a provision that one of them shall not alienate the property which he has got from the other, the presumption is that the condition against alienation is inserted for the benefit of the other party. The latter may waive the benefit of the condition, and if he elects to do so by giving his consent to a transfer, the transfer is valid transaction.

Rampher Singh v. *Ramkhelawan Singh*, 2 O. C. 252; *Hirdei* v. *Prag Tewari*, 14 O. C. 144; 11 Ind. Cas. 527; *Beni Madho* v. *Kali Prasad Singh*. 6 O. C. 331; relied upon.

It is not competent to a transferor of a non-transferable interest, conferred by a decree, to raise the plea that the transfer is void.

Hardei v. *Pray Tewari*, 14 O. C. 144; 11 Ind. Cas. 527; *Beni Madho* v. *Kali Prasad Singh*, 6 O. C. 331, followed.

Although the mere attestation of a deed does not import notice of its contents, yet where a superior proprietor attests a deed of gift, being aware of its provisions, and recognizes the donee as the transferee of the property, it will be inferred that he gave his consent to the transfer. Such a consent given by the superior landlord is binding on his son.

To constitute abandonment of a heritable, though non-transferable, interest in land, there must be the clearest evidence of an intention to abandon. Abandonment cannot be inferred from the mere fact that there has been no active assertion of the right during the short period which has intervened since the right came into existence.

Appeal against the order of the District Judge of Fyzabad, dated the 29th August 1910, upholding that of the Sub-Judge, Barabanki, dated 11th July 1910.

Mirza *Samiullah Beg*, for the Appellant.

Pandit *Gokaran Nath Misra*, for the Respondent.

JUDGMENT.—The facts of this case are set out in the order of reference to a Bench dated the 6th July 1911 and before we proceed to determine the particular matters in issue in this appeal, we think it proper to discuss the general question for the decision of which this reference to a Bench of two Judges was made. That question relates to the interpretation of decrees of Settlement Courts by which heritable and non-transferable rights in land have been conferred, and the particular point for consideration is whether the declaration in the decree that the right conferred is non-transferable is absolute so as to render any transfer made by the decree-holder absolutely void, or whether it is only qualified amounting merely to a restriction upon such alienations as are made without the consent of the superior proprietor with the result that a transfer made with such consent is good in law. As stated in the referring order, it has already been held in a number of decisions of this Court that the condition against alienation is imposed for the benefit of the superior proprietor who can waive it if he chooses [cf. *Rampher Singh* v. *Ram Khelawan Singh* (1)]. In the present appeal an attempt has been made to contest this view for, in support of the fifth ground of appeal, it has been argued that as Bala Prasad's interest in the land in dispute was, by the terms of the decree, a non-transferable interest, the gift which he made to his daughter Sardei of this interest was a void transaction and could not be validated even if it were proved that the superior proprietor had given his consent to the transfer. In this connection the learned Counsel for the appellant relies upon the provisions of section 6, clause (*i*) of the Transfer of Property Act, according to which no tenant having an untransferable right of occupancy is permitted to assign his interest. It is argued that Bala Prasad was a tenant with an untransferable right of occupancy within the meaning of this clause, but we are unable to accept this contention. It appears to us that the interests which are declared inalienable by the clause in question are particular interests which have been created by Statutes enacted to regulate the relations between landlord and tenant. * * * The interest which Bala Prasad acquired in the land in question was not an interest conferred by Statute but by a decree. He was not an

(1) 2 O. C. 252.

WAZIR MUHAMMAD *v.* HAR PRASAD.

occupancy-tenant with an untransferable right of occupancy as defined in the Oudh Rent Act. In fact, he was not a tenant at all within the meaning of section 3 (10) of the Oudh Rent Act for he was not liable to pay any rent. We are satisfied that his case does not, therefore, fall within the scope of section 6 (*i*) of the Transfer of Property Act. Nor can it come within clause (*h*) of the same section for, not having rights conferred by Statute and declared by Statute to be inalienable, it cannot be said that a transfer by him of his interest was in violaion of any provision of law, and consequently for an unlawful object.

The tansfer, therefore, cannot be deemed void on any of the grounds set out in clauses (*h*) and (*i*) of section 6 of the Transfer of Property Act.

Can it be held void, then, on the ground that the interest created by the decree is declared by the decree to be non-transferable.?

The answer to this question depends upon the force to be attributed to the condition against alienation. If it be held that the condition is absolute, that it has the force of a statutory prohibition against alienation, then, no doubt, the violation of the condition would render the transfer totally void. But we agree with the opinion previously expressed in this Court by Mr. Chamier [cf. *Hirdei* v *Parag Lewari*(2) and *Beni Madho* v. *Kali Prasad Singh* (3)] that there is an essential distinction between restrictions on transfers imposed by the Legislature and restrictions imposed by contract or decree. The general policy of the law is to promote the free alienation and circulation of property and to discourage the introduction of restrictions calculated to interfere with the fulfilment of these objects. But cases may and do arise in which for the protection of particular interests, it is deemed expedient to depart from this general principle and to fetter the privilege of free alienation. In such cases the prohibition against transfer being founded upon considerations of public interest must be treated as absolute. But no such force can be attributed to a restriction which has its origin in an agreement of parties or a decree of Court. The contract or decree does not purport to affect the rights or interests of any one but the parties themselves; it merely regulates the relations of the parties *inter se*. Consequently, where, as in the present case, we have a decree settling the rights of two parties which contains a provision that one of them shall not alienate the property which he has got from the other, the presumption is that the condition against alienation is inserted merely in order to settle the relations of the parties to the deree with respect to the property affected. The party who gets the property gets it subject to a limitation of his power of transfer—a limitation of which the other party gets the benefit. The latter may, if he chooses, waive the benefit of the condition and, if he elects to do so by giving his consent to a transfer, the transfer is a valid transaction. We are satisfied, therefore, that in decrees of this nature the condition against alienation is inserted for the benefit of the superior proprietor only, and that this view of the law, already accepted in this Court, is correct and should be followed. And we are further of opinion that, as a logical consequence of this view, it is not competent to the transferor of an interest conferred by such a decree as is now under consideration, in a suit between himself and the transferee, to raise a plea that the transfer is void as has been ruled in the cases reported in *Rampher Singh* v. *Ramkhelawan Singh* (1) and *Hardei* v. *Prag Tewari* (2).

Having thus disposed of the general question of the right of transfer possessed by the holder of a heritable and non-transferable interest under a decree, we pass on to the determination of the particular points raised in the memorandum of appeal.

What we have already said disposes of the plea taken in the fifth ground of appeal. The transfer made by Bala Prasad in favour of his daughter was not *per se* void. It was a valid transfer if made with the consent of the then superior proprietor, the present plaintiff's father.

The next point is the *factum* of consent. It is contended in the third and fourth grounds that consent was not proved, but we think this argument is untenable. No doubt, if nothing else appeared than that the plaintiff's father attested the deed of gift it might well be argued that there was no proof of

(2) 14 O. C. 144; 11 Ind. Cas. 527.
(3) 6 O. C. 331.

WAZIR MUHAMMAD v. HAR PRASAD.

consent on the principle that attestation of a deed does not import notice of its contents. But there is plenty of evidence on record to show that the *taluqdar* was aware of the provisions of the deed. And it has also been proved that he recognised *Musammat* Sardei as the transferee of the property. It has been shown that he was aware of the proceedings taken to obtain mutation of names in her favour in the revenue registers and that he deliberately abstained from taking action to oppose the mutation as he had no objection to the property being made over to the lady. We have no doubt, accordingly, that consent was in fact given and this finding disposes of the second and third grounds of appeal. And, as for the plea taken in the sixth ground, it must also be rejected. The consent given by the appellant's father is clearly binding upon the appellant.

It follows from this that the plaintiff cannot claim to re-enter upon the lands in suit on the ground of a breach of the condition in the decree against alienation: and, indeed, as has already been pointed out in the order of reference, this was not the case made out in the plaint.

All that remains to be considered is whether the plaintiff has succeeded in showing that he has a good cause of action on the grounds that the land has been abandoned by the persons entitled to it and that the defendant's possession is that of a trespasser.

The nature of the suit is clear. The plaintiff seeks redress solely for a wrong alleged to have been done to his right to possess. It is not a case in which it is alleged that an existing possession of the plaintiff has been wrongly interfered with by the defendant: clearly the plaintiff has never been in possession since the date of the decree in favour of Bala Prssad.

It was competent, therefore, to the defendant to raise, as he did, a plea of *jus tertii* by saying that the immediate right to possession was vested not in the plaintiff but in the heirs either of Bala Prasad or of his daughter Sardei. The plaintiff could only succeed by showing in himself the immediate right to possession.

Under the terms of the decree, the property was to be held by Bala Prasad and his descendants, generation after generation, and, so long as there are in existence persons answering to that description, the right to passession is with them, assuming for the moment that the property still belonged to Bala Prasad at the time of his death. It was admitted in the plaint that there are still alive two daughters of Bala Prasad and it was proved that another daughter of his, now deceased, left two sons who are still alive. And again we have it that his deceased daughter Sardei has left two minor daughters who are living under the guardianship of their father, the defendant.

Prima facie, the immediate right to possess is with these descendants; but the plaintiff pleaded that this right of theirs has been lost by abandonment. He asked the Courts to uphold this plea merely on the ground that Bala Prasad's two daughters had falied to take pssession during the few months that elapsed between the date of Bala Prasad's death and the date of the suit. In our opinion this plea was very properly rejected. To constitute the abandonment of such a right there must be the clearest evidence of an intention to abandon. Such evidence is not to be found in the mere fact that there has been no active assertion of the right during the short period which has intervened since the right came into existence. On the other hand, if the property passed to Sardei under the deed of gift, and we hold that it did, we have the fact that she has left two daughters and there is no proof that they have done anythiug to show an intention to abandon in favour of the plaintiff. On the contrary, the evidence of the defendant is that he is in possession on behalf of his daughters.

The plaintiff's suit was bound to fail and we hold that it was rightly dismissed.

We dismiss the appeal with costs.

Appeal dismissed.

H. W. G. v. MRS. H. W. G.

ALLAHABAM HIGH COURT.

MATRIMONIAL REFERENCE No. 1 OF 1911.

January 20, 1912.

Present:—Sir Henry Richards, Kt., K. C., Chief Justice, Mr. Justice Tudball and Mr. Justice Chamier.

H. W. G.—PETITIONER

versus

MRS. H. W. G.—RESPONDENT

AND

P. L.—CO-RESPONDENT.

Divorce suit—Delay unexplained—Suit dismissed.

The petitioner became aware of the misconduct of his wife in 1891 but did not institute divorce proceedings till 1910. The only explanation which was attempted to be given of this gross delay was that he did not know the whereabouts of his wife and the co-respondent: *Held*, that proceedings for divorce ought to be instituted at the earliest possible moment and delay of a very much shorter period than that which had occurred in this case would have to be fully explained before the petitioner would be entitled to a decree. [*Boulting* v. *Boulting*, 33 L. J. Mat. 33; 10 Jur. (N. S.) 182; 9 L. T. 779; 12 W. R. 389; 3 Sw. and Tr. 329; *Nicholson* v. *Nicholson* 3 P. and D. 53; 29 L. T. 108, referred to.

Held, further, that the petitioner in this case had altogether failed to explain the delay.

Matrimonial Reference by the District Judge of Cawnpore.

Mr. *Ramakant Malviya*, for the Petitioner.

JUDGMENT.—This matrimonial reference comes before us for confirmation of the decree granted by the learned District Judge of Cawnpore, who granted a decree for the dissolution of the marriage between the petitioner Henry William Gill and his wife Catherine Isabella Gill.

According to the evidence of the petitioner the parties were married in the year 1883. In 1891 his wife left him to visit a sister at Jhansi who was ill. In consquence of a letter which he received he went to Jhansi and there found that his wife was living in adultery with his brother-in-law, the latter's wife having died. He taxed his wife whith infidelity. She admitted it and told him that she would not come back to him. He took away his two children, the issue of the marriage. It is admitted that he took no steps further than to consult a Pleader until the present petition was filed; that is to say, a period of no less than 19 years has elapsed since the alleged misconduct of the wife occurred to the personal knowledg of the petitioner himself. The only explanation which is attempted to be given of this gross delay is that the petitioner did not know the whereabouts of his wife and the co-respondent. It is possible that during a considerable portion of the time which has elapsed the petitioner was unaware of where his wife or the co-respondent were living, but we are quite satisfied on the evidence that if the petitioner had instituted for the dissolution of his marriage within a reasonable period after his knowledge of her alleged misconduct, there would not have been the least difficulty in giving notice to the parties either by personal service or by substituted service. Proceedings for divorce ought to be instituted at the earliest possible moment and delay of a very much shorter poriod than that which has occurred in this case would have to be fully explained before the petitioner would be entitled to a decree. This question of delay is a matter which, we think, is often lost sight of by some of the District Judges. In the case of *Boulting* v. *Boulting*, (1) Sir J. P. Wilde says: "The first thing which the Court looks to when a charge of adultery is preferred is the date of the charge relatively to the date of the criminal act and knowledge of it by the party, because if the interval be very long between the date and knowledge of the fact and the exhibition of them to the Court, it will be indisposed to relieve a party who appears to have slumbered in sufficient comfort over them, and it will be inclined to infer either an insincerity in the complaint, or an acquiescence in the injury, whether real or supposed, or a condonation of it. It, therefore, demands a full and satisfactory explanation in order to take it out of the reach of such interpretation."

In the case of *Nicholson* v. *Nicholson* (2) the Court required a full explanation of a delay of even two years. In our opinion, the petitioner in the present case has altogether failed to explain the delay which has taken place.

We accordingly refuse to confirm the decree of the learned District Judge. We set aside that decree and dismiss the petition. We make no order as to costs.

Decree set aside.

(1) 33 L. J. Mat 33; 10 Jur. (N. S.) 182: 9 L T. 779; 12 W. R. 389; 3 Sw. and Tr. 329.

(2) 3 P. and D. 53; 29 L. T. 108.

CHELLAMMAL *v.* KRISHNASAWMY IYER.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 228 OF 1911.

January 1, 1912.

Present:—Mr. Justice Sundara Aiyar.

CHELLAMMAL—PETITIONER

versus

T. P. KRISHNASAWMY IYER—RESPONDENT.

Razinamah *decree, construction of—Stipulation that husband should give jewels to wife to wear when required—Suit by wife for possession of jewels, whether maintainable—Civil Procedure Code (Act V of* 1908), s. 47.

A *razinamah* decree in a suit by a husband against his wife for restitution of conjugal rights provided that the husband was to give certain jewels to the wife to wear whenever the latter required them and that at other times he was to keep them. In a suit by the wife pursuant to the *razinamah* for possession of the jewels: *Held*, (1) that, in the absence of the allegation that the wife required the jewels for purposes of wearing, the suit was not maintainable;

(2) that the suit should not be dismissed on the ground that the jewels were to be worn by the wife only on certain occasions, as that was not the import of the *razimamah*, nor as barred by section 47, Civil Procedure Code, 1908.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Subordinate Judge of Tanjore, in S.C.S. 1418 of 1910.

Mr. *T. R. Vencatrama Sastri*, for the Petitioner.

Mr. *T. R. Ramchandra Iyer*, for the Respondent

JDDGMENT.—The plaintiff is the wife of the defendant. The latter had instituted a suit for recovery of his wife and for restitution of conjugal rights. That suit was compromised between the parties and the compromise provided that the "plaintiff has no objection whatever to give the 1st defendant herein for being worn by her one pair of *kammal* set with diamonds which was given to her by her father at the time of her marriage and which is worth about Rs. 1,200 and one gold sovereign *malai* which was given to her by the plaintiff and which is worth Rs. 450, and that at other times the said jewels should be in his custody for safety". The present suit by the plaintiff is to recover the second of the two jewels mentioned in the compromise, namely, the *kasimalai*. The suit has been dismissed by the lower Court on the ground that the provision with regard to the jewels in the compromise decree is an unexecutable one and that, therefore, this suit is not maintainable, the proper remedy of the plaintiff being to take out execution of the *razinama* decree. The Subordinate Judge expresses an opinion that, according to the correct meaning of the *razinamah*, the plaintiff is entitled to wear the jewels in question only on special occasions, and that the defendant is entitled to have its custody except on those occasions. I am unable to agree with the Subordinate Judge on either of the points. There is no direction in the *razinamah* that the defendant should put the plaintiff in possession of the jewels, it only says, the husband has no objection to give the wife the jewels for wearing and then states that at other times the jewels should be in the husband's custody. This provision can only be regarded to be declaratory of the rights of both the parties with respect to the jewels. I am, therefore, of opinion that the suit cannot be dismissed on the ground that it is barred by section 47 of the Civil Pocedure Code. On the other hand, I am of opinion that the allegations in the plaint do not disclose any cause of action against the defendant according to the correct construction of the *razinamah* as I understand it. The learned Vakil for the petitioner argues that the effect of the provision is that the plaintiff is entitled to get possession of the jewels from the defendant, but this is in terms contrary to the provision that the husband should be in coustody of the jewels "at other times." I understand the expression "at other times" as connoting all times other than when the wife requires them for wearing. The construction suggested for the petitioner would lead to the result that the jewels should be in the custody or possession of the husband only if and when the wife pleases, but no such words are to be found in the compromise.

It is urged that as the jewels belonged to the wife it must be taken that her right of ownership was recognized and that she is, therefore, entitled to get possession of them. What has to be decided is, what are the mutual rights of the parties recognized by the compromise? There is no declaration of unrestricted ownership on the part of the wife It is stated, no doubt, that one of the jewels was given to her by her father and the other one now in question was given by the husband. According to Hindu Law

such jewels would form the *stridhanam* property of the wife, but when there is a dispute between the husband and the wife and the parties adjust them by compromise, the question for consideration is not, what are the rights of the parties under the law, but what rights they recognized by the compromise. It seems to me that, probably, the husband wanted to prevent the wife from selling the jewels, but was willing that she should have them for wearing. Hence, the language that the husband has no objection to give the jewels to the wife for wearing; Whether the language would be effective in law to restrain the wife from selling the jewels or not is not a question raised for decision in the suit. The point that I have to decide is, whether, according to the *razinamah*, the plaintiff can recover the jewes without an allegation that she required him to give them up for wearing. Admittedly, no such allegation was made; her object is apparently to establish that she is entitled to their possession, whether she wants them for wearing or not. But, to enable her to do so would, as I have already observed, result in running counter to the right of custody which is given to the husband at other times than when the wife wants them for wearing and to make his right of custody dependent entirely on the pleasure of the wife even though she may declare her intention of not wearing them. The result is, I uphold the dismissal of the suit, but not on the other grounds stated by the Subordinate Judge. I cannot agree with the observation that the wife is entitled to wear the jewels only on special occasions as there are no words in the *razinamah* to support such a construction. The jewels are such as a lady might wish to wear always and there is nothing to restrict her doing so in the compromise. I dismiss the petition, but in the circumstances without costs.

Petition dismissed.

ALLAHBAD HIGH COURT.

SECOND CIVIL APPEAL NO. 416 OF 1911.

January 18, 1912.

Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.

JOGAL KISHORE AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAM NARAIN AND OTHERS—PLAINTIFFS—RESPONDENTS

Mortgage—Subsequent purchase—Merger—Intention to keep mortgage alive.

In considering the question whether an incumbrance should be deemed to continue to subsist on the ground that the continuance of it was for the benefit of the person who has acquired the property, the point of time to be regarded is the date of the acquisition of the property. If at the date of the acquisition it was the intention of the parties to keep the incumbrance alive it must subsist.

Liquidation Estate Purchase Company v. *Willoughby*, (1898) A. C. 321; 67 L. J. Ch. 251; 78 L. T. 329; 14 T. L. R. 295; 46 W. R. 589; *Bindeshri Singh* v. *Balarj Sahae*, 10, O. C. 49, *Mohesh Das* v. *Bawan Dass*, 9 C. 961; 13, C L. R. 221; 10, I. A. 62, referred to.

Second appeal from the decision of the District Judge of Mainpuri, dated 21st February 1911

Mr. *J. N. Chaudhri* (with him Mr. *H. P.* Dube), for the Appellants.

Mr. *Gokal Prasad*, for the Respondents.

JUDGMENT.—This was a suit for a decree for sale upon a mortagage dated January 8th, 1884, made by Adbar Singh and others in favour of the respondents. On January 17th and 18th, 1898, the mortgagors by two deeds sold the mortgaged property to the respondents for an ostensible consideration of Rs. 1,800 of which Rs. 500 were said to have been retained by the respondents on account of the mortgage of January 11th, 1894. There was no mortgage of that date. The intention was to refer to the mortgage of January 8th, 1884. The mistake in the day of the month seems to have been due to the facts that the mortgage of January 8th, 1884, was rejected on January 11th and the mistake in the year seems to have been purely clerical error. In 1899 the appellants brought a suit for pre-emption saying that there was no such mortgage as the one referred to in the sale-deed, and that the statement in the deed that Rs. 500 had been retained on account of a previous mortgage had been made for the purpose of making it appear that the consideration was larger then it really was. The respondents produced two witnesses who swore that there

JOGAL KISHORE v. RAM NARAIN.

was a previous mortgage of the date given in the sale deed. That evidence was disbelieved and at the last moment the respondents produced a copy of the mortgage of January 8th, 1884, and said that a mistake had been made in the sale-deed and the sum of Rs. 500 had been retained on account of that mortgage. That explanation was rejected and a decree was made for pre-emption on payment of Rs. 1,300. The respondents appealed on another point saying in their grounds of appeal that they would enforce their right under the previous mortgage by a separate suit. They brought the present suit in July 1909. The defence of the appellants was and is that if there was any mortgage in existence in favour of the respondents when they (the respondents) bought the property in 1898, it must be taken to have then ceased to exist according to the rule contained in section 101 of the Transfer of Property Act. The respondents contend that the mortgage must be deemed to have continued to subsist as the continuance of it was for their benefit. The rule contained in section 101 of the Transfer of Property Act re-produces a rule well known to English Courts of Equity with reference to which many cases are to be found in the English and Indian Reports. Upon the authorities, it is quite clear that in considering the question whether an incumbrance should be deemed to continue to subsist on the ground that the continuance of it was for the benefit of the person who has acquired the property, the point of time to be regarded is the date of the acquisition of the property. One of the latest English cases in which the rule was considered is that of *The Liquidation Estates Purchase Company* v. *Willoughby* (1). In his judgment in that case the Master of the Rolls said: "We take it to be clear that if an intention to keep alive a charge on property is inconsistent with the real intention of the parties to the deed by which the purchaser of the property takes an assignment of it, that charge cannot be treated as still subsisting simply because the purchaser afterwards finds that it would have been better for him to have kept the charge alive". The decision of the Court of Appeal was reversed by the House of Lords on the facts but the correctness of the statement of the law contained in the judgement of the Master of the Rolls was not challenged. In fact, at page 339 of the report, Lord Macnaghton quotes the following passage from his judgment with approval: "The answer to this question depends upon the intention of the parties at the time and that intention must be proved from the terms of the deed and the circumstances under which it was executed." It was contended by Mr. Gokul Prasad that at the time of the sale-deeds it was for the benefit of the purchasers that the mortgage should continue to subsist in view of the probability or possibility of a claim for pre-emption being preferred. But I do not understand how a mortgage on the property could defeat a claim for pre-emption. A pre emptor must pay the price actually and in good faith paid for the property by the purchaser however the price may be made up. The mortgage-money was over-due; therefore, any person obtaining the property by pre-emption could pay it off whether the mortgagees consented or not. There might have been some ground for the argument if the mortgage had been with possession for a long term of years as in *Bindeshri Singh* v. *Balraj Sahai* (2); but even in such a case I think it should be held that the continuance of the mortgage was not for the benefit of the purchaser. In the present case, in the view which I take of the law, there seems to be no ground whatever for holding that the continuance of the mortgage was for the benefit of the respondents. The fact that it would now be convenient for the respondents to be able to set up the mortgage has no bearing on the question. See *Mohesh Lal* v. *Bawan Dass* (3)]. The respondents have themselves to thank for what has happened. They accepted a deed of sale containing incorrect particulars of a previous mortgage and they followed this up by producing absurd evidence in the pre-emption suit. We were asked to hold that the appellants were estopped by their conduct in the pre-emption suit from denying the continued existence of the mortgage, but it seems to be impossible to do that. The appellants were not parties to either the mortgage or the sale. It is not shown that they knew anything about the mortgage. The respondents set

(1) (1898) A. C. 321; 67 L. J. Ch. 251; 78 L. T. 329; 14 T. L. R. 295; 46 W. R. 589.

(2) 10, O. C. 49.

(3) 9, C. 961; 13 C. L. R. 221; 10, I. A. 62.

up a mortgage in order to prove that the price was Rs. 1,800 and failed to prove it with the result that the appellants obtained the property free from incumbrances for Rs. 1,300. That was the fault of the respondents. The mortgage was non-existent at the date of the pre-emption suit and it cannot be revived, in order to remedy the error of the Court or a party in the pre-emption suit.

In my opinion the respondents have no right to sue the appellants upon the mortgage of 1884 and their suit should have been dismissed.

I would allow this appeal and dismiss the respondent's suit with costs in all three Courts including in this Court fees on the higher scale.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 786 OF 1910.

February 3, 1912.

Present:—Mr. Justice Johnstone and Mr. Justice Rattigan.

Musammat BAKHTAWARI—DEFENDANT—APPELLANT

versus

SHIBBAN LAL AND ANOTHER—PLAINTIFFS AND BANU MAL—DEFENDANT—RESPONDENTS.

Regulation (XVII of 1806), ss. 7, 8—Mortgage—Foreclosure proceedings—Prescribed procedure imperative—Omission to affix seal on notice—Fatal defect—Panjab Land Alienation Act (XIII of 1900), s. 9 (3)—Consignment of foreclosure proceedings to record-room—Commencemnt of Act before expiry of year of grace—No pending proceedings.

Where foreclsoure proceedings were consigned to the record-room before the year of grace had expired, and after the consignment of the record, but before the expiry of the year of grace, the Punjab Alienation of Land Act came in force:

Held, that there were no proceedings *for the enforcement of the conditional sale clause pending* before the Court at the time of the commencement of the Act.

Where a mortgagee sues for possession of the morttgaged property upon the ground that he has become owner thereof under the terms of the conditional sale clause it is *incumbent* upon him to prove affirmatively that each and all of the conditions prescribed by section 7 and 8 of Regulation XVII of 1805 have been duly fulfilled. He must show that the foreclosure proceedings were valid in every respect. His plaint should distinctly allege, not only that the year of grace had expired, but that the procedure prescribed by law, both preparatory to and in connection with the notice of foreclosure, had been duly observed.

A plaintiff, who neither sets forth these necessary particulars in his plaint nor adduces any proof in support of the special relief which he seeks to enforce, cannot avoid the consequences of his neglect by merely relying on the circumstance that the defendant did not plead the non-observance of the prescribed procedure but defended the suit on other grounds.

Lachmi v. *Tota*, 16 P. R. 1888; *Kirpa Ram* v. *Bhagwana*, 106 P. R. 1889, followed.

Bhagirath v. *Nathmal*, 105 P. R. 1907, distinguished.

The provisions of Regulation XVII of 1806 are not merely directory but imperative, prescribing conditions precedent to the right of the mortgagee to enforce forfeiture of the estate of the mortgagor, and have for their object to protect mortgagors, who are often poor and ignorant men, from fraud and oppression on the part of the money-lenders. The prescribed procedure must, threfore, be strictly followed.

Madhopersad v. *Gajudhar*, 11 C. 111 at p. 117; 11 I. A. 186, followed.

The omission to affix the seal of the District Judge upon the foreclosure notice renders the foreclosure proceedings bad in law and is fatal to a suit by the mortgagee for possession as owner.

Sham Singh v. *Karm*, 185 P. R. 1889 relied upon.

Second appeal from the decree of the Divisional Judge, Ambala Division, dated the 9th of April 1910, reversing that of the District Judge, Ambala District, dated the 2nd of August 1909, dismissing plaintiffs' claim.

Bhagat *Govind Das*, for the Appellant.

The Hon'ble R. B. *Shadi Lal*, for the Respondents.

JUDGMENT.—On the 18th July 1894 one Jiwan Singh executed a mortgage of certain lands by way of conditional sale in favour of defendant, Banu Mal, who on the 5th December, 1896, sold his rights under the said deed in favour of plaintiffs.

In October 1900 plaintiffs had notice of foreclosure issued (it is alleged) through the District Judge to the mortgagor, and on the 3rd December 1900 the proceedings were ordered by the District Judge to be consigned to the record room. The year of grace expired in October 1901 and in the meantime (*i. e.*, on the 8th June 1901) the Punjab Alienation of Land Act (XIII of 1900) had come into force. In February 1909 plaintiffs sued for possession of the land, and as Jiwan Singh and his son, Surta, were both dead, the suit was brought against *Musammat* Bakhtawari, the widow of Surta.

Defendant urged numerous pleas in defence, *inter alia*, that she knew nothing of

the alleged mortgage; that it was, in any event, invalid for want of consideration and necessity; that the alleged foreclosure proceedings were null and void inasmuch as (1) there had been no previous demand for payment; (2) notice had not been duly served upon the mortgagor, and (3) that the notice issued by the District Judge was not in proper form. The District Judge framed four issues which dealt merely with the questions whether the mortgage had in fact been effected, and if so whether it had been effected for consideration and necessity.

Upon these issues, he found (1) that the mortgage had been effected; (2) that there was consideration and necessity for the alienation but that a large amount was due for interest, and that only Rs. 1,800 were legally chargeable upon the land. At the same time, as the mortgage-deed contained a clause providing for conditional sale, he referred the case under section 9 (3) of the Punjab Alienation of Land Act to the Deputy Commissioner for such action as that officer might deem fit to take. His judgment is dated 2nd August 1909, and no decree seems to have been drawn up by him until October 1909 when for the first time he drew up a decree in favour of plaintiffs for the sum of money which he found to be due to them.

From this decree, the plaintiffs appealed to the Divisional Judge and prayed that in lieu thereof they might be granted a decree for possession of the land *as owners*, the year of grace having expired long prior to their present suit. The Divisional Judge found that full necessity and consideration had been established and held that the District Judge was not justified in cutting down interest from Rs. 2,175 to Rs. 550. He held that the sole issue in the case was whether plaintiffs could be regarded as vendees or merely as mortgagees, and that for a decision to be given upon that issue, it was necessary to find out whether the foreclosure proceedings had been valid or not. He accordingly remanded the case for inquiry as to (1) whether the mortgagor duly received notice of plaintiff's application under Regulation XVII of 1806; and (2) whether plaintiffs had demanded payment of the mortgage-money from the mortgagor prior to issuing notice. He added that "if the plaintiffs prove that the proceedings to make the sale absolute were valid, they will, under *Gopal Das* v. *Hari Singh* (1), be clearly entitled to possession as vendees and the Deputy Commissioner will have no power to intervene."

The District Judge upon the remand, found in favour of plaintiffs upon both the points upon which further inquiry had been ordered, and upon the case coming before him again after the return to his order of remand, the Divisional Judge agreed with these findings and held that the foreclosure proceedings had been validly completed. In accordance with this finding, he held that as prior to the date of the present suit, the year of grace had elapsed, the present claim must be treated as one by a vendee for possession, and that consequently section 9 (3) of the Punjab Alienation of Land Act had no applicability. He, therefore, accepted the appeal and granted plaintiffs the decree for which they prayed.

Defendant has preferred a further appeal to this Court and we have heard lengthy arguments upon questions of no little difficulty. It has, for instance, been urged before us that, in the circumstances of the present case, the rights of the mortgagee did not mature into rights of ownership because, while the year of grace was still running, the Act above referred to came into operation and rendered it imperative on the part of the District Judge to refer the case to the Deputy Commissioner. As we have remarked, the year of grace did not expire till October 1911 and the Act came into force in June 1901. Notices had issued and had been served on the mortgagor before December 1900, when the District Judge directed the record to be consigned to the record-room. Mr. Govind Das contends that, despite this order, the proceedings for the enforcement of the condition intended to operate by way of conditional sale must be held to have been pending before the District Judge at the date of the commencement of the Act; that the District Judge was, therefore, bound in law to refer the case to the Deputy Commissioner, and that his failure to do so vitiated all the proceedings and acted as a bar to the mortgagee's right to claim that the year of grace had in due course expired.

As at present advised, we are not disposed to accede to this argument. It seems to us

(1) 88 P. R. 1909; 3 Ind. Cas. 619; 137 P. W. R. 1909.

that upon the facts as above stated there were no proceedings *for the enforcement of the conditionl sale clause "pending"* before the District Judge after he had directed the consignment of the record to the recordroom. After this order had been passed the case cannot reasonably be regarded as having been *pending* before the District Judge. No doubt it was open to either party to move him to take fresh cognizance of the case, and equally, no doubt, he could himself have called for the record and brought the case once more upon the file of cases pending before him. But it is admitted that he did not do so and in the circumstances we are of opinion that this objection must fail. It is also questionable whether in any event the omission on the District Judge's part to comply with the provisions of section 9 (3) of the Act would necessarily render it impossible for the mortgagee's rights to mature into ownership by expiry of time.

But, as we are unable on other grounds to maintain the decree of the Divisional Judge, we need not further discuss those questions. In cases such as the present, where a mortgagee sues for possession of the mortgaged property upon the ground that he has become owner thereof under the terms of the conditional sale clause, it is incumbent upon him to prove affirmatively that each and all of the conditions prescribed by sections 7 and 8 of Regulation XVII of 1806 have been duly fulfilled. In other words, he must show that the foreclosure proceedings were valid in every respect. As observed in *Luchmi* v. *Tota* (2) "his plaint, if correctly framed, should distinctly allege, not only that the year of grace had expited, but that the procedure prescribed by law, both preparatory to and in connection with the notice of foreclosure, had been duly observed. It is only the complete observance of this procedure, coupled with the non-payment by the mortgagor of the sum due upon the mortgage within the year of grace, that gives the plaintiff a right to enforce forfeiture of the mortgagor's estate, and a plaint which did not set forth the particulars above mentioned would be open to the objection of not discharging a complete cause of action, etc.....A plaintiff who neither sets forth these necessary particulars in his plaint, nor adduces any proof in support of the special relief which he seeks to enforce, cannot avoid the consequences of his neglect by merely relying on the circumstances that the defendant did not plead the non-observance of the prescribed procedure, but defended the suit on other grounds."—[*cf.* also *Kirpa Ram* v. *Bhgawana* (3)].

In the present case the Divisonal Judge observes,—

"Exception is now taken, for the first time, to the defects in the notice served, *e.g*, to the absence of the District Judge's seal and the omission to specify section 7 of the Regulation. So little did these prejudice the present mortgagor that she never specified them till the second hearing here. I rely on *Bhagirath* v. *Nathmal* (4), which admittedly overrules in part some earlier rulings." We need not consider whether certain *obiter dicta* in the ruling cited by the Divisional Judge are or are not entirely consistent with the earlier decisions of this Court, because in this case (as the Divisional Judge himself points out in his order of the 5th Jaunary 1910) the defendant admittedly took the first possible opportunity of objecting that the notice was irregular in form.

True, she did not specify the irregularities, but in view of her objection, it was especially incumbent upon the plaintiffs to prove affirmatively that there was no flaw in that notice. And, in any event, as the notice was before the learned Judge at the hearing of the appeal, the specific objections then taken by the defendant to the validity of that notice should have been considered by him and not brusquely brushed aside simply and solely because her objections had not previously been set forth in detail.

Turning now to the objections to the notice urged by the defendant, we find, after reference to the record of the foreclosure proceedings, that the notice did state that the mortgagor must redeem in the manner provided for by section 7 of the Regulation. This objection, therefore, fails.

But the other objection, namely that the notice is invalid as it did not bear the seal of the District Judge, is well founded The notice bears the signature of the District Judge, but the seal is wanting.

Section 8 of Regulation XVII of 1806 provides that when the Judge has received the written application therein referred to,

(2) 16 P. R. 1888.

(3) 106 P. R. 1889.

(4) 105 P. R. 1907.

he "shall cause the mortgagor or his legal representative to be furnished as soon as possible with a copy of it and shall at the same time notify him by a *parwana* under his seal and official signature that if he shall not redeem the property mortgaged", etc. Their Lordships of the Privy Council have pointed out that these provisions are not merely directory but imperative, prescribing conditions precedent to the right of the mortgagee to enforce forfeiture of the estate of the mortgagor, and have for their object to protect mortgagors, who are often poor and ignorant men, from fraud and oppression on the part of money-lenders, and, that therefore, the prescribed procedure must be strictly followed, *Madhopersad* v. *Gajudhar* (5). Following this decision of their Lordships, the Full Bench of this Court held that a notice which bore the seal of the District Judge but not his signature and only some illegible initials without any official designation, did not comply with the provisions of the said section [*Sahm Singh* v. *Karm* (6)]. Thereafter, the Division Bench in the same case held that as the procedure did not comply with the requirements of the Regulation and it being well recognized law that any failure to comply with the Regulation strictly is fatal to a suit for foreclosure, plaintiffs' suit must be dismissed.

In our opinion the omission to affix the seal of the District Judge upon the notice is an even more serious defect than the absence of the Judge's official signature, and as the notice issued to the mortgagor in this case did not in that important particular comply with the requirements of the Regulation, the foreclosure proceedings were bad in law. The result is that the year of grace cannot be regarded as having duly expired and that the plaintiffs' rights under the mortgage-deed have not matured into ownership.

The original mortgage accordingly subsists and plaintiff's present suit for possession as vendee must fail.

The Divisional Judge, in his order dated the 5th January 1910, describes the suit as one by plaintiffs for possession as vendees of the land in suit. But it was not so regarded by the District Judge and the decree passed by the latter is based upon the assumption that the mortgage, as such, is still subsisting and that plaintiffs' claim is based upon it. It was upon this view of the case that he granted plaintiffs a money-decree. From that decree the defendant preferred no appeal and it must, therefore, be held binding upon her.

But plaintiffs are dissatisfied with that decree and seek possession of the land either as mortgagees or as vendees. We hold that they are not vendees and the Courts below are agreed that the mortgage is not open to objection on the score of want of consideration or necessity. In the circumstances, as the mortgage still subsists, we must refer the case to the Deputy Commissioner under section 9 (3) of the Punjab Alienation of Land Act for such action as he may think fit to take. The appeal is accepted with costs throughout and the decree of the Divisional Judge is set aside. If the Deputy Commissioner declines to take action under section 9 of the said Act, the record will be returned to this Court for further orders.

Appeal accepted.

(5) 11 C. 111 at p. 117; 11 I. A. 186.
(6) 185 P. R. 1889.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 139 OF 1910.
August 3, 1911.

Present :—Mr. Evans, J. C.

Musammat MUNA—DEFENDANT—APPELLANT

versus

MANTA RAM—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 74—Interest—Penalty—Enhanced interest—Question of fact.

Under the terms of a mortgage interest on the mortgage-money was agreed to be paid at the rate of ten annas per cent. per mensem and it was to be paid annually without any objection. If in any year, the mortgagor failed to pay the interest, the mortgagee was to have the power either to realize interest or compound interest at the rate of Rs. 1-4 per cent. per mensem. Default was made in the payment of interest at the end of the first year:

Held (1) that the mortgagee was entitled to interest at the rate of ten annas for the first year and thereafter to interest and compound interest at the rate of Rs. 1-4 calculated in the usual way;

(2) that enhanced interest was chargeable from the date of default in the payment of interest at the lower rate;

(3) that the covenant to pay interest at the enhanced rate was not a penalty. It was intended by the parties to be enforced and was not unreasonable.

Musammat Muna v. *Ram Prasad*, 11 O. C. 307, followed.

Kalachand Kyal v. *Shih Chunder Roy*, 19 C. 392, *Baid Nath Das* v. *Shamanand Das*, 22 C. 143; *Rameswa*

GOPI NARAIN *v.* KUNJ BEHARI LAL.

Prasad v. *Rai Sham Kishen* 29, C. 43; *Abdul Gani* v. *Nand Lal*, 30 C. 15, distinguished.

The question whether an agreement to pay enhanced interest is a penalty or not is a question of fact.

The Hon'ble Mr. *Sri Ram*, for the Appellant.

Pandit *Gokaran Nath Misra*, for the Respondent.

JUDGMENT—The husband of the appellant executed a mortgage-deed in favour of the respondent's father on the 27th October 1899 for Rs. 2,600. The respondent has obtained a decree on the mortgage-deed for Rs. 10,675. The sole point for decision in this appeal is whether the interest decreed against the appellant is correct. One of the stipulations in the deed was as below:—

"Interest on the mortgage-money aforesaid is agreed to be paid at the rate of ten annas per cent. per mensem and it shall be paid annually without any objection. If in any year I fail to pay the interest the mortgagee shall have power either to realize from me the interest or compound interest (*sud dar sud*) at Re. 1-4 per cent. per mensem." The lower Court allowed interest as claimed, *viz.*, ten annas for the first year and thereafter at Re. 1-4 per cent. compound interest calculated in the usual way.

The learned Advocate for the appellant takes three points in this appeal.

(1) That interest at Re. 1-4 should only be allowed on the unpaid interest at ten annas according to the terms of the deed.

(2) That no date is fixed from which enhanced interest can be charged and, therefore, it should not be charged from the end of the first year.

(3) That the agreement to pay enhanced interest at Re. 1-4 is by way of a penalty and cannot be enforced.

None of these objections have any force.

(1) No attempt is made to show that the words "*sud dar sud*," as entered in the deed, mean anything different from compound interest as usually calculated, and the system of calculation set up on behalf of the appellant is unknown to this Court and is not recognised in loan transactions.

(2) The date from which enhanced interest is charged is clearly the date of default in payment of interest—"if in any year I fail to pay interest, etc." In this case default was made at the end of the first year.

(3) I see no reason why I should not follow this Court's ruling in the case of *Musammat Muna* v. *Ram Prasad* (1), which is a complete expositition of the law on the subject up-to date.

It is perfectly clear that under section 74, Act IX of 1872, the question whether the agreement to pay enhanced interest is a penalty or not is a question of fact and in this case there is no doubt that the appellant's husband expressly agreed to pay and the respondent's father expressly demanded and intended to take interest at the enhanced rate if interest at ten annas was not paid punctually. It is difficult to imagine a clearer case.

Although I sympathise with a lady who is compelled to pay a large sum owing to her husband's default I have no option but to confirm the decree of the lower Court.

The learned Advocate for the appellant has cited several rulings of the Calcutta High Court, *viz.*, *Kalachand Kyal* v. *Shib Chunder Roy* (2). *Baid Nath Das* v. *Shamanand Das* (3); *Rameswar Prasad* v. *Rai Sham Kishen* (4); *Abdul Gani* v. *Nand Lal* (5).

The rulings in these cases depend on the particular facts of each case and on the covenants between the parties. All I can say in this case is, that the covenant between the parties was a covenant which they intended to enforce.

It was not unreasonable and it must now be enforced.

The appeal is dismissed with costs.

Appeal dismissed.

(1) 11 O. C. 307.
(2) 19 C. 392.
(3) 22 C. 143.
(4) 29 C. 43.
(5) 30 C. 15.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 132 OF 1910.

January 15, 1912.

Present.—Sir Henry Richards, KT., K. C., Chief Justice, and Mr. Justice Banerji.

GOPI NARAIN AND OTHERS—DEFENDANTS—APPELLANTS

versus

KUNJ BEHARI LAL—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Trusts Act (II of 1882), s. 88—Purchase made by trustee—Trustee and beneficiary—Right and liability.

GOPI NARAIN *v.* KUNJ BEHARI LAL.

One *G.* made a Will by which he appointed several persons as trustees of his estate. The trustees appinted *K.*, who was a co-trustee, their general attorney. A part of the trust property was subject to a mortgage. The mortgage-bond was attached in execution of a decree and was about to be sold. *K.* advised the trustees to purchase the mortgage-bond as that would enhance the interest of the trust estate. The trustees could not come to a final conclusion before the date of sale. Thereupon *K.* purchased the bond himself:

Held, that *K.* must be held to have made this purchase for the benefit of the trust and that he could only charge the trust with the amount which he had actually paid for it.

First appeal from the decision of the Subordinate Judge of Mainpuri, dated the 8th February 1910.

The Hon'ble Mr. *Moti Lal Nehru*, (with him Dr. *Tej Bahadur Sapru* and Messrs. *Muhammad Ishaq* and *Jag Mohan Nath*), for the Appellants.

Mr. *B. E. O'Conor* (with him Messrs. *Ghulam Mujtaba* and *Baldeo Ram Dave*), for the Respondents.

JUDGMENT.—This appeal arises out of a suit on foot of a mortgage, dated the 19th of June 1887. The mortgagor was one Fateh Chand, and the mortgagee was one Abdul Kafil. The mortgage was for Rs. 50,000 at 14 annas per cent. per mensem interest. It is clear now that Abdul Kafil was not the real mortgagee but was only *benamidar* for one Adbul Jalil, a Pleader in Cawnpore. This mortgage was subsequently attached and sold in execution of a simple money-decree which Gaya Prasad had obtained against Abdul Jalil and which was being executed against the representatives of the latter. The certificated auction-purchaser of this mortgage was Babu Kunj Behari Lal, the plaintiff in the present suit. This bond has been the subject of a good deal of litigation which, in the view we take of the case, it is not material to refer to. It was made, as already stated, by Fateh Chand in favour of his Pleader, and one of the defences taken in the present suit is the plea that there was no consideration for the bond. The bond, no doubt, was of a very suspicious nature, made as it was in favour of the Pleader of Fateh Chand. Fateh Chand was a man who managed to dissipate what must originally have been an estate of considerable value and had the suit been one between Fateh Chand and Abdul Jalil we might have had great difficulty in holding that anything like the full principal sum of Rs. 50,000 was due. We think, however, for reasons which we shall presently state, that the defendant-appellants in the present appeal cannot be allowed to say that the bond was not for its full face consideration. Three villages were mortgaged, one called Pali Khurd, another called Pali Kalan, and a third called Sadikpur. A one-third share in each of these villages has been sold in satisfaction of prior mortgages, but two-thirds of Pali Khurd was purchased by the defendant Abdul Hamid and two-thirds of Pali Kalan was purchased by Gaya Prasad, both in execution of simple money-decrees. Sadikpur was purchased by Sheo Dayal. The price paid for Pali Khurd by Abdul Hamid must clearly have been based upon the property being subject to a heavy incumbrance. In a written statement by Abdul Hamid in certain litigation between one Sheo Prasad and himself and others, he expressly admitted that at the sale of this property the mortgage of the 19th of June 1887 was proclaimed and that he purchased the property subject to that mortgage. Pali Kalan was also purchased at a price which would have been an absurdly low value unless the property was subject to a heavy incumbrance. After the death of Gaya Prasad the defendants Gopi Narain and the other trustees, (who are the defendants-appellants and are hereinafter referred to as "the trustees") in their application for Probate of the Will of Gaya Prasad placed a very small value on the property and expressly stated that it was subject to this mortgage for Rs. 50,000 and interest. Neither the trustees nor Abdul Hamid have given any affirmative evidence of the want of consideration. Under these circumstances we think that the decision of the learned Subordinate Judge that the bond had been given for full consideration must be accepted.

It is now necessary to state some further facts upon which the other peeas taken in the suit are based. Gaya Prasadl was a man possessed of considerable wealth. He made a Will on the 13th of July 1899 and thereby appointed certain persons to be his trustees, and amongst them the plaintiff in the present suit Kunj Behari Lal. He named as President of the Board of Trustees the defendant-appellant, Gopi Narain, and the respondent, Kunj Behari Lal, was selected

by his co-trustees as Vice-President of the Board. Under the Will of Gaya Prasad both Kunj Behari Lal and Gopi Narain took considerable benefits. After some litigation, the Will was duly proved, and it was at the instance of the trustees that the decree already mentioned against Abdul Jalil was being executed against the latter's widows. It must be borne in mind that the trustees were, at the time of the execution of the decree, in possession of the village of Pali Kalan under the Will of Gaya Prasad, and that the mortgage which was attached in execution of the decree against Abdul Jalil affected this village as well as the other two villages already mentioned. The trustees executed a power-of-attorney on the 30th of January 1900 in favour of Kunj Behari Lal. This document will be found at page 75 of the appellant's book. It sets forth that the trustees other than Kunj Behari Lal have other engagements and have no time to attend Court in a body and look after and contest cases, and they then proceed to appoint Kunj Behari Lal their general attorney to act for them in all Court matters. He was not, however, empowered to purchase or take property in mortgage or borrow money in their names. On the 7th of January 1905 Kunj Behari Lal wrote to Gopi Narain, as President of the Committee, a letter which will be found at page 45 of the respondent's book. In this letter he points out that the mortgage of the 19th of June 1887 would be sold on the 24th of January 1905 and that in his opinion it would be most advisable for the trustees to purchase this bond. He says in the letter, "If any stranger purchases this village and is successful in his suit the whole of the share in *mauza* Pali Kalan will be lost." He says further that if the trustees do not buy the bond he himself would do so. No one can doubt the soundness of the advice given in this letter. Granted that the bond was a little shady and that some claim was being made to it by the widows of Abdul Jalil, it was still most advisable to purchase it. Kunj Behari lived at Etawah, the other trustees lived at Cawnpore. In the ordinary course of events the letter would reach Gopi Narain about the 8th of January and on the 10th of January application was made in the execution case that the trustees should be permitted to bid for the bond of the 19th of June 1887 which was to be sold in execution of Gaya Prasad's decree. The Will of Gaya Prasad provided for the holding of meetings of the trustees at stated times, and in the letter of Kunj Behari Lal, to which we have already referred, he suggested that an extraordinary meeting of the Committee should be called to consider the question of purchasing the bond. It appears from the evidence that a notice of a meeting was sent out and that on the agenda the question of the purchase of the bond was expressly mentioned. It also appears that there was no *quorum* at the meeting which was summoned for the 22nd of January, that is to say, two days before the sale. It, therefore, appears that there was no express resolution on the part of the trustees on the subject of the purchase of the bond. Kunj Behari Lal attended the sale. He never obtained any express leave on his own account to bid at the sale although, undoubtedly, he was one of the decree-holders. It does not appear from the evidence whether any order was made on the application of the trustees for leave to bid, and, strictly speaking, Kunj Behari had no right to bid at the sale either on his own behalf or on behalf of the trustees without leave of the Court, but he nevertheless attended the sale and it appears that he and one Sheo Prasad bid at intervals from the commencement of the sale and that the last bid was made by Sheo Prasad. We may here mention that Sheo Prasad was also a general attorney for the trustees. He was also attorney for Kunj Behari. The bond was knocked down for the sum of Rs. 3,115. Kunj Behari was examined and he states that the purchase was made by Sheo Prasad for him, that he had no money with him and that he borrowed it from Gopi Narain. Gopi Narain lent him the money not out of private monies of his own and the amount was subsequently re-paid to him. He says also that after he had purchased the document, that is to say, the bond in question, Gopi Narain asked him to give the document to the Committee "and I said that I would not give it." A number of the notices issued for the subsequent meetings of the trust Committee have been put in evidence and these show that time after time amongst the list of business to be transacted is the question of the purchase of the bond,

but no resolution was ever come to on the subject either by the trustees to surrender any rights they might have or for the taking of any steps against Kunj Behari. The matter finds a place in the agenda for the last time in the notice dated the 2nd of July 1905. Kunj Behari did not obtain a sale certificate for some three years after the date of the purchase and in the meantime the bond had been claimed by the widows of Abdul Jalil. In our opinion the inference to be drawn from the evidence is that Kunj Behari bid for the bond in the first instance possibly with the intention of allowing the trustees to have the benefit of it. It is equally possible that when he found that before the sale the trustees had come to no resolution, he bid for the bond on his own behalf intending to keep it for himself. We do not believe that the trustees as a body ever intended that Kunj Behari should purchase the bond for himself and we are satisfied that they never gave him any such permission. The application for leave to bid strongly suggests that the trustees at once saw the soundess of the advice given them by Kunj Behari, namely, that it would be advantageous to purchase the bond. We are satisfied also that after the purchase had been made they would have been glad to take over the purchase from Kunj Behari. This is shown by the fact that time after time the question of the bond is placed upon the agenda of the meetings of the trustees, and also by the fact that Gopi Narain asked Kunj Behari to let the trustees have the bond. We think that it is most probable that Kunj Behari having succeeded in getting the property knocked down to him or to his attorney at a very low price determined to keep it himself and that the trustees thought they could not compel him to give it up. Kunj Behari was probably supposed to know more of Court matters than his co-trustees and they considered that they were at his mercy.

The question then arises, can Kunj Behari under these circumstances retain the benefit of his purchase? We are of opinion that he cannot. Section 88 of the Indian Trusts Act provides: "Where a trustee, executor, partner, agent, Director of a Company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantge, he must hold for the benefit of such other person the advantage so gained." Illustration (*h*) is as follows: "*A*., a guardian, buys up for himself incumbrances on his ward *B*.'s estate at an under-value. *A*. holds for the benefit of *B*. the incumbrances so bought and can only charge him with what he has actually paid." This section incorporates and codifies the law which prevails in England on the subject of purchases made by trustees. The authorities will be found collected in Lewin on Trusts, page 300, XI Edition; Williams no Executors, page 488, X Edition, and Coote on Mortgages, Vol. II, page 841. In the present case Kunj Behari purchased for Rs. 3,115 a mortgage for Rs. 50,000 and the value of two-thirds of the village Pali Kalan if unencumbered must have been over Rs. 25,000. He was not only one of the co-trustees and, therefore, bound to do all in his power to protect the interests of the trust estate but he was also the general attorney of the trustees. It seems to us that when he made the purchase of this incumbrance, he must be held to hold it for the benefit of the trust and can only charge the trust with the amount which he actually paid for it. The case seems to us to fall within the second part of section 88 of the Indian Trusts Act. It is quite clear that his interests as purchaser of this bond were or might be adverse to the interests of the trust estate as owners of the equity of redemption in the village of Pali Kalan. The mortgage, however, affected not only the village of Pali Kalan but also the villages of Pali Khurd and Sadikpur and the plaintiff, therefore, is entitled to a decree against the purchaser of Pali Khurd, that is, Abdul Hamid, and also against the purchaser of Sadikpur but his decree against these villages must only be for the proportion which they ought to bear having regard to the value of the villages as compared with that of Pali Kalan. These two villages formed no part of the trust estate. As against the village of Pali Kalan, the suit must be dismissed upon the terms that the trustees do pay to the plaintiff that

portion of the price paid by him for the purchase of the bond which is proportionate to the value of the village Pali Kalan as compared with the value of the two other villages. He should get the said amount of the purchase-money together with interest at the rate of $10\frac{1}{2}$ per cent per annum, the rate fixed in the bond. If the defendants-trustees fail to pay such sum the decree of the Court below should stand. The parties have agreed as to the respective values of the three villages and we are thus enabled to fix the amount for which the decree ought to be made against the villages of Pali Khurd and Sadikpur in the event of the defendants-trustees paying the apportioned amount of the price paid by Kunj Behari and interest, and we are also able to fix the proportionate amount of such price. By agreement, this price with interest up-to-date fixed for payment, namely, the 24th of March 1912 amounts to Rs. 2,260. We accordingly modify the decree of the Court below as follows. In the event of the trustees paying into Court the sum of Rs. 2,260 as aforesaid, the other defendants, *viz*, Abdul Hamid and the heirs of Pathak Sheo Dayal, shall pay to the plaintiffs on or before the 5th of July 1912, the sum of Rs. 50,327-10 9 (*i.e.*, Rs. 38,272 principal and Rs. 12,055-10 9 interest up to the aforesaid date) together with costs in both Courts and future interest at 6 per cent. per annum, but in the event of the said defendants, Abdul Hamid and the heirs of Sheo Dayal, not paying the said sum of Rs. 50,327-10-9 together with costs and future interest as aforesaid, a $\frac{2}{3}$rd share of Pali Khurd, Pargana Bharthana, District Etawah, and *mahal* Rani Indumati of *mauza* Sadikpur, Pargana Bharthana, District Etawah, shall be sold. In case the trustees do not pay the said sum of Rs. 2,260, as aforesaid, all the defendants shall pay to the plaintiff on or before the 5th of July 1912, the sum of Rs. 85,475 (*i.e.*, Rs. 65,000 principal and Rs. 20,475 interest up to the date above mentioned) together with costs in both Courts and future interest at 6 per cent. per annum. On failure by the defendant to pay the said amount on or before the date above mentioned the plaintiffs will be entitled to bring to sale *mahal* Gopi Narain of *mauza* Pali Kalan, Pargana Bharthana, District Etawah, and *mahal* Rani Indumati of *mauza* Sadikpur, Pargana Bharthana, District Etawah, and $\frac{2}{3}$rds of *mauza* Pali Khurd, Pargana Bharthana, District Etawah. In the event of the trustees paying the said sum of Rs. 2,260 they will have their costs in the Court below and in this Court to be paid by the plaintiffs, but in calculating the costs of the trustees in this Court they will only be allowed one-third of the costs of translating and printing. The costs in this Court payable to the respective parties will include fees on the higher scale.

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL NO. 54 OF 1910.

August 14, 1911.

Present:—Mr. Evans, J. C.

B. INDAR DAWAN SINGH—DEFENDANT—APPELLANT

versus

DEPUTY COMMISSIONER, FYZABAD, MANAGER, COURT OF WARDS, AJODHIA ESTATE—PLAINTIFF—RESPONDENT.

Appeal, Second—Question of fact or law—Liability of estate to pay Nankar-*holders—Question to be decided upon construction of documents—Misinterpretation of documentary evidence—Interference on second appeal.*

Where a lower Appellate Court has misread and misinterpreted the documentary evidence on the record, has misunderstood the real point for decision in the case and its finding on a question of fact is based on no evidence at all, the Court of second appeal can interfere with that finding.

The question as to the obligation of an estate to pay *Nankar*-holders which is to be decided upon a construction of the documents before the Court, is a mixed question of law and fact.

Appeal against the order of the District Judge, Fyzabad, dated 29th March 1910, reversing that of the Assistant Collector, Bara Banki, dated 6th December 1909.

Pandit *Gokaran Nath Misra*, for the Appellant.

The *Government Pleader*, for the Respondent.

JUDGMENT.—This is an appeal by the defendant in a case in which the Deputy Commissioner of Fyzabad, as Manager of the Ajodhia Estate, sued him for arrears of rent. The case was remanded for trial of the following issues :—

1. What is the annual amount of *Nankar* payable by the estate to the *Nankar*-holders in this village ?

2. What sums have been paid on account of *Nankar* by the appellant during the years in suit ?

INDAR DAWAN SINGH v. DEPUTY COMMISSINER.

Before dealing with the finding of the learned Judge upon these issues, it is necessary to point out that he has discussed a question which was not raised in this Court of appeal and which is taken for the first time before him on remand. This question was that the *Nankar* alleged to have been allowed to the appellant by the late Maharaja was a personal allowance and not on account of the *Nankar* paid to the old *zemindars*. This is an entirely new plea which cannot be considered now. It was not taken before this Court and the learned Judge was not asked to consider it.

The finding of the learned Judge on the issues remanded is as under:—"I find on the first issue that the *Nankar*-holders did not receive annually Rs. 330 in cash from the appellant, and on the second that it is not satisfactorily proved that the latter paid it for the two years in suit."

It appears to me that the learned Judge was under some kind of misapprehension as to the exact meaning of the first issue. The first issue was what was the annual amount of *Nankar* payable by the estate to the *Nankar*-holders in this village. In other words, it was intended that he should record a finding as to whether the estate was under an obligation to pay *Nankar* to certain *Nankar*-holders. The question of actual payment need only have been considered under the second issue. For the appellant it is contended that the learned Judge has misread and misinterpreted the documentary evidence on the record and misunderstood the real point for decision in the case, and the following rulings are cited as an authority that his decision can be considered in second appeal:—

Govind v. *Vithal* (1); *Futtehma Begum* v. *Mohamed Ausur* (2); *Iswar Chunder Santra* v. *Satish Chunder Giri* (3) and *Protap Narain* v. *Ronghuram* (4).

For the respondent it is contended that his finding is on a pure question of fact which is binding on this Court. I am of opinion that the question as to the obligation of the estate to pay these *Nankar*-holders is a mixed question of law and fact which is to be decided upon a construction of the documents before the Court. Before going further I may note that it is immaterial whether the amount payable to the *Nankar*-holders was Rs. 330 or Rs. 352-8 a year, as stated by the appellant, because if the appellant paid Rs. 330 for two years, that would be sufficient to wipe off the deficiency of Rs. 639-9-4 which figure has now been accepted by the parties.

A short summary of the evidence is as below:—On the 30th September 1868, there was a decision of the Settlement Officer between one Prag Singh and the Maharaja which recites that there are certain old *zemindars* in the village who get *Nankar* allowances to the extent of Rs. 330 and, therefore, Prag Singh was only entitled to occupancy-rights. On the same day Balak Ram, the agent of the Maharaja, admitted that all the shareholders in the village got Rs. 330 a year and that he was of opinion that no further allowance should be granted to them except a small deduction in the rent payable by them for the land which they cultivated. It is obvious that this Rs. 330 refers to the *Nankar* allowance mentioned by the Settlement Officer in his order of the same date.

A year after, on the 28th September 1869, Mr. McMinn, in a case between Prag Singh and the Maharaja on account of the rent payable for the land held by Prag Singh, decided that the plaintiff was entitled to a decree deducting Rs. 16 on account of *Nankar* as well as the usual deduction of 12½ per cent. given to old *zemindars*.

I now come to the second Regular Settlement. The assessment statement of this village was prepared by Mr. Norrie and approved of by Mr. Hope. It is dated the 29th February 1896. It states that the village belongs to the Maharaja of Ajodhia and that the inferior rights were vested by him in his father-in-law, Indar Dawan Singh, and the Settlement Officer remarks as below:—

"About 50 Muhammadans and Thakurs have obtained decrees for *Nankar* in cash amounting to Rs. 330 annually, which is paid by set-off from their rents (copy of decrees awaited)." Before this in 1894 certain inquiries were made from the Maharaja as to the rights of Indar Dawan Singh and the Maharaja wrote a *Rubkar*, dated the 12th September 1894, in which he said, amongst other things, that he would allow

(1) 20 B. 753.
(2) 9 C. 309.
(3) 30 C. 207.
(4) 6 C. W. N. 185.

RAM GOPAL v. JAGMOHAN SINGH.

Rs. 352-8 *Nankar* to Indar Dawan Singh. In the same document there was a grant of under-proprietary rights to Indar Dawan Singh in certain villages subject to certain conditions. Amongst other conditions was the payment of Government Revenue and *talukdari* dues at the rate of 46 per cent. per annum. The next documents to be noticed are receipts of 1902 executed by Indar Dawan Singh on the one hand for Rs. 352-8 on account of *Nankar* dues, and on the other hand a receipt signed by the Maharaja's Diwan acknowledging Rs. 352 8 on account of rent due from Indar Dawan Singh. These documents show that no cash was received or paid but merely receipts were executed in order to adjust their mutual accounts. In 1909 a report was made by the *Tahsildar* to the Deputy Commissioner in charge of the Ajodhia Estate with reference to the *Nankar* allowance claimed by Indar Dawan Singh and the *Tahsildar* reported, according to the evidence recorded by him, that he was entitled to Rs. 352-8 on account of *Nankar*. This inquiry was apparently made when the rent due from Indar Dawan Singh fell into arrears. There is on the record a letter written by the Special Manager of the Court of Wards, dated the 1st August 1908. In that letter, the Special Manager asked for a list of *Nankar*-holders and receipts for past years; and it is now admitted that this list was sent together with the receipts to the Court of Wards but they have not been produced in this case. All the evidence on the record clearly shows that the *Nankar* allowance to Indar Dawan Singh was on account of the amount payable to the *Nankar*-holders which *Nankar* had been paid so far back as 1868.

The result of my examination of all the documentary evidence on the record satisfies me beyond the slightest doubt that the *Nankar* claimed by the appellant was equivalent to a reduction of rent on account of money paid by him to the old *Nankar*-holders. This reduction has always been allowed to him during the life-time of the late Maharaja, and the Court of Wards as his successor is bound to give the same allowance.

With reference to the finding of the learned Judge on the second issue that it is not proved that the appellant paid the *Nankar* for the two years in suit, it is conceded that the receipts sent by him to the Court of Wards have not been produced and almost all the *Nankar*-holders have given evidence to the effect that they have been paid by the appellant. The learned Judge disbelieves their evidence as being the evidence of persons interested in getting the *Nankar*, who would naturally say that they had always got it and the receipts could have been prepared at any time. The statement made by the *Nankar*-holders that they have received the amount due to them are statements against their interest because they cannot now make any claim for the years in suit against the estate. It is not pretended that any payments have been made on behalf of the Court of Wards to these *Nankar*-holders. The finding of the learned Judge on this issue appears to be based on no evidence at all.

For the foregoing reasons I accept the appeal and, setting aside the decision of the lower Appellate Court, restore that of the Court of first instance with costs in all Courts.

Appeal accepted.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 325 OF 1910.

June 19, 1911.

Present:—Mr. Rafique, A. J. C.

RAM GOPAL—PLAINTIFF—APPELLANT

versus

JAGMOHAN SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Oudh Law Act (XVII of 1876), *s.* 9 (1), (3)—*Pre-emption—Sale by under-proprietor*—Birt-holder *in* mahal *not a co-sharer*—Birt-holder *and co-sharer in another* mahal *members of village community—Determined right by lot.*

An under-proprietor in one of the *mahals* of a perfectly divided village sold some land to a co-sharer in another *mahal*. The plaintiff, a *birt*-holder in the *mahal* in which the land sold was situate, sued for pre-emption of the land :—

Held, (1) that the plaintiff could not be said to be a co-sharer of the tenure in which the property sold was situate, as the under-proprietary tenure of the vendor was higher than that of a *birt*-holder;

(2) that the pre-emptor and the vendee come under the definition of "members of a village community" given in section 9 (3) of the Oudh Laws Act, and, therefore the right to purchase the land in suit should be determined by lot.

RAJA DEI v. UMED SINGH.

Appeal against the order of the District Judge, Fyzabad, dated the 26th May 1910, reversing that of the Munsif, Akbarpur, dated the 29th March 1910.

Mr. *Muhammad Wasim* for Mr. *Mumtaz Husain*, for the Appellant.

Pandit *Gokaran Nath Misra*, for the Respondents.

JUDGMENT.—The village of Madar Barhi is perfectly divided into five *mahals*. Bachu Singh is a co-sharer in the *mahal* of Madho Singh. Ram Gopal, the plaintiff, appellant, is a *birt*-holder in the *mahal* of Madho Singh. Jagmohan Singh, the defendant-respondent, is a co-sharer in another *mahal*.

On 20th April 1909, Bachu Singh executed a deed of sale in favour of the defendant-respondent in respect of 1 *bigha*, 4 *biswas* land situate in *mahal* Madho Singh in lieu of Rs. 200. The plaintiff-appellant sued in the Court of the Munsif of Akbarpur to recover possession of the land sold to the respondent on the allegation that he (the plaintiff appellant) had preferential right to purchase the land in question. The suit was brought against Bachu Singh and the respondent-vendee. It was alleged in the plaint that Bachu Singh vendor was an under-proprietor of the land in suit and that the plaintiff-appellant was also an under-proprietor in the *mahal* of Madho Singh in his right of a *birt*-holder. The claim was resisted. It was urged in defence that the plaintiff-appellant was not a co-sharer of Bachu Singh in the *mahal* of Madho Singh and hence he had no preferential right over the plot. The Court of first instance decreed the claim. In appeal the learned District Judge reversed the decree of the first Court holding that the appellant as a *birt-dar* was not a co-sharer of the vendor.

In second appeal before this Court two contentions are raised. It is urged that the plaintiff appellant and the vendor, Bachu Singh, have the same character in the *mahal* of Madho Singh, namely, that of an under-proprietor, and *secondly*, that in any case both the plaintiff-appellant and the respondent-vendee come under the definition of members of a village community under clause 3, section 9 of Act XVIII of 1876. In the latter case, lots should have been drawn between them. In support of the first contention it is said that the *birt*-holder is an under-proprietor. The vendor had admittedly only under-proprietary rights in the land in suit. Hence the plaintiff-appellant is a co-sharer and his case falls under clause 1 of section 9, Act XVIII of 1876.

The first clause of section 9 of Act XVIII of 1876 is as follows:—

"to co-sharers of the sub-divison (if any) or the tenure in which the property is comprised, in order of their relationship to the vendor or mortgagor." Bachu Singh, vendor, is not a *birt*-holder. He is an under-proprietor but his tenure is higher than that of a *birt*-holder. The plaintiff-appellant cannot be said to be a co-sharer of the tenure in which the property in suit is situate I agree with the lower Appellate Court that the plaintiff-appellant is not a co-sharer of Bachu Singh, and that the appellant's case does not fall within clause 1 of section 9 of Act XVIII of 1876.

He comes under clause 3 of that section and this is not disputed for the respondent. The right to purchase the land in suit should, therefore, be determined by lot.

The parties' Pleaders have drawn lots and the respondent's Pleader has been sucessful. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 402 OF 1911.

January 8, 1912.

Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.

Musammat RAJA DEI—DEFENDANT—APPELLANT

versus

UMED SINGH—PLAINTIFF—RESPONDENT.

Hindu Law—Alienation—Gift made by widow—Suit for declaration by remote reversioner—Nearest reversioner being entitled to life-estate only—Gift in favour of nearest reversioner—Suit by remote reversioner to have it declared invalid, whether maintainable.

N., a Hindu, died leaving a widow *W.*, a daughter *R.* and a daughter's son *K. W.* made a gift of her husband's property in favour of *R.*'s son *K. U.*, a remote reversioner, sued for a declaration that the gift was not binding on him:

Held, that the suit was maintainable, because a remote reversioner presumptively entitled to the full ownership of the property can maintain such a suit where the immediate reversioner is a female who would take only a life-estate.

Bal Gobind v. *Ramkumar*, 6 A. 431, *Hannuman Pandit* v. *Jota Kunwar*, A. W. N. (1908) 207; *Abinash Chandra Mazumdar* v. *Hari Nath Singh*, 32 C. 62, followed.

RAJA DEI v. UMED SINGH.

Madari v. *Malki*, 6 *A.* 428, *Iswar Narain* v. *Janki*, 15 A. 132, not approved of.

Rani Anand Kunwar v. *Court of Wards* 8 I. A. 14; 6 C. 764; 8 C. L. R. 381, referred to.

Second appeal from the decision of the Additional Judge of Saharanpur, dated the 9th March 1911.

Mr. *L. M. Banerji*. for the Appellant.

Mr. *Nihal Chund*, for the Respondent.

JUDGMENT.

CHAMIER, J.—Nagina Singh died many years ago leaving a window *Musammat* Waziri, a daughter *Musammat* Raja Dei and a daughter's son Kan Singh. In June 1909 *Musammat* Waziri, who was in possessiou of the estate of her husband, made a gift of it to Kan Singh. The plaintiffs at once brought this suit for a declaration that the gift was not binding upon them. The plaintiffs, other than the present respondent Umed Singh, are more distantly related to Nagina Singh than Umed Singh is. The Courts below have agreed in making a declaration as prayed in favour of Umed Singh. Kan Singh died while the suit was pending in the Court of first instance. The appeal to the lower Appellate Court was filed by *Musammat* Raja Dei and it is she who has filed the second appeal. In this Court it is contended that at the date of the institution of the suit Umed Singh was not the nearest reversionary heir of Nagina Singh and, therefore, the suit was not maintainable. Indeed, it is contended that even Kan Singh, supposing he had not been the donee of the property, could not have maintained a suit for a declaration inasmuch as the next reversioner was his mother Raja Dei.

There is, of course, no doubt that the nearest reversioner who is the presumptive heir, though he may have only contingent interest, may sue for a declaration that a transfer by a female heir in possession of the property of the last full owner does not bind the estate. Upon the question whether a remote reversioner may maintain such a suit when the immediate reversioner is, or rather will be, the holder of a life-estate only, as where the immediate reversioner is a Hindu female, there is some conflict of authority in this Court. In *Madari* v. *Malki* (1) Straight and Brodhurst, JJ., held that such a suit could not be maintained unless the immediate reversioner was shown to be in collusion with the heir in possession, but in *Balgobind* v. *Ramkumar* (2) Oldfield and Mahmud, JJ., held that such a suit could be maintained.

In *Ishwar Narain* v. *Janki* (3) Tyrell and Blair, JJ., refused to follow the decision in the latter case and adopted the view taken in the former case. In the case of *Hanuman Pandit* v. *Jota Kunwar* (4) my learned collegue, after referring to several decisions of this and other Courts, said that he preferred the decision in *Balgobind* v. *Ramkumar* (2) and the same view was taken in *Drigbija Singh* v. *Jagannath Singh*, F. A. No. 210 of 1910, which is the latest case in this Court. The balance of authority in the Calcutta High Court is clearly in favour of the view taken in *Balgobind* v. *Ramkumar* (2) and the Madars High Court have held in serveral cases that such a suit can be maintained by a remote reversioner when the immediate reversionr is a female entitled to a life-estate only. I have myself in several cases in Oudh followed the view taken by Oldfield and Mahmud, JJ., in *Balgobind* v. *Ramkumar* (2), by the Madras High Court and by many Judges in the Calcutta High Court, and I am content to adopt the arguments contained in the judgment of Mahmud, J., and in the judgment of Brett and Mukerjee, JJ., in the latest case in the Calcutta a High Court [*Abinash Chandra Mazumdar* v. *Harinath Shaha* (5)]. I am of opinion that a remote reversioner presumptively entitled to the full ownership of the property can maintain such a suit as this, where the immediate reversioner is a female who will take, if any thing, a limited or life-estate only. The existence of Raja Dei then, in my opinion, offiers no bar to the maintenance of the present suit. Nor, in my opinion, is the maintenance of the suit barred by the fact that Kan Singh was, at the date of the institution of the suit, the next reversioner presumptively entitled to the full ownership of the property. In *Rani Anand Kunwar* v. *Court of Wards* (6) their Lordships of the Privey Council said: "If the nearest reversionary heir refuses without sufficient cause to institute proceedings, or if he has precluded himself by his own act or conduct from suing or has colluded with the widow or concerned in the act alleged to be

(1) 67 A. 428.

(2) 6 A. 431.

(3) 15 A. 132.

(4) A. W. N. (1908) 207.

(5) 32 C. 62.

(6) 8 I. A. 14; 6 C. 764; 8 C. L. R. 381.

wrongful the next presumptive reversioner would be entitled to sue." These remarks clearly cover the present case where the nearest reversionary heir was a female who supports the alienation in question and the nearest reversionary heir, presumptively entitled to the full ownership of the property, was the person in whose favour the transfer complained of was made. In my opinion, the Courts below were right in holding that the respondent, Umed Singh, was competent to maintain this suit. It has not been suggested that they did not exercise a wise discretion in making a declaration in his favour. I would observe in conclusion that no question of estate arises here for Kan Singh, the donee, was not the next reversioner. I would dismiss the appeal with costs.

KARAMAT HUSAIN, J.—I agree with my learned colleague in the order proposed by him.

BY THE COURT.—Order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 996 OF 1910.

December 18, 1911.

Present:—Mr. Justice Tudball.

CHHOTEY LAL—DEFENDANT—APPELLANT

versus

Pandit HAR NARAIN—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1908), s. 4 (2)—*'Land', meaning of—Whether includes grove land—Tenancy—Suit in Revenue Court for ejectment on ground of sub-tenancy—Subsequent suit in Civil Court for ejectment on ground of trespass*—Resjudicata.

A grove-holder is a tenant within the meaning of the Agra Tenancy Act.

A. brought a suit in the Revenue Court against B. for ejectment on the ground that *B.* was his sub-tenant in respect of certain grove land.

The Revenue Court held that *B.* was not *A.'s* sub-tenant. Subsequently, *A.* instituted a suit against *B.* in the Civil Court on the ground that he was a trespasser in respect of that land.

Held, that the suit in the Civil Court was barred by *res-judicata.*

Niranjan v. *Gajadhar*, 5 A. L. J. 71; A. W. N. (1906) 45; 30 A. 133, referred to.

Second appeal from the decision of the Subordinate Judge of Bareilly, dated 21st of July 1910.

Mr. *B. C. Mukerjee*, for the Appellant.

Mr. *Sital Prasha Ghose*, for the Respondent

JUDGMENT.—This appeal arises out of a suit in ejectment brought by the plaintiff, a grove-holder, against the defendant. It is to be noted in the commencement that neither party claims to be the *zemindar* of the soil. The bone of contention between the parties is a plot of land belonging to the *zemindar* which is planted with trees, in other words, it is a tenant's grove. In 1906 the plaintiff brought a suit in the Revenue Court to eject the defendant claiming the latter to be his sub-tenant. The first Court decreed the suit in his favour. The defendant appealed to the Commissioner. The latter dismissed the suit holding that it was one which ought to have been brought in the Civil Court. However, in 1908, the plaintiff brought a suit for rent against the defendant in the Revenue Court. In that suit the defendant raised the following pleas: *first*, that he cultivated the land without any rent having been legally fixed; *secondly*, that the plaintiff had formerly brought a suit for rent but had withdrawn it because no rent had been fixed; *thirdly*, that as the plaintiff had not had the rent assessed by a Court and as no rent had been fixed by an agreement between the parties the plaintiff had caused a fictitious rent to be entered which, as a matter of fact, had not been paid, and, *fourthly*, that the plaintiff had only purchased trees of the grove, that he had cut and removed his trees and that he could not sue for rent. The Assistant Collector framed five issues, the last issue being "is the plaintiff legally entitled to sue or not?" The meaning of this issue apparently was whether or not the relationship of landlord and tenant existed between the parties. The plaintiff apparently purchased the grove standing on this land on the 19th December 1871 from one *Musammat* Jasoda, who presumably was a tenant from the *zemindar*. The defendant's case in the suit for rent was that the plaintiff had cut and removed his trees, that the *zemindar* had granted the land to the defendant for the purpose of planting a grove and allowed him to hold the land rent-free, and that he, the defendant, had planted the grove and the trees then standing on the land. The parties went into evidence and the Assistant Collector held that the relationship of landlord and tenant did not exist between the parties and, therefore, the plaintiff was not legally entitled to sue for rent. He did not attempt to decide the other issues. The plaintiff then came to the Civil Court

with the present suit. He made his claim in a peculiar manner. He went back to the ejectment suit of 1906. He pleaded that in that suit the defendant had set up a title in himself and had denied the plaintiff's title, that the Assistant Collector had decided the point in plaintiff's favour, that the defendant instead of appealing to the District Judge (there being a question of proprietary title) had appealed to the Commissioner, that the Commissioner had no jurisdiction to hear the appeal, and that, therefore, his decision upsetting that of the Assistant Collector was *ultra vires* and of no force. In execution of the Assistant Collector's decree the plaintiff had ejected the defendant but after the decision of the Commissioner the defendant in execution of the Commissioner's decree re-gained possession. The re-gaining of possession in this manner the plaintiff claimed to be a trespass and he pleaded the decision of the Assistant Collector as *res judicata*. The Court of first instance accepted this plea of the plaintiff and decreed the suit without going into the merits. On appeal the lower Appellate Court held, relying on the decision in *Niranjan* v. *Gajadhar* (1), that the question between the parties was not a question of proprietary title and, therefore, the appeal did lie to the Commissioner and the point was, therefore, not *res judicata* by reason of the Assistant Collector's decision in 1906, and remanded the case for decision on the merits. On the merits the Munsif found in favour of the plaintiff and held that beyond doubt he was the owner. In this finding the lower Appellate Court has also acquiesced and this is a finding of fact and I am bound by it. In the Munsif's Court, however, after the evidence had been taken, a plea was raised orally that the decision of the Assistant Collector in 1908 in the rent suit operated as *res judicata* on this very point as to which of the parties was the owner of the grove. Both the Courts below have rejected this contention and held that the decision did not operate as *res judicata*. The sole point taken on appeal before me is that the decision of 1908 by the Assistant Collector does operate as *res judicata* and the Civil Court is bound by that decision and cannot go behind it. The question in the Revenue Court was a question between two persons claiming tenant-right. It is urged before me that a grove-holder is not a tenant within the meaning of the Act, that the word "land" defined in the Tenancy Act is land which is held for agricultural purposes, that the present land is held for the purpose of a grove and not for agricultural purpose, and that, therefore, the question between the parties in the rent-suit of 1908 was really a question of proprietary title and not a question of tenant-right. To this contention I find myself unable to accede. One has only to look to the pleadings of the defendant in the rent-suit of 1908 to see that he admittedly cultivated the land, that the land was, as a matter of fact, being used for agricultural purpose; but over and above that the land which is used for the purpose of a grove is, in my opinion, used for agricultural purpose. The person who holds it is a person by whom rent is and would be payable but for a contract express or implied. Rent, moreover, means what is to be paid or delivered by a tenant in cash or in kind for the land held by him or on account of a grove. I have no hesitation in holding that a grove-holder is a tenant. It is unnecessary for me to decide the more difficult question as to what class of tenant he may be. For the purpose of the present case, it is sufficient to decide that he is a tenant and that the matter in dispute between the present parties is merely a question of tenant-right and not proprietary title. In my opinion, the decision in *Niranjan* v. *Gajadhar* (1) is one which applies to the present dispute. The decision by the *Tahsildar* in 1908 was a decision on the point as to the relationship of the parties. No doubt, he was of opinion that the defendant had received the land direct from the *zemindar* and not from the plaintiff, and for this reason he held that the defendant was not the plaintiff's tenant. I fail to see that this decision is a bar to the present suit. The plaintiff, as a matter of fact, has had to accept that decision and also the Commissioner's decision and has come to the Civil Court to sue the defendant as a trespasser. To hold that the decison of the *Tahsildar* on the point operated as *res judicata* would really lead to gross injustice. The Revenue Court has declined jurisdiction and has held that the defendant is not the plaintiff's sub-tenant. The plaintiff accepting that has now sued in the Civil Court to eject the defendant as a trespasser. The *zemindar* is no party to the suit which is one between rival claimants to a

(1) 5 A. L. J. 71; A. W. N. (1906) 45; 30 A. 133.

tenant-right, and as between them the matter is one for decision by the Civil Court and the Assistant Collector's decision cannot operate as *res judicata*. Either the defendant is a trespasser or a sub-tenant and the plaintiff is entitled to have his right to eject the defendant decided by a competent Court. In my opinion the decision of the Court below on this point is perfectly correct. The plaintiff is not precluded by the decision of the *Tahsildar*. The appeal, therefore, fails and is dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 1287 AND 1304 OF 1909.

January 15, 1912.

Present:—Mr. Justice Coxe.

Lala MEHDI LAL—PLAINTIFF—APPELLANT

versus

W. M. GRANT AND ANOTHER—DEFENDANTS—1ST AND 2ND PARTY—RESPONDENTS.

[*Bengal Tenancy Act (VIII of* 1885), *s.* 22, *sub-s.* (3) —Ijardar *purchasing occupancy-holding—Occupancy-right, whether ceases—Tenancy, whether ceases.*

When an *ijardar* purchases an occupancy-hoding, the occupancy-right comes to an end, but the holding itself does not cease to exist.

Ram Mohan Pal v. *Sheikh Kachu*, 32 C. 386; 9 C. W. N. 249; 1. C. L. J. 1, relied upon.

Ramrup Mahto v. *H. Manners*, 4 C. L. J. 209 and *Raghbar Mahto* v. *H. Manners*, 13 C. L. J. 568; 11 Ind. Cas. 389, referred to.

Therefore, the purchaser of a holding from an *ijardar*, becomes a *raiyat*.

Appeal from the decree of the District Jugde of Bhagalpore, dated March 4th, 1909, confirming that of the Assistant Settlement Officer of Bhagalpore, dated September 16th, 1908.

Babu *Khetra Mohan Sen*, for the Appellant.

Babu *Biraj Mohan Majumdar*, for the Respondents in S. A. No. 1287 of 1909.

JUDGMENT.

S. A. No. 1287 OF 1909.

This appeal arises out of a suit under section 106 of the Bengal Tenancy Act. The case for the plaintiff, as laid before me, is as follows. The lands in suit originally belonged to four tenants. Suits for rent were brought against them by the *ijardar* in possession of the village. He obtained decrees and sold the holdings in execution. Three of these holdings he purchased himself. The fourth, that of Jitu Mauji, was purchased by the plaintiff. Thereafter, the *ijardar* sold the *jote* right in the three holdings that he had purchased to the plaintiff. The plaintiff contends, with respect to these four holdings, that he is a *raiyat* and the defendants are his under-*raiyats*. In the record-of-rights he was recorded as a tenure-holder and the defendants as *raiyats* under him. He disputed the correctness of this entry. Hence this suit. The defendants supported the case of the plaintiff in the Courts below. But, notwithstanding this, the Assistant Settlement Officer, in the first instance, and the learned District Judge in appeal held that the entry in the record-of-rights was correct and dismissed the suit.

The plaintiff appeals to this Court. It appears to me that the judgment of the Courts below cannot be sustained. The learned District Judge proceeds upon section 22, sub-section 3 of the Bengal Tenancy Act, as it stood before the amendment of 1907. That sub-section enacted that an *ijardar* could not acquire a right of occupancy in any land comprised in his *ijara*. It was held in *Ramrup Mahto* v. *H. Manners* (1) that this sub-section did not refer to cases where the *ijardar* had acquired the land by purchase. This view has been dissented from in *Raghubar Mahto* v. *H. Manners* (2). But, even if it is correct, the sub section cannot, in my opinion, be considered as laying down that when an *ijardar* purchased a holding in execution of a decree under the Bengal Tenancy Act, as it stood before it was amended, the tenancy ceased to exist. It was held in the leading case of *Ram Mohan Pal* v. *Sheikh Kachu* (3) that in cases coming under the preceding sub-sections of the section, although the occupancy-right came to an end, the holding itself did not cease to exist. It may well be that after the purchase by the *ijardar* the occupancy right came to an end. But I am not prepared to say that the tenancy itself came to an end, or that it could not be transferred to the plaintiff by the *ijardar*. It is stated in the plaint that what was sold to the plaintiff was the purchased *jote* right of the *ijardar* and this statement is not controverted in any way. It appears to me,

(1) 4 C. L. J. 209.

(2) 13 C. L. J. 568; 11 Ind. Cas. 389.

(3) 9 C. W. N. 249; 1 C. L. J. 1; 32 C. 386.

therefore, that whether the plaintiff has occupancy-rights or not, he certainly purchased the interest of a *raiyat* and not that of a tenure holder. The view of the learned District Judge that the purchase from the *ijardar* did not convey occupancy rights to the appellant is not sufficient to justify the decision that the appellant is, therefore, a tenure-holder.

As regards the holding of Jitu Mauji section 22 can have no application and it cannot be held that the appellant has any higher right in the land, covered by this purchase, than that which the original *raiyats* had. It seems to me, therefore, that on the facts found by the learned District Judge the plaintiff is a *raiyat* and is entitled to relief under section 106 of the Bengal Tenancy Act.

This appeal has not been contested by any of the principal defendants. The Deputy Registrar has been appointed guardain *ad litem* of certain minors among the proprietors of the village. But he cannot in any way object to the relief which the plaintiff claims.

The appeal is decreed and the plaintiff is declared entitled to be recorded as a *raiyat* and to have the defendants recorded as under-*raiyats* in the record-of-rights.

In the circumstances of the case, the costs of this appeal need not be allowed. But he will get his costs in the lower Courts.

S. A. No. 1304 of 1909.

This appeal is governed by the judgment delivered in Appeal from Appellate Decree No. 1287 of 1909 and the same relief will be allowed to the appellant.

Appeals allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2816 OF 1909.

July 7, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

JANKI PERSHAD SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

Syed YAHIA HOSSAIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Power-of-attorney—Am-muktearnamah—Parda-nashin *lady—Authority to husband—Power to execute deed of sale, whether includes power to execute agreement for sale—Specific Relief Act (I of* 1877), *ss.* 22, 27, *cl (c)—Transferee without notice—Notice to some of transferees, members of joint* Mitakshara *family, whether good—Specific relief, grant of—Discretion of Court.*

A power given to an attorney to execute deeds of sale does not authorize him to enter into an agreement for sale.

A notice to some of the transferees who are members of a joint *Mitakshara* family, in the absence of anything to show that those to whom the notice was given were entitled to represent the others, is not a sufficient notice within clause (*c*) of section 27 of the Specific Relief Act.

A contract for sale of land was made with a *parda-nashin* Mahomedan lady through her husband who was her attorney. The purchase-money, although not insufficient, was considerably less than what was paid by a subsequent purchaser. The authority of the husband to bind the lady was not proved. The variation of the time at which the contract was to be performed was not shown to have been assented to by the lady herself:

Held, that the Court may properly refuse to enforce the contract for sale.

Appeal from the decree of the District Judge of Gaya, dated September 4th, 1909, affirming that of the first Munsif of that place, dated March 31st, 1909.

Babus *Umakali Mukherjee* and *Gonesh Dutt Singh*, for the Appellants.

Babus *Manmatho Nath ukherjee*, *Probo h Chandra Chatterjee* and Mr. *Khurshed Hossain*, for the Respondents.

JUDGMENT.—This appeal is directed against a decree in a suit for specific performance of a contract of sale of property which admittedly belonged to the first defendant, a *parda-nashin* Mahomedan lady. The case for the plaintiffs is that a contract was made with them in Junary 1905 for the sale of this property to them at the rate of Rs. 50 *per dam*. It was agreed at the time that the conveyance should be executed upon payment of the consideration in May following. The plaintiffs alleged that they were unable by reason of mishaps in their family and the advent of plague in that part of the country to perform their part of the contract and the vendor consented to have the conveyance executed in August or September 1905. It is admitted that the conveyance was not so executed, and it was not till the 13th December 1905 that the plaintiffs were in a position to tender a conveyance to the defendant for execution. Meanwhile, negotations appear to have taken place between the vender and the defendants-appellants before us, and on the 27th January 1906 a conveyance was actually executed by the first

defendant in their favour. There is evidence to show that on the 13th January 1906 the defendants had purchased the stamp-paper on which the conveyance was subsequently executed. This indicates plainly that the negotiations with them had been completed on or before that date. On the 27th March 1907, the plaintiffs commenced this action to enforce specific performance of the alleged contract of sale in their favour. The claim was resisted by the purchasers on various grounds, but their objections were overruled by the Court of first instance and a decree made in favour of the plaintiffs. Upon appeal that decree has been confirmed by the District Judge. On the present appeal, the decree of the District Judge has been assailed substantially on three grounds, namely, *first*, that the plaintiffs are not entitled to succeed because the authority of the husband of the first defendant to bind her by the agreement has not been established; *secondly*, that the facts found do not show that the defendant's are purchasers with notice of the alleged prior contract in favour of the plaintiffs; and, *thirdly*, that under the circumstances of the case the Court, in the exercise of its discretion under section 22 of the Specific Relief Act, ought not to decree specific performance.

In so far as the first of these grounds is concerned, it appears to have been the case of the plaintiffs in the Courts below that the second defendant (the husband of the first defendant) entered into negotiations with the plaintiffs for the sale of this property on behalf of his wife. The plaintiffs placed reliance upon a power-of attorney, said to have been executed by the wife in favour of the husband. This power-of-attorney was not produced in the Courts below. In fact the attempt of the plaintiffs to enforce its production was unsuccessful. But the defendants could not be blamed for the result, as they were substantially in the same position as the plaintiffs themselves; it is not suggested that the power-of-attorney was in their custody. Apart from this circumstance, it is clear from an extract from the power of attorney, which has been produced in this Court, that the power-of-attorney did not authorise the husband to bind his wife in this manner. The extract shows that the husband was authorised to execute, amongst other documents, deeds of sale and to admit execution thereof before the Registering Officer. This power-of-attorney obviously does not authorise the husband to enter into an agreement for sale of the property owned by his wife. Clearly, an agreement for the sale of property and the execution of a conveyance after the agreement for sale had been made by the owner of the property, are entirely distinct things. Consequently, the power-of-attorney is of no assistance to the plaintiffs. We may further point out that even if the power-of-attorney had been of any avail to the plaintiffs and even if the original had been produced, it would have been necessary for the plaintiffs, as pointed out by their Lordships of the Judicial Committee in *Sudhisht Lal* v. *Sheobarat Koer* (1), to show that it had been executed by the wife under circumstances which would make it binding upon a *parda-nashin* lady. In so far, therefore, as the judgment of the District Judge is based upon the assumption that as the power-of-attorney had not been produced, it had been withheld because if produced it would not support the case of the defendants, cannot be upheld. The learned Vakil for the plaintiffs-respondents has, however, contended that there is evidence to show that, apart from the power-of-attorney, the contract was in reality entered into between the plaintiffs on the one hand and the lady on the other directly. He has invited our attention to a passage in the judgment of the District Judge where it is stated that a witness on behalf of the plaintiffs swears that he had a conversation with the lady on this matter, and she told him that she had allowed her husband to make a contract for sale at the rate of Rs. 50 *per dam*. But the plaintiffs are placed in a position of obvious disadvantage if they rely upon a contract direct with a *parda-nashin* lady. Even if it is assumed for a moment that the agreement was made directly with her at the final stage of the transaction, there is no finding in the judgment of the District Judge that the subsequent variation was with her consent. As we have already explained, the contract was not performed at the time originally fixed, that is, May 1905. The plaintiffs asked for an extension of time till September following. But even then, they were not ready to perform their part of the agreement and it was not till

(1) C. 245; 8 I. A. 39.

the middle of December that they were in a position to tender the conveyance to the lady for execution. It is not shown, as we have stated, that the lady either expressly or by implication assented to the variation of one of the most important terms of the contract, namely, the time when it was to be performed. Under these circumstances, we are of opinion that the first ground urged on behalf of the appellants must prevail.

In so far as the second ground taken on behalf of the appellants is concerned, there is, in our opinion, no answer to it. Under section 27 of the Specific Relief Act, the contract could not be enforced as against the defendants if they were transferees for value who had paid their money in good faith and without notice of the original contract. On this part of the case, the plaintiffs suggested that written notices had been served upon the defendants. That, however, was of no avail, because it transpired that the notice had been served too late. The alternative case which they put forward was that verbal notices were given to two of the defendants. This also would not avail them, because if the theory is adopted no notice was given to some of the purchasers. But it was ingenuously suggested by the learned Vakil for the plaintiffs-respondents that these purchasers were members of a joint *Mitakshara* family and that if notice were given to two of them, they might be treated as operative against all. This contention is obviously fallacious. It is clear that the conveyance of the defendants was to be executed in the name and for the benefit of all the members of their family. If the notice was binding upon them all, because the two persons to whom notice was given were the leading members of the family, the other members need not have been joined as parties to this suit. The fact that they have all been joined as parties shows that the contract for sale was made with them and there is nothing to show that two of them were entitled to represent the others. It was necessary for the plaintiffs to establish notice in time as against them all; this has not been done. We are, therefore, of opinion that the case has not been brought within the provisions of section 27 of the Specific Relief Act as explained in *Kannan* v. *Krishnan* (2). It was pointed out in this case by Mr. Justice Muthusami Ayyar that the intention of section 27 was to adopt the equitable doctrine of notice in suits for specific performance to protect *bona fide* purchasers for value, and to treat at the same time purchasers with notice as persons purchasing subject to the vendor's pre-existing contractual obligations or with notice of a trust in favour of the party entitled to specific performance. But here the facts found by the District Judge do not show that the defendants are persons against whom the contract set up by the plaintiffs may be specifically enforced.

In so far as the third ground taken by the appellants is concerned, it must clearly succeed. We are invited to enforce specific performance of a contract for sale of land alleged to have been made with a *parda-nashin* Mahomedan lady. The purchase-money, althought it might be treated as not insufficient, is considerably less than what has been offered and paid by the appellants before us. The transaction is surrounded by circumstances by no means free from doubt and suspicion. The authority of the husband to bind the lady has not been proved. The variation of the time at which the contract was to be performed has not been shown to have been assented to by the lady herself. Under these circumstances, we are of opinion that we may, under section 22 of the Specific Relief Act, properly refuse to enforce this contract. That section provides that the jurisdiction to decree specific performance is discretionary and the Court is not bound to grant such relief merely because it is lawful to do so; the discretion of the Court, however, is not arbitrary but sound and reasonable guided by judicial principles and capable of correction by a Court of Appeal. We are not unmindful that, as pointed out by their Lordships of the Judicial Committee in the case of *Jaipal Kunwar* v. *Indar Bahadur* (3), an Appellate Court will not in this respect lightly interfere with the exercise of discretion by the primary Court. In the case before us, however, the District Judge has refused to exercise his discretion under section 22 on the ground that the vendor herself was not the appellant in his Court.

(2) 13 M. 324.
(3) 31 I. A. 67; 26 A. 238.

In re VELAPPA GOWNDEN.

That view clearly cannot be sustained. It was pointed out by the Full Bench of the Madras High Court in the case of *Gurusami Sastrial* v. *Ganapathia Pillai* (4), that the fact that subsequently to and in breach of his contract to sell, the vendor has sold the same land to third parties having notice of the contract, and that, if the relief is refused to the plaintiff, the land may remain in possession of such third parties, does not affect the question as to the propriety of the exercise by the Court of its discretionary power to enforce the contract. This view was also accepted as well founded in the case of *Baikantha Barik* v. *Shib Dass* (5). We, therefore, do not feel inclined to remand the case, as we might possibly have done, if the District Judge upon a consideration of all the circumstances of the case had refused to exercise the discretion vested in him under section 22 of the Specific Relief Act.

The result is that this appeal is allowed, the decree of the District Judge set aside and the suit dismissed, but, under the circumstances, without costs.

Appeal allowed.

(4) 5 M. 337.
(5) 2 C. L. J. 321.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 843 OF 1911.

January 25, 1912.

Present:—Mr. Justice Sundara Aiyar.

In re VELAPPA GOWNDEN—PLAINTIFF APPELLANT.

Hindu Law—Alienation—Widow—Future necessity—Suit based on succession and possession—Declaration to reversionary rights, whether can be granted—Discretion—Practice—Pleadings.

Where a Hindu widow's husband's brother challenges an alienation by her on the allegations that he succeeded to the property alienated by survivorship and was in possession of it, on both these allegations being found against him, he cannot be allowed to change his cause of action and ask that he may be given a declaratory decree to the effect that the alienation by the widow would not affect his reversionary interests in the property.

A Hindu widow has no right to sell her husband's property for a consideration to be received by her in future, unless there is any urgent necessity in the *near* future.

Second appeal against the decree of the District Court of Trichinopoly, in A. S. No. 173 of 1910, presented against that of the District Munsif of Karur in O. S. No. 1236 of 1908.

Mr. S *T Srinivasa Gopalachari*, for the Appellant.

This case coming on for orders as to admission the Court passed the following.

JUDGMENT.—The defendant took a sale-deed from the plaintiff's 2nd witness, who is the plantiff's brother's widow. The plaintiff alleges in his plaint that he and his deceased brother were undivided, and that, after the latter's death, he became the sole owner of the plaint property and was in possession, and that his brother's widow executed a sale-deed in favour of the defendant, purporting to treat the property as hers by right of inheritance from her husband. The plaintiff asked for a declaration that the sale in favour of the defendant would not affect his rights in the property. Both the Courts have found against the plaintiff both on the question of his right as survivor to succeed to the property on his brother's death and on the question of possession. They have held that the plaintiff and his brother were divided. On the question of the validity of the alienation, the Munsif found that Rs 1,000 was borrowed by the widow for defraying the expenses of her daughter's marriage and for the balance of Rs. 250, she received a hypothecation document from the vendee charging the lands sold. This was the case set up by the defendant himself. It is quite clear that the widow would have no right to sell her husband's property for a consideration to be received by her in future, when there is no allegation that there was any pressing necessity to provide for any expenses in the future in the interests of her husband's estate. It is not alleged in this case that Rs. 250 was wanted for any urgent necessity in the near future.

The alienation, therefore, cannot apparently be supported as one binding on the reversioner. But this question really did not arise in the case, for the right which the plaintiff wanted to be declared was a present right as owner of the property, he having obtained the sole title by survivorship on the death of his brother. In such a case, no question of the validity of the alienation with respect to its effect on the rights of reversioners arises. If the widow did not

succeed to the property as her husband's heir, then the alienation would be absolutely void as against the plaintiff, the present owner, and the character of the alienation would, in that case, also be equally unnecessary. The appellant's Counsel presses for a declaration that the alienation would not affect his reversionary rights. This, as already stated, was not the right which he sought to be declared in his plaint, and it is quite possible that the defendant, notwithstanding the framing of the third issue regarding the character of the alienation, might not have adduced all his evidence relating to that question, as he might have been advised that any finding on that issue would not affect the decree which the Court should pass in the case. And I do not think this is a case in which the Court should permit the plaintiff to vary the cause of action on which he came into Court and grant the discretionary relief of declaration. I have no doubt that the Court would be well advised not to exercise its discretion in such a case in favour of the plaintiff.

I would, therefore, dismiss the second appeal without pronouncing a decisive opinion on the third issue. I have already stated that I would not be prepared to accept the finding of the lower Appellate Court that the alienation is binding on the plaintiff. I dismiss the second appeal.

Appeal dismissed.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 427 OF 1911.
January 26, 1912.
Present:—Mr. Justice Banerji.
Musammat KOLPATI KUAR—PLAINTIFF—APPELLANT
versus
RAJDHARI LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage executed during pendency of suit in which mortgagar's title to the property is in question—Lis pendens—Res judicata.

A mortgage, executed during the pendency of a suit in which the mortgagor's title to the property is in question, is subject to the result of the suit. If the suit is decided against the mortgagor, any subsequent suit by the mortgagee on the basis of the mortgage would be barred as *res judicata*.

Second appeal from the decision of the District Judge of Ghazipur, dated the 14th day of September, 1911.

Mr. *Gobind Prashad*, for the Appellant.

Mr. *Haribans Sahai*, for the Respondent.

JUDGMENT.—This was a suit for sale upon a mortgage of the 21st of November 1894 executed by one *Musammat* Sahodra. It was brought against the nephews of her husband, she having in the meantime died. The defendants contested the claim on the ground that Sahodra had no interest in the property as her husband died as a member of a joint Hindu family and the property passed by right of survivorship to the other members.

The Court of first instance found that the family was joint and that, therefore, *Musammat* Sahodra had no right to make the mortgage and that the mortgage could not be enforced as against the property now in the hands of the defendants. That Court dismissed the suit. The decree of that Court has been affirmed by the lower Appellate Court on the ground that in a suit between Sahodra and Gaya Prasad, the ancestor of the defendants, it was held in 1895 that Gaya Prasad, father of Beni Prasad, and Ganga Prasad, husband of *Musammat* Sahodra, were joint at the time of Ganga Prasad's death, and that this judgment operates as *res judicata*. It is contended on behalf of the appellant that as the mortgage in her favour was executed before the date of the judgment and she was not a party to the litigation in which the judgment was passed it could not operate as *res judicata* as against her. It appears that *Musammat* Sahodra had applied to the Revenue Court for partition. In that case Gaya Prasad, the ancestor of the defendants, raised the objection that Sahodra had no interest in the property, the family being joint. The question whether the family was joint or separate was in issue in that case and this question was decided in favour of Sahodra by the Court of first instance, but an appeal was preferred to the District Judge from the decision of that Court. It was during the pendency of that appeal that the mortgage in favour of the plaintiff was executed. As the question of the mortgagor's title was then in litigation and the plaintiff took a mortgage from the mortgagor during the pendency of the litigation she took the mortgage subject to the result of that litigation. Under the rule of *lis pendens* the decision

in that case is binding on the plaintiff and the Court below is right in holding that it operates as *res judicata* upon the question of Sahodra's title. Of course, had the mortgage in favour of the plaintiff been executed before the institution of the partition-case, the judgment in the partition-case would not have been binding on the plaintiff, but, under the circumstances stated above, it is clearly binding. This is the only ground urged in appeal, and as it has no force I dismiss the appeal with costs including fees on the higher scale.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 269 OF 1910.

January 16, 1912.

Present:—Sir Henry Richards, KT., K.C., Chief Justice, and Mr. Justice Banerji.

ABHAI CHARAN CHAKRAWATI—DEFENDANT—APPELLANT

versus

KESHO DAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Agent and principal—Principal entitled to final account at the determination of agency—Accounts.

A principal is always entitled to have a final account taken between himself and his agent at the determination of the agency. If accounts have been taken from time to time and settled between the parties, the agent when rendering the final account will be entitled to rely upon those casual accounts and to urge that they ought to be accepted as being *prima facie* correct.

First appeal from the decision of the Subordinate Judge of Benares, dated 20th July 1910.

The Hon'ble Dr. *Sunder Lal* (with him the Hon'ble Mr. *Moti Lal Nehru*), for the Appellants.

Mr. *J. N. Choudhri* (with him Dr. *Satish Chandra Banerji*), for the Respondents.

JUDGMENT.—In our opinion, the decision of the learned Subordinate Judge was quite correct. It is perfectly clear that there never was a final account between the parties.

The principal is always entitled to have a final account taken between himself and his agent at the determination of the agency. If, from time to time, accounts have been taken and settled between the parties, the agent when rendering his final account will be entitled to rely upon those casual accounts and to urge that they ought to be accepted as being *prima facie* correct. But, in the present

case, it is perfectly clear that there never has been a final account between the parties. The decree of the learned Subordinate Judge was accordingly quite correct and we dismiss the appeal with costs, including in this Court fees on the higher scale.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 291 OF 1911.

January 19, 1912.

Present:—Sir Ralph Benson, Judge.

S. K. SANKA AIYAR—PETITIONER

versus

S. K. SUBBIAH IYER AND ANOTHER—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 164—Service of summons—Ignorance of proceedings—Limitation.

Article 164 of Schedule I of the Limitation Act (IX of 1908) applies only when the petitioner had knowledge of the decree in cases where summons was not duly served on him.

It does not apply where the defendant alleges that he was duly served but that he had no knowledge of any of the proceedings.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the order of the Subordinate Judge of Tinnevelly, dated the 12th July 1910, in M. P. No. 347 of 1910 in S. C. S. No. 69 of 1909.

JUDGMENT.—The Article applicable is Article 164 of the 1st Schedule of the new Limitation Act (IX of 1908), and the time is 30 days from the date when the petitioner had knowledge of the decree in the cases where the summons was not duly served. In this case, the defendant alleged in his affidavit that he was duly served and that he had no knowledge of any of the proceedings. If that was true, there was no bar. The Subordinate Judge should have decided the plea before dismissing the application. He did not do so.

His order is set aside, and he is directed to restore the petition to his file, and dispose of that according to law. The petitioner's costs will abide the event.

Order reversed.

JAINATH PATHAK *v.* KALKA UPADHYA.

ALLAHABAD HIGH COURT.
FULL BENCH

SECOND CIVIL APPEAL No. 191 OF 1911.
January 23, 1912.

Present:—Sir Henry Richards, KT., K. C., Chief Justice, Mr. Justice Tudball and Mr. Justice Chamier.

JAINATH PATHAK AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KALKA UPADHYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), *s.* 9—*Entry of name as fixed-rate tenant—Presumption as to nature of tenancy and not as to title to the tenancy—Conclusive proof.*

The entry as to fixed-rate tenancy mentioned in section 9 of the Agra Tenacy Act is conclusive proof as to the nature of the Tenancy only and not as to the title to the tenancy.

Mulai Singh v. *Rnjwant Singh* A. W. N. (1906), 68; 3 A. L. J. 842, referred to.

Second appeal from the decision of the Additional Judge of Jaunpur, dated the 10th December 1910.

Mr. *Durga Charan Banerji*, for the Appellants.

The Hon'ble Nawab *Abdul Majid*, for the Respondents.

JUDGMENT.—The facts, which must be assumed for the purposes of this appeal, are very clearly set forth in the order of reference of the learned Judges. The short point for our decision is whether or not a person who was recorded in the manner stated must be deemed to have all the estate in the fixed-rate tenancy vested in him or her alone, irrespective of the rights of all other persons who under the ordinary law would be entitled to the tenancy, but for the fact that such a person is so recorded. The defendants, who are the transferees of *Musammat* Rupao, rely on the provisions of section 9 of the Agra Tenancy Act. That section is as follows:—"Every entry at the last revision of records before the commencement of this Act recording a person as a permanent tenure-holder, or a fixed-rate tenant, or otherwise shall, in the absence of a judicial decision to the contrary in proceedings instituted before the commencement of this Act, be conclusive proof that such person is a permanent tenure-holder, or a fixed-rate tenant, or not, as the case may be."

The section is certainly unfortunately worded and *prima facie* the language of it is in favour of the defendants' contention, *viz.*, that *Musammat* Rupao must be deemed, having regard to the words of the Act, as having had the entire estate in the fixed-rate tenancy and that their title as her transferees is complete. This view met with favour by the learned Judges who decided the case of *Mulai Singh* v. *Rawant Singh* (1). They say, "in our opinion, the language of the section is clear and imperative."

Prior to the passing of this Act, there had been some what similar provisions in Act X of 1598, (sections 3, 4 and 7) and Act XII of 1881 (sections 4, 5 and 6). Under those Acts it was the duty of the Court to inquire as to the nature of a tenancy which had been held at a fixed-rate for certain periods, and certain presumptions in favour of the tenants were provided. Those sections were all intended to meet the case of disputes between the *zemindar* and his tenant as to the nature of the tenancy. Before the passing of the Agra Tenancy Act of 1901, at the time of revision of records, inquiries were held as to the nature of these tenancies, but these again were inquiries between the *zemindar* and the tenant and did not touch upon the title to the tenancy itself. It is admitted that fixed-rate tenancies, unlike occupancy-tenancies, are heritable and transferable. Section 20 expressly so provides. Fixed-rate tenancies devolve on the death of the fixed-rate tenant according to the ordinary law. If the contention of the defendants be sound, namely, that by virtue of section 9 the entry is conclusive not only between landlord and tenant but also between all persons claiming the tenancy, then it follows that if the managing member of a joint and undivided family was recorded as the fixed-rate tenant, the tenancy at his death would not devolve upon the surviving members of the joint family but would go to the heirs of the member of the family (who happened to be recorded) as if the family were separate. Again, if the widow or a daughter succeeded to a fixed-rate tenancy on the death of a fixed-rate tenant, who was a Hindu, the tenancy on the death of the widow or daughter would go to the heirs of the widow or daughter and not to the heirs of the last male holder.

It seems to us quite clear that this could not have been intended. A learned Judge of this Court, in Second Appeal No. 26 of 1906,

(1) A. W. N. (1906) 68; 3 A. L. J. 842.

held that section 9 did not apply to questions as to the title to the fixed-rate tenancy. The same view was taken by the Board of Revenue in a case reported in *Gajadhar Dasaundi* v. *Gokul Dasaundhi* (2). In our opinion, the decision of the Court below was not correct. The entry mentioned in section 9 is conclusive proof only as to the nature of the tenancy. The case, however, was decided on the preliminary point and the general merits of the case were not gone into by the lower Appellate Court. We accordingly allow the appeal, set aside the decree of the lower Appellate Court, and remand the case with directions that the same may be re-admitted and the learned Judge do proceed to hear and determine the same according to law.

Costs in this Court will be costs in the cause. Costs in this Court will include fees on the higher scale.

Appeal allowed.

(2) Select Decision No. 2 of 1909.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No 284 OF 1911.

January 25, 1912.

Present:—Mr. Justice Benerji.

Musammat MAGHLI—DEFENDANT—APPELLANT

versus

Musammat LADLI—PLAINTIFF—RESPONDENT.

Hindu law—Possession of property by a female of a joint Hindu family not entitled to the property—Adverse possession—Stridhan—Inheritance.

S. and R. were two brothers living in a joint Hindu family. *R.* died before *S.* leaving a widow *Musammat* Larai. *S.* died a fortnight afterwards. Larai, the widow of R., got possession of the property as against the mother of *S.* and remained in such possession for over twelve years:

Held, that the possession of *Musammat* Larai was adverse to the rightful owner and that the property became her *stridhan*.

Kashi Ram v. *Musammat Amri* 32 A. 189; 7 A. L. J. 153; 5 Ind. Cas. 207. referred to.

On Larai's death it devolved upon her heir as *stridhan*.

Ganeshi Lal v. *Ajodhia Prasad*, 28 A. 345; A. W. N. (1906) 39; 3 A. L. J. 85, referred to.

Second appeal from the decision of the District Judge of Jhansi, dated 23rd December 1910.

Mr. *Homilton* for the Appellant.

Mr. *Durga Charan Banerji*, for the Respondent.

JUDGMENT.—This was a suit for possession of a 4-pie share out of 8 pies, and for a declaration that the defendant had no title to the said share. The property originally belonged to two brothers Ram Nath and Sham Nath. Ram Nath died in 1884, and it has been found that his brother Sham Nath died a fortnight afterwards. The property came into the possession of *Musammat* Larai, the widow of Ram Nath, and she continued in possession until her death on the 20th of June 1904. The defendant-appellant is the widow of Ram Nath's uncle. The plaintiff is Ram Nath's mother. Upon the death of Larai half of the property was recorded in the name of the plaintiff and the other half in the name of the defendant. It is this half share which the plaintiff claims in the present suit. She states that upon the death of *Musammat* Larai she, as the mother of Ram Nath became entitled to the property. It is manifest that the defendant has no title. But she contends that the plaintiff has no right to the property claimed, as *Musammat* Larai was in adverse proprietary possession for more that 12 years. It is true that upon the death of Sham Nath the person entitled to the property, there being no nearer heirs, was his mother, the present plaintiff, but she did not obtain possession and *Musammat* Larai, who had no title to the property, remained in possession for upwards of 12 years. This possession was adverse to the plaintiff, the rightful owner. Larai thus acquired an indefeasible title to the property by reason of her adverse possession and it became her *Stridhan*. This was so held in *Kashi Ram* v. *Musammat Amri* (1). The property having become her *stridhan* it descended on her death as *stridhan* property to the person who was the heir to such properties. There can be no doubt that in the absence of nearer heirs her husband's heirs were her heirs to the property. The presumption is that she was married in the Brahma form and as it is not suggested that she left any other heirs who would be nearer to the heirs of her husband it passed to her husband's heirs. [See Golab Chandra Sarkar's Hindu Law, III Edition, p. 461; Trevelyan's Hindu Law of Inheritance, p. 93; *Ganeshi Lal* v. *Ajodhia Prasad* (2)]. The

(1) 32 A. 189; 7 A. L. J. 153; 5 Ind. Cas. 207.

(2) 28 A. 345; A. W. N, (1906) 39; 3 A. L. J. 85.

plaintiff as the mother of Ram Nath is Ram Nath's heir, there being no nearer heirs. Therefore, upon the death of *Musammat* Larai she became entitled to the property. There was no inconsistency between the title which, in my opinion, she has to the property and the title set up by her in the plaint. She claimed in the plaint a right to the property as the heir of Ram Nath. It is in her capacity as heir of Ram Nath that she is entitled to the property upon the death of *Musammat* Larai whose *stridhan* the property in question became by reason of her adverse possession. The decrees of the Courts below are, therefore, right and this appeal must fail. I dimiss it with costs including fees on the higher scale.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 108 OF 1911.

January 23, 1912.

Present:—Sir Henry Richards, KT., K.C., Chief Justice, and Mr. Justice Tudball.

SAT NARAIN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BADRI NATH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Pre-emption—Vendee selling the property to another person prior to suit—Suit against the first vendee alone—Second vendee made party to the suit beyond one year after the first sale but within one year after second sale—Limitation Act (IX of 1908), Sch. I, Art. 10.

A. sold his share in a village to *B.* on 16th November 1909. *B.* re-sold the property to *C.* on the 14th of November 1910 and got the sale-deed registered on the 21st of November 1910. *D.* sued *B.* for pre-emption on the 15th of November 1910. *C.* was made a party to the suit in February 1911:

Held, that the suit was not barred by limitation.

First appeal from the order of the Additional District Judge of Gorakhpur, dated 30th June 1911.

Dr. *Tej Bahadur Sapru*, for the Appellants.

Mr. *Iswar Saran*, for the Respondents.

JUDGMENT.—Two points are raised in this appeal. *Firstly*, that the evidence adduced in the Court below was not sufficient to prove the custom, and *secondly*, that the suit is barred by limitation against the defendants-appellants. The sale took place on the 16th of November 1909. The original vendees re-sold the property to the appellants on the 14th of November 1910. The suit was instituted on the 15th of November 1910, but the present appellants were not impleaded as defendants until February 1911. The sale-deed of the 14th of November 1910 was not registered until the 21st of November 1910. It thus would appear that the present appellants were no parties to the suit until after the expiry of one year from the date of the original sale. The plaintiff is admittedly a co-sharer with the original vendor, he is also an own brother. The original vendees were strangers. The second set of vendees who are appellants here, are co-sharers but not relations. The evidence in support of custom consists of the *Wajib-ul-arz* of 1833, and that of 1860. According to the custom, as worded in the *Wajib-ul-arz* of 1833, there was a right of pre-emption to a co-sharer in the case of a sale to a stranger. According to the record in the *Wajib-ul-arz* of 1860 there is a right of pre-emption first to an own relation, who is a co-sharer, and then to the co-sharer against the strangers. The Court below has found that the custom exists and that the plaintiff as a co-sharer, who is a relation, has a right against the defendants-appellants who are co-sharers, but not relations. We do not feel ourselves in the position to say that this finding was not justified. The custom which the plaintiff is putting forward was a very usual custom, *viz.*, the custom of a co-sharer, who is a relation, having a right of pre-emption against the co-sharer who is not a relation. So far as the finding of the Court below is a finding of fact it is binding on us in second appeal. With regard to the second point, *viz.*, of limitation, we think on the facts that the suit is not barred.* It was the sale of the 16th of November 1909 which gave the plaintiff his cause of action. He could not prevent the original vendees from re-selling the property, but these vendees must be taken to have bought the property subject to the plaintiffs' right to pre-empt. They, of course, were necessary parties in this sense that unless they were made parties they would not be bound by a decree against their vendors, the original

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*The Punjab Chief Court has held differently in *Narain Singh* v. *Hayat*, 25 P. R. 1903; 74 P. L. R. 1903 and *Shah Muhammad* v. *Piaramal*, 84 P. R. 1911; 13 Ind. Cas. 792 *infra*. But the view of the Chief Court is apparently unsound.—*Ed.*

vendees. We have already pointed out that the sale to the appellants was not made until the 14th of November 1910, and that the sale-deed had not been registered when the present suit was instituted. In our opinion, the appeal fails and ought to be dismissed. We accordingly dismiss the appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 118 OF 1909.

January 13, 1912.

Present:—Sir Henry Richards, KT., K. C., Chief Justice, and Mr. Justice Banerji.

OUDH BIHARI PANDE AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

MAHADEO SAHI AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 1—Review—Inconsistent judgment in the same case—Error apparent on the face of the record.

Where in the same case the High Court by mistake gave two inconsistent judgments, one before and one after remand, the error was held to be apparent on the face of the record and was corrected on review.

Application for review of the judgment of the High Court, dated the 31st of May 1909, in Execution Second Appeal No. 118 of 1909.

FACTS.—A mortgage decree for sale was passed in favour of Mahadeo Sahi, Lallu Sahi and Bachai Sahi in 1899. At the date of the decree Mahadeo Sahi alone was major, the other two were minors. The interest of each of the decree-holders was separately specified in the decree. Mahadeo Sahi made an application for execution of the decree on his own behalf as well as on behalf of the minor decree-holders. The judgment-debtors made an objection that the application was barred by time. The Court of first instance as well as the lower Appellate Court overruled the objection of the judgment-debtors. In second appeal the High Court held on 1st of May 1907, that the application was not barred by limitation so far as the minor decree-holders were concerned; as against Mahadeo Sahi, however, the Court held that it would be so barred unless he could establish certain payments which he alleged to have been made by the judgment-debtors in part satisfaction of the decree. The case was sent back to the Court below to be disposed of accordingly. The Courts below thereafter held that the payments alleged by Mahadeo Sahi had been made and the application was not barred by time. The judgment-debtors again preferred a second appeal to the High Court. On 31st of May 1909, the High Court upset the decision of the lower Courts, and overlooking its judgment of the 1st of May 1907 decided that the application for execution was barred by limitation as against all the decree-holders. Lallu Sahi, one of the minor decree-holders, after having attained majority on 8th of February 1911, made an application for review of the judgment of the High Court, dated 31st May 1909, on the ground that it was apparently inconsistent with the decision of the Court, dated 1st May 1907, and ought to be amended.

Mr. *Parmeshwor Dyal*, for the Appellants.

Mr. *Surendra Nath Sen*, for the Opposite Party.

JUDGMENT.—The facts connected with this application for a review of judgment were shortly as follows. An application was made by one Mahadeo on behalf of himself and certain minors for execution of a certain decree which awarded separate amounts to the different decree-holders. This Court by a judgment, dated the 1st of May 1907, decided that the decree was time-barred against Mahadeo unless he could establish certain alleged payments but that the decree was not barred against the minors. The case was accordingly remanded. The lower Courts held that the payments had been established and that the execution was not barred against Mahadeo. The matter came up before this Court and judgment was delivered on the 31st of May 1909. In that judgment the fact was overlooked that Mahadeo had applied for execution not only for himself but also for the minors. The minors were not separately represented and the Court in error dismissed the application for execution as a whole, which had the effect of dismissing the application in so far as it was an application on behalf of the minors as well as Mahadeo. This is clearly an error apparent on the face of the record. The previous judgment of this Court had decided that the application was not barred so far as the

minors were concerned. We, therefore, allow the application for review of judgment and now set aside so much of the judgment of the 31st of May 1909 as directs that the application for execution should be dismissed, and in lieu thereof direct that the application be dismissed in so far as it is an application on behalf of Mahadeo himself and also so much of it as awards costs against the minors. In all other respects, the decree will stand good. We make no order as to the costs of this hearing.

Application allowed.

PUNJAB CHIEF COURT.

CIVIL REVISION No. 100 OF 1910.

February 5, 1912.

Present:—Mr. Justice Rattigan.

DEO RAJ AND ANOTHERS—PLAINTIFF—PETITIONERS

versus

GOVIND PARSHAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Mortgage by vendee after sale—Pre-emptor not bound by mortgage—Parties—Mortgagee not a necessary party in pre-emption suit—Mortgagee bound by decree against vendee.

A pre-emptor is not bound to pay anything more than the amount which is fixed in a pre-emption decree as the price at which the sale took place.

A pre-emptor is not bound by a mortgage effected by the original vendee after the sale. The mortgagee in such a case must look to his mortgagor alone.

Bogha Singh v. *Gurmukh Singh*, 93 P. R. 1902, followed.

Such a mortgagee is not a necessary party in a suit for pre-emption. As he holds the property under the vendee, he is bound by a decree for pre-emption passed against the vendee.

Petition, under section 70 (1) (*a*) and (*b*) of Act XVIII of 1884, as amended by Act XXV of 1899, for revision of the order of the Divisional Judge, Ambala Division, dated the 7th June 1909, affirming that of the Additional District Judge, Ludhiana, dated the 20th January 1909, decreeing plaintiffs' claim.

Pandit *Ram Bhaj Datta*, for the Petitioner.

The Hon'ble Mr. *Shadi Lal*, for the Respondents.

JUDGMENT.—After hearing somewhat lengthy arguments upon the questions involved in this case, I do not feel called upon to interfere.

It appears that after a sale of certain property in favour of one Ghoka, the latter effected a mortgage on the property. Subsequently, defendants sued Ghoka for pre-emption and succeeded in obtaining a decree against him. The mortgagees were no parties to that suit.

The pre-emptor applied for execution of the decree and was met by an objection on the part of the mortgagees to the effect that they were in possession and could not be ousted. The Court executing the decree held that the mortgagees were not in possession and overruled their objections. They accordingly sue for possession of the property as mortgagees and assert that they were in possession and were wrongfully ejected. Defendants denied that plaintiffs were ever in possession. No issue was framed upon this point, but if plaintiffs thought it important for their case to establish the fact, they should have adduced evidence in support of their allegations. As it is, there is nothing to show that the finding of the Court in execution proceedings is incorrect. But I do not think I need waste time upon that point. At utmost, the plaintiffs are mere mortgagees and it is, I think, well established that a pre-emptor is not bound to pay anything more than the amount which is fixed in the pre-emption decree, as the price at which the sale took place. *Bogha Singh* v. *Gurmukh Singh* (1) is authority for holding that he is not bound by a mortgage effected by the original vendee after the sale, and that the mortgagee in such a case must look to his mortgagor.

In the present case the defendants have deposited the decretal money into Court and if plaintiffs have a just claim against Ghoka they can (if so advised) enforce that claim against him. But I cannot see that defendants are to be kept out of the property simply because Ghoka, after the sale to him, chose to burden it with a heavy incumbrance.

It is said that the mortgagees should have been made parties to the pre-emption suit, but I cannot agree that they were necessary parties. The only necessary party in the present case, so far as the pre-emptor was concerned, was the owner for the time being of that property (that is to say, the vendee). I cannot see how a person who

(1) 93 P. R. 1902.

In re KRISHNASAWMI DOSS.

was admittedly holding the property as a mortgagee under the vendee and who would, therefore, be bound by any decree for pre-emption passed against the vendee, could claim to be made a party. No such mortgagee could plead independently that plaintiff had no right of pre-emption and the utmost that he could claim would be recognition of his own limited rights. But with these rights created by the vendee after the pre-emptor's cause of action had accrued, the pre-emptor was not concerned and they were enforceable against the original vendee alone.

Mr. Ram Bhaj Dutt wished me to re-open the question whether the whole of the property, in the alleged possession of plaintiffs, was covered by the sale-deeds but I declined to go into that question as both Courts are agreed in their findings. I must accordingly reject this petition with costs.

Petition rejected.

MADRAS HIGH COURT.

SECOND CIVIL No. 937 OF 1911.

January 25, 1912.

Present:—Mr. Justice Sundara Aiyar.

In re KRISHNASAWMI DOSS—

APPELLANT.

Hindu Law—Alienation—Manager's power to sell family propery for purchasing other property—Necessity—Propriety and reasonableness of sale—What the issue should be—Burden of proof—What the alienee must show.

A Hindu father or manager is competent to sell the joint family lands for the purpose of purchasing other lands if the sale does not injuriously affect the interests of the other members of the family.

The issue in such cases should be "whether the sale was a *proper* and *reasonable* act," instead of "whether the sale was for actual *necessity*."

If a sale is positively beneficial to the family, it may be supported as against the other members of the family who are not entitled to have it set aside on mere sentimental considerations. But the *propriety* and *reasonableness* would be judged without ignoring the fact that the alienation is an absolute sale of family property.

Where necessity is not established it would lie on the alienee to show that, for some reason other than necessity, the alienation was beyond doubt, or a reasonable one not affecting the interests of the other members in any way.

No hard and fast rule can be laid down for determining the propriety and reasonableness of such a sale of ancestral immoveable property but it must be shown, *inter alia*,—

(*i*) that the new lands are at least not inferior in quality and value to the old lands;

(*ii*) that though the new lands are not superior in value to the old lands, the family would otherwise gain by the change;

(*iii*) that the family would not lose by parting with ancestral lands and purchasing new lands.

Second appeal against the decree of the District Court of Chingleput, in A. S. No. 111 of 1909, presented against the decree of the District Munsif of Chingleput, in O. S. No. 263 of 1907.

Mr *T. Rangachariar*, for the Appellant.

This case coming on for orders as to admission, the Court delivered the following.

JUDGMENT.—I am of opinion that there is no ground for interference in second appeal. The plaintiffs purchased certain lands from the 2nd defendant, one of the two members of an undivided family consisting of the 2nd defendant and his father, the 1st defendant. Before the sale to the plaintiff, the father had sold the lands to the 3rd defendant. The plaintiffs sued to enforce his sale of the son's half share and contended that the sale to the 3rd defendant by the father was not binding on the son. The son did not appear. The question decided by both Courts was, whether the previous sale by the father to the 3rd defendant was binding on the son, in which case the sale in favour of plaintiff could not be given effect to.

Both Courts have held that the sale is not binding on the son. The allegation of the 1st defendant, the father, in his written statement, was that, being old, he found it difficult to cultivate the lands and sustained loss in consequence, and that he sold them to meet family debts and to pay up some antecedent debts. His written statement itself is not before me, but what I have stated above appears from the summary in pargraph 6 of the judgment of the Munsif. It is not stated that there are any further material allegations in it. The 3rd defendant, the vendee from the father, alleged that the sale was effected for justifiable purposes and for meeting family necessity. The material issue relating to this question was in these terms:—"Whether the sale-deed, relied on by the 3rd defendant, is true and whether it would defeat the plaintiff's claim . . . ." The facts found are that a portion of the purchase-money was used for paying up certain debts and the remainder was invested in the purchase of certain

lands situate in the village where the 1st defendant's son-in-law was living, and, it is stated, that the 1st defendant hoped that this would make the management of his property easier. The Munsif held that a Hindu father has no right to sell ancestral lands for buying other lands, even supposing that the lands so bought were of equal value with those sold away and even though a Court might hold that the sale was, from a pecuniary point of view, beneficial to the family. The District Judge is also of opinion that the sale in this case would not come within the rule which justifies alienations for necessity. He seems to distinguish the case of an exchange from one in which family land is sold for buying other land. I find it difficult to agree in the view that there is any distinction between the two classes of cases. He observes that it is not proved that the lands newly purchased were of equal value with those sold away. It is strongly contended that a father would be entitled to sell family land, if the object of doing so is to purchase other land which would not injuriously affect the interests of the other members of the family and might be more convenient for purposes of management. It may be that the rule relating to the powers of a father or other manager of a Hindu family to alienate immoveable property belonging to it has sometimes been enunciated in too strict terms. Expressions are to be found in reported cases that there must be actual *necessity*. It may be that if a sale is positively beneficial to the family, it may be supported as against the other members of the family, and that mere sentimental considerations against the alienation of ancestral property may not entitle them to set aside a sale. And it may be that the question would be more aptly expressed by putting it in the form whether the sale was a *proper* and *reasonable* act, instead of "whether it was necessary." The propriety and reasonableness would, of course, be judged without ignoring the fact that the alienation is an absolute sale of family property. But where no necessity is established, it would lie on the alienee to show that, for some reason other than necessity, the alienation was, beyond doubt, a reasonable one not affecting the interests of the other members in any way. It must certainly be shown that the family would not lose by parting with ancestral lands and purchasing new lands. This would necessitate the giving of evidence to show that the new lands are at least not inferior in quality and value to the old lands. It may be open to the alienee to establish reasonableness by showing that, though the new lands are not superior in value to the old lands, the family would otherwise gain by the change. I should be unwilling to lay down any hard and fast rule and the reasonableness and validity of a sale of ancestral immoveable property should be determined by the Courts.

In this case, as already observed, neither the first nor the 3rd defendant pleaded any consideration which would induce the Court to support a sale, and no issue was framed to try any such question. Some evidence, it is stated, was adduced to show that the lands newly purchased were as valuable as those sold away. I am by no means sure that this circumstance would, by itself, be sufficient to support the sale. But it has to be remembered that no issue was framed to try that question, and I cannot assume that the plaintiff either adduced *all* his evidence on the question or would have felt bound to do so, having regard to the pleadings and the frame of the issues.

I must, therefore, hold that the judgment of the lower Appellate Court is right and dismiss this second appeal.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 731 OF 1910.

January 19, 1912.

Present:—Mr. Justice Sundara Aiyar.

AKILANDAM PILLAI—PETITIONER

versus

CHINNASAWMI MOOPAN—RESPONDENT.

Civil Procedure Code (Act V of 1908), *s.* 11—Resjudicata—*Suit on a loan—Plea of discharge by plaintiff in a previous suit against him by defendant—Bar—Non-production of pleadings in previous suit to prove* resjudicata.

This is a suit for money and articles alleged to have been advanced to defendant as a loan by plaintiff. In a previous suit by defendant against plaintiff for *waram* due to the former, the present plaintiff pleaded that he deducted the *waram* from out of the present loan. As plaintiff's witnesses did not appear, that suit was decided against him. Without causing the pleadings or judgment in that suit to be pro-

KARAM CHAND *v.* SULTAN.

duced, the lower Court dismissed the present claim of plaintiff as barred by the operation of the rule of *res judicata* :

Held, in remanding the suit for fresh disposal, (1) that if the present plaintiff's plea in the previous suit was one of discharge, the claim was not *res judicata* ;

(2) that the lower Court should not have decided the question of *res judicata* without an examination of the pleadings and the judgment in the previous suit.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the District Munsif of Sivaganga, dated 19th July 1910, in S. C. S. No. 497 of 1910.

Mr. *T. V. Muttukrishna Iyer*, for the Petitioner.

Mr. *P. R. Narayansawmi Iyer*, for the Respondent.

JUDGMENT.—The judgment of the lower Court cannot be upheld. The plaintiff alleges in his plaint that he advanced certain articles and money to the defendant, his tenant, the total value of the same being Rs. 34-7-0, and that the defendant had agreed to pay this amount out of his share of the *waram* for the land. He also alleges that, as a matter of fact, he received the amount of this loan less a sum of Rs. 9-11-0 out of the defendant's share of the *waram*. The plaintiff states that the defendant sued the plaintiff in Small Cause Suit No. 184 of 1910 for the full amount of the *waram* due to him and that the plaintiff set up a plea of discharge, but the plea was disallowed, as his witnesses did not attend on the day of hearing of Small Cause Suit No. 184 of 1910. The present action is for the return of the loan advanced to the defendant. The defendant pleaded that the plaintiff contested his claim in Small Cause Suit No. 184 of 1910 and that a decree was passed in the defendant's favour and that the present claim was, therefore, *res judicata*. The District Munsif upheld the defence. He observes:—"In Small Cause Suit No. 184 of 1910 brought by the defendant against the plaintiff, plaintiff pleaded that the amount now claimed should be deducted, but that suit was decreed against him, as he did not appear and prove his plea. The present claim is consequently barred by the rule as to *res judicata*."

It is not clear from the Munsif's judgment whether he understood the plea of the present plaintiff in the defendant's previous suit as one of discharge or set-off. If, as alleged by the plaintiff, it was one of discharge, then the disallowance of the plea would not be a bar to the plaintiff's suit to recover the loan advanced by him. The written statement of the present plaintiff in the previous suit has not been put in, nor even the judgment in that suit. I cannot but express my regret that the District Munsif should have proceeded to decide the case on the plea of *res judicata* without causing the pleadings and the judgment in the previous suit to be put in. If the judgment in the previous suit decided, as a matter necessary for the dispoal of that suit, that the plaintiff advanced no loan to the defendant, then, no doubt, the present suit would be barred. But it is impossible to hold, on the materials before me, that that question was decided. I set aside the decree of the District Munsif and remand the suit to him with the direction that it be restored to the file and disposed of according to law.

I do not dispose fully of the question of *res judicata*. It would be open to the defendant to prove it, producing the necessary documents.

Costs of this petition will abide the result.

Order reversed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 48 OF 1911.

Februry 3, 1912.

Present:—Mr. Justice Chevis.

KARAM CHAND AND OTHERS—DEFENDANTS—APPELLANTS

versus

SULTAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Redemption-suit—Suit to redeem one particular mortgage—Decree for redemption of later mortgage—Cause of action different—Prayer for "any other relief"—Construction of document—Entry settling accounts and recording amount due under mortgage.

In a suit for redemption it is imperative that plaintiff should say, in the event of there being more mortgages than one, which mortgage he is seeking to redeem.

When a plaintiff sues to redeem a certain mortgage, that particular mortgage is his cause of action, and to shift the attack to a later mortgage is to change the suit into one based on a differnt cause of action.

PITCHUVIER *v.* PERUMAL KONAN.

A prayer "for any other relief" may well cover any other relief arising out of the same cause of action, but does not cover a relief arising from a different cause of action.

An entry relating to a mortgage already existing, in which accounts are settled and a sum is entered in the amount due under the mortgage, does not constitute a new mortgage.

Appeal from the order of the Divisional Judge, Shahpur Division, dated the 15th November 1910, confirming that of the Munsif, 1st Class, Chiniot, District Jhang, dated 30th April 1910, decreeing claim.

Mr. *Nanak Chand*, for the Appellants.

Mr. *Duni Chand*, for the Respondents.

JUDGMENT.—Plaintiffs sued to redeem a mortgage effected by Sarang in favour of Chanan etc. It is clear that there was such a mortgage, and it is also clear that any suit to redeem that mortgage is long time-barred. But the lower Courts have decreed plaintiffs' claim, holding that there was a fresh mortgage by Ahmad in favour of Dulo on 25th *Sawan* 1906. Now plaintiffs never amended their plaint, so I fail to see how in this suit they can be allowed to redeem the latter mortgage. Counsel for respondents urges that no amendment was needed, that it is merely a matter of misdescription, the wrong details being given in the plaint by ignorance, and the right facts only coming to light during the trial of the suit. Counsel also urges that the words "or any other relief" cover the point. I cannot agree. In a suit for redemption it seems to me imperative that plaintiffs should say, in the event of there being more mortgages, than one, which mortgage they are seeking to redeem. The prayer for "any other relief" may well cover any other relief arising out of the same cause of action, but when a plaintiff sues to redeem a certain mortgage that particular mortgage is his cause of action and to shift the attack to a later mortgage is to change the suit into one based on a different cause of action. Had there been no mortgage by Sarang I might take it that the mortgage of 1906 was really the mortgage sued on, but there actually was an earlier mortgage by Sawan, so we cannot regard the case as one in which the only flaw is that the wrong names and dates have been given by mistake in the plaint.

Plaintiffs are on the horns of a dilemma. If there was only one mortgage it is the original mortgage by Sawan, and any suit to redeem it is time-barred. If there was a new mortgage in *Sambat* 1906 plaintiffs have sued on the wrong mortgage. And, unluckily for them, it is now too late to bring a fresh suit with regard to the new mortgage of *Sambat* 1906.

As a matter of fact, I do not feel that this is really a hard case for the plaintiffs. The only evidence as to a new mortgage in *Sambat* 1906 is the entry in the *bahi* of 25th *Sawan* 1906 and the statement of Dulo as a witness in the former suit in 1856, A. D., and having read both of these I am strongly of opinion that all that happened in *Sambat* 1906 was that the accounts were settled and Rs. 315-10 was then entered as the amount due under the mortgage. Dulo, no doubt, called the entry a *girvinama* at the end of his statement, but a perusal of his whole statement leaves not the least doubt in my mind that he never meant to say a formal mortgage-deed was written but that he only meant to say an entry relating to the mortgage, already existing, was made. Counsel for respondents has also urged that the entry as an acknowledgment gave rise to a fresh period of limitation, but it was not signed by the mortgagee; so this cannot renew the period of limitation.

I accept this application and, reversing the decree of the lower Courts, I dismiss the suit with costs in all Courts.

In conclusion, I note that Counsel for respondents has argued that the objections taken in this Court were not raised in the grounds of appeal to the Divisional Court, but they were clearly taken in argument in that Court, and the ground of appeal, which urges that the suit is time-barred, covers the point.

Application accepted.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 280 OF 1909.

January 16, 1912.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

PITCHUVIER AND OTHERS—APPELLANTS

versus

PERUMAL KONAN AND OTHERS—RESPONDENTS.

Land Acquisition Act (I of 1894), ss. 30, 31 (2)—

PITCHUVIER *v.* PERUMAL KONAN.

Reference to District Judge—Order passed by District Judge with consent of parties—Time given to one party to institute suit for determination of right to compensation-money within a fixed period—Suit instituted within fixed time but withdrawn—Compliance with condition as to time—Jurisdiction of Court other than that of District Judge to determine right to compensation-money under the circumstances.

On a reference to the District Judge under section 30 of the Land Acquisition Act, by consent of parties the Judge passed an order for payment of compensation-money to one of them after four months, if, in the meantime, the other party did not institute a suit to establish his right to the money. The other party did institute a suit within four months, but it was withdrawn on objection as to non-joinder with leave to institute a fresh suit and then the present suit was instituted in proper form:

Held, (1) that the condition in the Judge's order was complied with on the institution of the first suit; (2) that as the District Judge's order was passed by consent of parties, the Munsif had jurisdiction to entertain the suit for the determination of the right to money awarded as compensation under the Land Acquisition Act.

Narasimha Row v. *Rama Row*, 5 M. L. J. 79, referred to.

Harish Chundar Chatterji v. *Bhoba Tarini Debi*, 8 C. W. N. 321 and *Bhandi Singh* v. *Ramadin Rai*, 2 C. L. J. 359, explained.

Appeal against the order of the temporay Subordinate Judge of Madura, in A. S. No. 377 of 1907, preferred against the decree of the District Munsif of Manamadura, in O. S. No. 14 of 1905.

Mr. *C. V. Anantakrishana Iyer*, for the Appellant.

Mr. *K. Sirinivasa Iyengar*, for the Respondents.

JUDGMENT.—A reference was made under section 30 of the Land Acquisition Act by the Collector for the determination of the apportionment of the compensation, awarded by him, between the *Mahajans* and the *ryots* of the village in which the acquired land was situate. While the investigation before the Judge was going on, the parties arrived at an understanding that the money should be paid to the *Mahajans* after the expiration of four months, if within that time four of the *ryots* did not file a regular suit to establish their right to any portion of the money. The four *ryots* did file a suit for the purpose in the Munsit's Court within the four months, but the defendants the *Mahajans* attempted to defeat that suit by raising a technical objection that all the *ryots* should have instituted the suit. The suit was consequently withdrawn, with leave to sue again, and the present suit was launched, making all the *ryots* parties. It is now contended that, as the present suit was commenced after the expiration of four months, it cannot by maintained. We agree with the lower Appellate Court that the condition mentioned in the District Court's order was complied with when the four *ryots*, referred to therein, filed the first suit. That was the suit contemplated by the parties and the present suit was necessitated by the technical objection of non-joinder raised by the defendants.

The only other point raised is, that the District Court alone has jurisdiction to decide the question of apportionment of compensation-money except in the case referred to in section 31 (2) of the Land Acquisition Act and the Munsif's Court had, therefore, no jurisdiction to entertain the suit. The District Court's order was passed by consent and no proceedings were taken by either party to impeach it as was done in *Harish Chandra Chatterji* v. *Bhoba Tarini Debi* (1). We are of opinion that the defendants cannot attack it collaterally in defence to this suit. The District Judge's order cannot be regarded as so utterly void as to permit them to do so. The Munsif's Court is not wanting in inherent jurisdiction to try a suit for the determination of the right to money awarded as compensation under the Land Acquisition Act. Both parties having consented to the Judge's order, which was in fact suggested by the defendants, they must be regarded as estopped from questioning the District Munsif's jurisdiction: See *Narasimha Row* v. *Rama Row* (2).

The case relied on by the appellants, *Bhandi Singh* v. *Ramadhin Rai* (3), is not in point as the order of the District Judge there was not one passed by consent.

The Court merely held that the proper course to be pursued by an aggrieved party in such a case was to have it set aside by a superior Court and not to institute a fresh suit. The order appealed against is right. We dismiss this appeal with costs.

Appeal dismissed.

(1) 8 C. W. N. 321.
(2) 5 M. L. J. 79.
(3) 2 C. L. J. 359.

JADUNANDAN PROSAD SINGHA *v.* KOER KALLYAN SINGH.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 1917 OF 1909.
August 24, 1911.
Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

JADUNANDAN PROSAD SINGHA—PLAINTIFF—APPELLANT

versus

KOER KALLYAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure (Act V of 1908), O. XLI, r. 22, sub-r. (1)—Cross-objection against co-respondent—Test to be applied—Mortgage-suit—Mortgage executed and attested on certain date, but registered subsequently—Another mortgage of same property registered in the meantime—Priority—Registration Act (III of 1877), ss. 47, 50.

Order XLI, rule 22, sub-rule (I) of the Civil Procedure Code of 1908, is comprehensive enough to admit of a cross-objection by one respondent against another.

The test to be applied is, whether the questions, which arise between the several sets of parties, are so connected that one of them ought not to be allowed to re-open matters, so far as he is concerned, without an opportunity being allowed, in the interests of justice, to another to protect himself by urging his objections, even though they be directed, not against the appellant, but against a co-respondent.

In a mortgage-suit the questions were, whether the plaintiff's mortgage took effect from the date of execution (January 19th 1908), or from the date of registration (January 23rd) that is, whether it was entitled to priority over the mortgage of defendants Nos. 3 and 4, dated January 22nd, and whether the mortgage set up by defendant No. 5 was genuine. The Court held upon the first question in favour of the plaintiff and on the second question, against defendant No. 5 who appealed making the plaintiff and the other defendants, respondents. Defendants No. 3 and 4 preferred a cross-objection to the effect that the plaintiff's mortgage took effect from January 23rd and was not entitled to priority over their security:

Held, that the cross-objection was competent.

A mortgage-deed was duly executed and attested on January 19th, 1908. Another mortgage of the same property was executed and registered on January 22nd and on January 23rd the first mortgage-deed was registered and on that day the date of the deed was altered by the mortgagor from 19th to the 23rd January:

Held, that the first mortgage should have priority over the second mortgage.

Appeal from the decree of the first Sub-Judge of Patna, dated July 10th, 1909, modifying that of the Munsif of Behar, dated December 14th, 1908.

Babu *Mohendra Nath Roy* and *Joy Gopal Ghosha*, for the Plaintiff-Appellant.

Babus *Jogesh Chandra Roy* and *Siva Nand Roy*, for the Respondents-Defendants Nos. 3 and 4.

Babus *Jnanendra Nath Bose* and *Biraj Mohan Majumdar*, for the Respondent-Defendant No. 5.

JUDGMENT.—This appeal is directed against the decree in a suit to enforce a mortgage security executed by the first defendant in favour of the plaintiff. The second defendant is alleged to have subsequently acquired an interest in the equity of redemption and has been joined as a party in that character. The third and fourth defendants claim to be mortgagees under an instrument, dated the 21st January 1908: the fifth defendant sets up a mortgage alleged to have been granted on the 13th January 1908. The sixth defendant holds a mortgage executed on the 14th September 1907, and the seventh defendant sets up a mortgage granted on the 6th January 1908. The date of the mortgage-bond, which the plaintiff seeks to enforce, is the 19th January 1908, but it appears on the face of it to have been altered to the 23rd January 1908. In the Court of first instance, there were two matters substantially in controversy between the parties, namely, *first*, whether the mortgage of the plaintiff took effect from 19th January 1908, *i.e.*, whether it was entitled to priority over the mortgage of the third and fourth defendants; and, *secondly*, whether the mortgage set up by the fifth defendant represented a genuine transaction. The Court held upon the first question in favour of the plaintiff, and upon the second question against the fifth defendant. The fifth defendant thereupon appealed to the Subordinate Judge and he joined as parties respondents, the plaintiff and the remaining defendants. Of the latter, the third and fourth defendants preferred a cross-objection, under rule 22 of Order XLI of the Civil Procedure Code, to the effect that the mortgage set up by the plaintiff took effect only from the 23rd January 1908, and was not entitled to priority over their security. The Subordinate Judge allowed the appeal as also the cross-objection. He found upon the evidence that the mortgage set up by the fifth defendant was not a collusive transaction and that the mortgage sought to be enforced by the plaintiff took effect from the altered date, the 23rd January 1908. The plaintiff has now appealed to this Court, and on his behalf the decision of the Subordinate Judge

has been assailed on three grounds, namely, *first*, that the mortgage of the fifth defendant is collusive and the finding of the Subordinate Judge to the contrary is not supported by the reasons assinged by him, *secondly*, that it was not competent to the third and fourth defendants to prefer a cross-objection against the plaintiff upon an appeal preferred by the fifth defendant, and *thirdly*, that, upon the facts found, the mortgage of the plaintiff took effect from the date of execution and not from any subsequent period.

In so far as the first ground is concerned, it cannot be supported. We have examined the reasons assigned by the Subordinate Judge in support of his conclusion as to the true character of the mortgage set up by the fifth defendant. These grounds do not involve any error of law, and it is not open to this Court to consider whether the Subordinate Judge has taken a correct view of the facts. The first ground, therefore, fails.

In so far as the second ground is concerned, it raises an important question which was not suggested in the Court below. No objection appears to have been taken before the Subordinate Judge as to the competency of the cross-objection by the third and fourth defendants: that, however, does not preclude a consideration of the point by this Court: if the cross-objection was really incompetent, the omission of the plaintiff to take exception to it could not possibly validate the same. Now, it is not disputed that Order XLI, rule 22, sub-rule (1) of the Court of 1908, is comprehensive enough, so far as its language is concerned, to admit of a cross-objection by one respondent against another. But it has been urged that the reason of the rule requires that some limitation should be put upon its scope and application. Reference has been made to judicial decisions under the Codes of 1859 (Act VIII of 1859, section 348) and 1882 (Act XIV of 1882, section 561) to show that such restriction is justifiable on principle. [*Anwar Jan* v. *Azmut Ali* (1); *Bishun Churn* v. *Jogendra Nath* (2), *Shabiuddin* v. *Deomocrat Koer* (3) and *Kallu* v. *Manni* (4).] That principle is that, as a general rule, the right of any respondent to urge a cross-objection should be limited to his urging it only against the appellant: and it is only by way of exception to this general rule, that one respondent may urge a cross-objection as against another respondent: the exception, it is said, holds good in those cases where the appeal opens up questions which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents. This may be accepted as a sound principle, but, as was pointed out by Mr. Justice Banerjee in *Bishun Charan* v. *Jogendra Nath* (2), no exhaustive rule on the subject can be formulated, and the true test ought to be, whether, for the ends of justice, it is necessary that upon the appeal of one of the parties the matter should be re-opened only so far as he is concerned or the whole case should be reviewed and some of the respondents allowed the opportunity to urge a cross-objection against their co-respondents. One test of a negative character is sometimes useful: if the party against whom a cross-objection is sought to be urged by his fellow-respondent is not a necessary party to the appeal, the cross-objection can hardly be allowed to be urged. But if he is a necessary and proper party respondent to the appeal, the answer to the question whether the cross-objection should be allowed to be urged must depend upon the circumstances of the case. The test to be applied is whether the questions which arise between the several sets of parties are so connected that one of them ought not to be allowed to re-open matters, so far as he is concerned, without opportunity allowed, in the interests of justice, to another to protect himself by urging his objections, even though they be directed, not against the appellant, but against a co respondent. Cases of the type of *Abdul Ghani* v. *Muhammad Fasih* (5) are fairly simple; if the defendants have a common ground, upon an appeal by one of them, the plaintiff may very well be allowed to urge a cross-objection against a defendant-respondent. The case before us, however, is of a special character, and is unlike any of those to be found in the books. Here the plaintiff and third and fourth defendants were so far united that their common interest was to defeat the

(1) 15 W. R. 26.
(2) 26 C. 114.
(3) 30 C. 655.
(4) 23 A. 93.

(5) 28 A. 95; 2 A. L. J. 667; A. W. N. (1905) 200.

fifth defendant, who set up a heavy prior charge which, if real, was entitled to precedence over both of them. If the fifth defendant was defeated, the question of priority as between themselves might be immaterial if the property was of sufficient value to satisfy the claim of both of them, (section 48, Transfer of Property Act). Good reasons might, therefore, be assigned as to why the 3rd and 4th defendants did not prefer an appeal against the plaintiff, although the first Court had overruled their contention that they were entitled to priority. But when they found that the fifth defendant had preferred an appeal, they might, in justice, contend that if that appeal was successful, it would be material for them to urge that the decree of the first Court was erroneous in so far as it gave the plaintiff a priority over them. To put the matter briefly, as soon as the plaintiff and the 3rd and 4th defendants became unsuccessful against their common enemy, the fifth defendant, the conflict of interest between them became important from a practical point of view. We are, therefore, not prepared to accept the contention that the rule on the subject should be narrowly defined and that a cross-objection should not be allowed unless the appeal directly opens up a question between co-respondents. In our opinion, the principle ought to be liberally applied and the case before us, under the circumstances stated, falls rather within the exception than within the rule. We may point out that Order XLI, rule 22, sub-rule (3), introduces a modification of the rule as embodied in section 561 of the Code of 1882: the effect of the alteration is to leave no doubt that a respondent may prefer a cross-objection against a co-respondent: the limits of the rule, however, are not attempted to be defined and sub-rule (4), which has been added in the Code of 1908, may possibly create a difficulty in some cases. The present case, however, is reasonably free from difficulty, and we must hold that the cross-objection was competent. If the contrary view were maintained, the result would have followed that the first and fourth defendants would have been driven to prefer a separate appeal, although if the fifth defendant did not prefer any appeal it might be wholly unnecessary for the 3rd and 4th defendants to proceed with their appeal for the protection of their own interest. The second ground urged by the appellant, therefore, fails.

The third ground on which the judgment of the Subordinate Judge is assailed raises a question of some nicety. It has been found that the mortgage in favour of the plaintiff was duly executed and attested on the 19th January 1908. The mortgagee, however, would naturally not part with his money till the deed was registered, and the mortgagor was also apparently unwilling to part with the document till he had got the money. The money was paid and the deed was registered on the 23rd January 1908. As we have already stated, the mortgagor altered the date from the 19th to the 23rd January. The Subordinate Judge has found that this was done before registration and was known to the mortgagee, but it has not been found—and the circumstances negative any possible suggestion—that the mortgagee agreed that the deed would take effect from the 23rd January. Under section 47 of the Registration Act, upon registration, the deed would take effect from the time it would have taken effect if registration had not been necessary. The question, therefore, arises from what date the deed took effect. The learned Vakil for the third and fourth defendants has relied upon the cases of *Sheo Narain* v. *Darbari* (6); *Mouladan* v. *Raghunandan* (7) and *Ramalinga* v. *Ayyadorai* (8) to show that the deed would not take effect till it was delivered and the mortgage-money paid. These cases, however, are of no real assistance to the respondents. They merely show that the parties may intend that no obligation should attach under the deed unless a condition precedent had been fulfilled. Sections 58 and 59 of the Transfer of Property Act show that a valid mortgage may be created to secure money to be advanced or a future debt. The case of *Amirthathammal* v. *Periasimi* (9) shows, further, that a valid title may pass even if no consideration is paid at the time of the conveyance. On the other hand, the third proviso to section 92 of the Indian Evidence Act indicates that the existence of a separate oral agreement constituting a condition precedent

(6) 2 C. W. N. 207.
(7) 27 C. 7.
(8) 28 M. 124; 14 M. L. J. 493.
(9) 32 M. 325; 5 M. L. 255; 4 Ind. Cas. 507.

to the attaching of any obligation under a contract grant or disposition of property which has been reduced to the form of a document, may be proved. In fact, the cases mentioned by the learned Vakil for the respondents show that although a conveyance or a mortgage-deed has been duly executed and attested, no obligation may attach thereunder, if the parties so agree, till certain conditions have been fulfilled. They do not show that upon fulfilment of the condition precedent, the obligation attaches with effect from that date and not from the date of execution of the instrument. It may be assumed, therefore, that in the case before us the conduct of the parties shows that no obligation was intended to attach under the mortgage-deed till the money was paid by the mortgagee and the document presented to the proper officer for registration by the mortgagor, although we are by no means satisfied that this inference may legitimately be drawn from the mere circumstance that the mortgagor did not, upon execution of the document, deliver the same to the mortgagee. We are not prepared to hold that upon fulfilment of the condition, the obligation attached with effect from the date of registration. As already explained, section 47 of the Registration Act does not by any means support this view. We are not unmindful that under the law of England a common law deed, to be effective, must be delivered as the act and deed of the party expressed to be bound thereby as well as sealed, (Laws of England, Ed. Halsbury, Volume X, page 385); but there is, in our opinion, no analogy between a common law deed in England and a mortgage-deed in this country. In the former case, delivery is essential for the validity of the deed: in the latter case, delivery is not essential although absence of delivery may serve to indicate that the parties intended that no obligation should attach under the instrument till a condition precedent had been fulfilled. There are, again, other points of fundamental difference; for instance, a common law deed is said to import consideration (Laws of Engand, Ed. Halsbury, Volume X, page 357), whereas, if a suit was brought to enforce a mortgage security, the claim could be defeated on proof that there was no consideration. It must, further, be remembered, that even in England in the case of deeds, the tendency of the Courts has been to interpret the term 'delivery' rather liberally so as not to defeat the intention of the parties: *Xenos* v. *Whickham* (10) and *Exton* v. *Scott* (11): as to which, see, however, *Oracknoll* v. *Janson* (12). Although, therefore, in England in the case of a common law deed title passes at the time of its delivery, we are not prepared to apply that rule to a case like the present where the instrument is valid in law without delivery, and where the delivery is postponed to secure the performance of mutual conditions, namely, registration of the document by the mortgagor and payment of the money by the mortgagee. No useful analogy can be drawn from another class of cases to which reference was made by the learned Vakil for the respondents, namely *Hopkinson* v. *Rolt* (13) and *West* v. *Williams* (14). These cases discuss the question of priority of mortgages to secure future advances, dealt with in section 79 of the Transfer of Property Act. The doctrine that a first mortgagee should be postponed in respect of any advances made by him after notice of a subsequent incumbrance, is plainly of no assistance to the respondents. Although the mortgage of the plaintiff was not registered till the 23rd January 1908, and that of the third and fourth defendants had been registered on the day previous, each took effect from the date when it would have taken effect if registration had not been necessary, that is, *prima facie*, from the date of its execution. The sole question is whether the operation of the mortgage instrument of the plaintiff did not commence till the 23rd January, because it was not delivered till that date. For reasons altready explained, we think this question ought to be answered in the negative. The alteration of the date by the mortgagor from the 19th January to the 23rd January did not clearly alter the position of the mortgagee. He plainly intended to take the property as security upon the title as it stood on the 19th January. No reasonable man of ordinary prudence would consent to

(10) (1867) 2 H. L. 296 at pp. 309, 312, 320, 323; 36 L. J. C. P. 313; 16 L. T. 800; 16 W. R. 38.

(11) (1833) 6 Simon 31; 38 R. R. 72.

(12) (1879) 11 Ch. D. 1; 40 L. T. 640; 27 W. R. 851; 48 L. J. Ch. 168.

(13) (1861) 9 H. L. C. 514; 34 L. J. Ch. 468; 7 Jur. (N. S.) 1269; 5 L. T. 90; 9 W. R. 900.

(14) (1899) 1 Ch. 132; 79 L. T. 575; 47 W. R. 308; 68 L. J. Ch. 127.

take the property as it may stand on some uncertain future date, with the inevitable risk that the intending mortgagor may be at liberty meanwhile not merely to create encumbrances on the property but even transfer it absolutely. If such was the intention of the parties, it is inconceivable why the document was at all executed and attested on the 19th January 1908, the execution and attestation might very well have been postponed to the date of the actual payment of the consideration-money. The obvious intention of the parties was to fix the security on the title as it stood on the 19th January, and they effectively did so, even though there was a collateral agreement that no obligation should attach under the instrument till payment of money on the one hand and delivery to the Registering Officer on the other. The moment the condition was fulfilled, obligation attached with effect from the date of execution and attestation of the document, notwithstanding the execution and registration of another mortgage instrument by the mortgagor in the interval. There is no special hardship on the subsequent encumbrancer, because as in this country documents do not take effect from the date of registration, every person who acquires property takes it subject to the risk that there may be a prior title created within the preceding four months, or, in some instances, even eight months (sections 23 and 24 of the Regitrsation Act). We must, consequently, hold that the mortgage set up by the plaintiff took effect from the 19th January 1908 and was entitled to priority over that of the third and fourth defendants executed on the 21st January 1903.

The result, therefore, is that this appeal must be allowed in part and the decree of the Subordinate Judge modified. The plaintiff will have a decree on his mortgage in the usual form. It will be declared that he is entitled to priority over the mortgage of the third and fourth defendants, but not over that of the fifth defendant. The plaintiff will pay the costs of the fifth defendant in all the Courts, but will receive all his costs from the first, third and fourth defendants. The suit is dismissed as against the second defendant who was unnecessarily made a party and who will have his costs in the first Court only, but no Pleader's fees, from the plaintiff.

A self-contained decree will be drawn up in this Court in supersession of the decree of the Subordinate Judge.

Appeal allowed in part.

Advocate High Court
Jammu & Kashmir

CALCUTTA HIGH COURT.

CIVIL RULE No. 4742 OF 1911.

January 29, 1912.

Present:—Mr. Justice Stephen and Mr. Justice D. Chatterjee.

BAIJ NATH MISTRY AND OTHERS—PLAINTIFFS—PETITIONERS

versus

RAJA JANG BAHADUR—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115—Material irregularity—Refusal of jurisdiction—Leaving material issue undecided.

In a suit on a promissory-note executed by defendant No. 2, the questions were, whether he had authority to bind defendant No. 1 and whether his action had been ratified by defendant No. 1. The lower Appellate Court held that defendant No. 2 had no authority to borrow money on behalf of defendant No. 1, and that the issue of ratification was immaterial, and it did not come to any finding upon it. That Court also held that in point of law it would have been ratification if the defendant No. 1 had told the defendant No. 2 to pay the plaintiff from his pocket, but as the defendant No. 1 directed defendant No. 2 to pay the plaintiff out of his rent collections that was not ratification. The Court did not come to any finding on the facts alleged to have occurred.

Held, by *Stephen, J.*, (whose opinion prevailed), that the lower Appellate Court did not decline jurisdiction, nor did it act with material irregularity, and that the High Court could not interfere in revision.

Held by *Chatterjee, J.*, that the Court below left the most important issue undecided and so acted with material irregularity and virtually refused to exercise a jurisdiction vested in it by law.

Rule against the judgment of the Judicial Commissioner of Ranchi, dated May 26th, 1911, modifying that of the Munsif of Giridhi, dated December 10th, 1910.

Mr. *H. N. Sen*, Counsel, and Babu *Rajindra Chandra Guha*, for the Petitioners.

Babu *Naresh Chandra Sinha*, for the Opposite Party.

JUDGMENT.

STEPHEN, J.—This suit is brought on a promissory-note executed in favour of the plaintiff by the second defendant, who was then the *Dewan* of the father of the first defendant. The consideration for the note

was an advance of money to the second defendant to enable him to pay road-cess on behalf of the first defendant. In the Munsif's Court it was held that the second defendant had an implied authority from the father of the first defendant to raise the money, and that his action had been ratified by the first defendant. The suit was accordingly decreed against the first defendant. On appeal to the Judicial Commissioner this decree was set aside on the findings that the second defendant had no authority to borrow money on behalf of the first defendant and that the acts necessary to constitute a ratification of the second defendant's action by the first did not occur. A Rule has been issued calling on defendant No. 1 to show cause why this order should not be set aside. The question whether defendant No 2 had authority to bind defendant No. 1 is one which the Court had jurisdiction to decide, and we cannot interfere with its decision on revision. It is argued before us, however, that the question of ratification was an issue in the case, and that the Judicial Commissioner failed to exercise his jurisdiction to decide it. The question of ratification was not expressly set out as an issue, but as it is independont of the question of the authority of the second defendant, it must be regarded as an issue by itself. The finding of the trying Court is, that on demand being made of the first defendant, he told the second defendant to pay the amount claimed out of his rent collections. The Appellate Court found that the question whether this occurred was immaterial, that there would have been ratification if certain circumstances had occurred which did not in fact occur, and that the facts found by the first Court constituted no admission that the money ordered to be paid was to come out of the pocket of the first defendant. The law laid down by the Judicial Commissioner cannot be accepted as correct but, looking at the facts of the case, I cannot doubt that he had the question of ratification before his mind, and that he in fact decided it adversely to the petitioner. I am of opinion, therefore, that he has not declined jurisdiction on this matter, and that he has not acted with material irregularity within the meaning of section 115 of the Code, and, consequently, that this Rule should be discharged.

The Court being divided in its opinion, the opinion of the Senior Judge prevails.

The Rule is discharged. No order as to costs.

D. CHATTERJEE, J.—I regret very much that I am unable to agree with my learned colleague in the view he has taken of this case.

The plaintiff expressly alleged in his plaint that the defendant No. 1 had admitted the debt after the death of his father. This was denied by the defendant No. 1. The case of the plaintiff was that even if the defendant No. 2 had no initial authority to bind the Raja the latter had, when a demand was made of him for the debt, directed his servant, defendant No. 2, to re pay the debt from the collections of his estate. The learned Munsif found that this was so, and that there had been a clear ratification or admission of the debt. The learned Judge thinks that this issue of ratification was immaterial and does not come to any finding upon it. The reason given is that it would have been ratification if the Raja had directed payment from his pocket, but could not be ratification as the money was directed to be paid from the collections of his estate. This view of law is decidedly erroneous, but that alone would not, perhaps, by itself give us jurisdiction to interfere in revision. Here, however, the learned Judge has not come to a decision on the facts alleged to have occurred, and has thereby left undecided the most important issue in the case. He has, I think, by so doing, not only acted with material irregularity but virtually refused to exercise a jurisdiction vested in him by law. The decision of the Privy Council in the case of *Amir Hassan Khan* v. *Sheo Baksh Singh* (1) has been relied on as negativing our jurisdiction to interfere in this case. Their Lordships held in that case that a Court deciding a question of law wrongly does not exercise jurisdiction illegally or with material irregularity. The judgment of the Judicial Committee does not furnish any test, however, for determining under what circumstances a Court may be said to have acted illegally or with material irregularity. See *Dwarka Nath Sen* v. *Kishori Lal Goswami* (2). In the case of *Sidharath Rai* v. *Anantram* (3)

(1) 11 C. 6; 11 I. A. 237.
(2) 11 C. L. J. 426; 14 C.W.N. 703; 6 Ind. Cas. 549.
(3) 8 Bom. L. R. 567.

the Bombay High Court (Jenkins, C. J., and Aston, J.) held that where a Court refuses to set aside an *ex parte* decree on an erroneous view of the law of limitation, it fails to exercise a jurisidiction vested in it by law. In the case of *Rudrappa* v. *Narsing Rao* (4) the same Court (Jenkins, C. J., and Batchelor, J.) held that where the only issue tried by the lower Courts is not an issue upon which the dispute could be adjudicated upon, it is an exercise of jurisdiction with material irregularity. So the returning of a plaint without warrant of law has been held to be an acting illegally in the exercise of jurisdiction: *Zamiran* v. *Fateh Ali* (5).

I think these are sufficient authorities on which we can hold that the action of the Court below is within the mischief of section 115 of the Civil Procedure Code.

I would, therefore, make the Rule absolute and send the case back to the lower Court for a proper decision of the issue of ratification.

Rule discharged.

(4) 29 B. 213; 7 Bom. L. R. 12.
(5) 32 C. 146.

MADRAS HIGH COURT.

APPEALS AGAINST ORDERS NOS. 50 AND 51 OF 1910.

January 12, 1912.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Abdur Rahim.

IN No. 50.

V. THIRUVENGANDAM PILLAI, TRANSFREE-DECREE-HOLDER BY V. LACHMIAH, AUTHORIZED AGENT—APPELLANT

versus

DORIDLA SUBBIAH AND ANOTHER—RESPONDENTS.

IN No. 51.

V. THIRUVENGADAM PILLAI, BY AGENT V. LACHMIAH—APPELLANT

versus

B. VENCATA SUBBIAH AND OPHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 2 (10), O. XXI, rr. 53, 16—Judgment-debtor, whether includes his assignee—Decree-holder, rights of assignee of—Assignee of the holder of attached decree, rights of, to execute decree.

The definition of "udgment-debtor" doesnot include the assignee of the judgment-debtor.

Under Order XXI, rule 53, an assignee of a decree-holder does not stand in exactly the same position as the decree-holder himself for purposes of execution The only two persons who can take out execution under the rule are the decree-holder of the attached decree or the attaching creditor, and not the assignee of the holder of the attached decree.

Appeal against the orders of the District Court of Cuddapah, in Execution Petitions Nos. 7 and 8 of 1909, dated 23rd September 1909, in O. S. No. 14 of 1900.

Mr. *G. Krishnaswami Iyar*, for the Appellant.

Mr. *A. Ramachandra Iyer*, for the Respondents.

JUDGMENT.—The appellant in Appeals Nos. 50 and 51 of 1910 is the assignee of a decree which one Abdul Aziz had obtained against one Subbiah in the District Court of Cuddapah. The assignment is dated 16th March 1906 and notice of it was given to Subbiah on the 20th March 1906. The 1st and 2nd respondents in Appeal No. 51 of 1910 had a decree against Abdul Az'z which was passed by the District Munsif's Court to Nandalur. On the application of the respondents, attachment was ordered on 20th June 1906 by the District Munsif of Nandalur of Abdul Aziz's decree against Subbiah and notice was given to the Cuddapah District Court under rule 53 of Order XXI of the Code of Civil Procedure. The appellant, on the 1st March 1909, applied to the Cuddapah District Court for execution of the decree in question on the strength of the assignment and the respondent also applied to the said Court for execution of the said decree. The District Court has dismissed the appellant's application, and allowed the application of the respondents in Appeal No. 51 of 1910.

The District Judge of Cuddapah has dismissed the appellant's application on the ground that the assignment was not *bona fide* and was intended to defeat the rights of the respondent who has attached the decree. But we may at once point out that this finding is not supported by any evidence. The assignment in favour of the appellant was made before the decree was attached and there is nothing to show that the appellant knew that there was a decree outstanding against his transferor in favour of the respondent. The assignment purports to be for consideration and there is no evidence showing the contrary. We,

therefore, cannot accept the finding of the District Court that the assignment was a colourable or fraudulent transaction.

At the same time, it seems to us that, having regard to the provisons of rule 53 of Order XXI of the Code of Civil Procedure, the appellant's application was rightly dismissed Under that rule, the District Court of Cuddapah, when it received notice of the attachment from the Nandalur District Munsif's Court, was bound to stay execution of its decree until the Nandalur Court cancelled the notice on the respondent or the holder of the attached decree. Abdul Aziz applied for the execution. The notice has not been concelled and, therefore, the only two persons mentioned in rule 53 of Order XXI of the Code of Civil Procedure, who can take out execution, are the holder of the attached decree, or the respondent, the attaching creditor. The application of the respondent was, therefore, clearly rightly allowed by the lower Court. On the other hand, rule 53 of Order XXI of the Code of Civil Procedure does not mention the assignee of the holder of the attached decree and rule 16 of Order XXI of the Civil Procedure Code tends to show that the Legislature did not intend to treat the assignee of the decree-holder as standing exactly in the same position as the decree-holder himself for purposes of execution. Rule 16 of Order XXI of the Civil Procedure Code seems to contemplate that an assignee of the decree-holder may not, in such cases, be entitled to take out execution as a matter of right, although the decree-holder himself will be so entitled. We may also point out that the definition of judgment-debtor, as given in section 2, clause 10 of the Code of Civil Procedure, does not include the assignee of the judgment-debtor. We, therefore, confirm the order of the District Judge and dismiss the appeals, with costs in Appeal No. 51 of 1910.

Appeals dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1024 OF 1911.

January 26, 1912.

Present:—Mr. Justice Sundara Aiyar.

In re VEERAPPA CHETTYAR—APPELLANT.

Landlord and tenant—Kasavaryam *tenure*—Kasavaryamdar *doing* gurukkal *services to the temple*—*Whether holding under the temple*—*Presumption*—*Onus of proof.*

Defendant was holding suit land under *Kasavaryam* tenure and it was not proved that he was holding under any particular *mirasidar*. He was, however, doing *gurukkal* service in the temple:

Held, that, in the absence of proof of title in the temple, no presumption arose that the defendant was holding under the temple, though the temple was the only person whom the defendant was serving.

Second appeal against the decree of the Subordinate Judge of Mayavaram, in A. S. No. 437 of 1910, presented against the decree of the District Munsif of Valanjuman in O. S. No. 293 of 1903.

Mr. *V. V. Streenivasa Aiyengar*, for the Appellant.

This appeal coming on for admission, the Court passed the following

ORDER.—I am unable to say that there is any legal objection to the finding that the temple is not proved to be the owner of the plot in question. The case for the appellant has been put in this way. The documents show that the defendant was holding the land on *Kasavaryam* tenure. The defendant was doing *gurrukkal* service in the temple. It is not proved or alleged that the defendant was holding the land under any particular *mirasidar*, and, therefore, it must be taken that he was holding under the temple, being the only person whom the defendant was serving. The inference may be a proper one for a Court of fact to draw. But I cannot say that the lower Courts were mistaken in holding that the temple was bound to prove its title to the land before it could presume, on account of the incidence of *Kasavaryam* tenure, that the defendant, a *Kasavaryamdar*, was holding under the owner of the temple.

The argument practically amounts to this, that the defendant was holding under some one and as he cannot say that that person is other than the temple, he must be taken to be holding under the temple. I cannot say that the lower Courts were wrong in law in refusing to draw the inference.

It is also urged that Exhibit V has been

misconstrued. But, on reference to paragraph 7 of the Munsif's judgment, I am unable to say that he holds that Exhibit V furnishes positive evidence against the title of the temple. He only says that it furnishes no evidence in favour of its title, while it does with respect to other plots which were in its actual occupation. There is, no doubt, a considerable body of evidence adduced from which a different conclusion might have been arrived at. But I cannot say that there is any question in second appeal.

I dismiss the appeal.

Appeal dismissed.

PUNJAB CHIEF COURT.

CIVIL REVISION NO. 878 OF 1911.

February 15, 1912.

Present:—Mr. Justice Rattigan.

GANDA SINGH—DEFENDANT—PETITIONER.

versus

NATHU RAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Injunction, suit for—Encroachments on land reserved for common use—Limitation—Burden of proof—Unreasonable delay in suing—Limitation Act (IX of 1908), Sh. I, Art 120—Specific Relief Act (I of 1877), s. 54.

In a suit for a prepetual injunction directing defendants to restore to its original condition certain land encroached upon by them, which was originally reserved for the common use of the porprietors, it is for the plaintiffs to prove that the encroachments were made within six years befor suit.

Kanakisabai v. *Muttu*, 13 M. 445; *Waziran* v. *Babu Lal*, 26 A. 391, followed.

A mere surmise by the Court that the encroachments are "recent" is insufficient for holding that they took place within six years.

Persons, who have patiently allowed encroachments to take place and have not taken action within a reasonable time, cannot be said to have suffered such injury as would justify the Court in interfering on their behalf under section 54 of the Specific Relief Act.

Petition, under section 70 (1) (*a*) of Act XXV of 1899, for revision of the order of the Divisonal Judge, Jullundur Division, dated 20th January 1911, reversing that of the Munsif, 2nd class, Phillour, dated 27th June 1910, dismissing the claim.

R. S. Pandit *Sheo Narain*, for the Petitioner.

R. B. Lala *Sukh Dial*, for the Respondents.

JUDGMENT.—In this and the connected cases (*viz.* Civil Revisions No. 879 and 880 of 1911) the question involved is the same, and this order will accordingly apply to all three cases.

In the petitions Mr. Sheo Narain admits that a partition took place in 1865 and that certain plots were reserved for extension of the village. He also admits that his clients have built upon these reserved plots, and he urges in their justification that they have done nothing exceptional, as (according to him) all the village proprietors have been guilty of similar encroachments. It is not, however, upon this ground that I am asked to interfere with the decree of the Divisional Judge. Mr. Sheo Narain contends that the learned Judge has assumed that the encroachments made by the defendants were of recent origin and that plaintiffs were, therefore, entitled to the injunction for which they pray. Defendants have, on the other hand, throughout urged that the encroachments were of long standing and that plaintiffs' present suit is not maintainable, and their pleas were found by the Munsif to be established.

The learned Divisional Judge was of opinion that the evidence adduced on behalf of the plaintiffs was no better and no worse than that adduced on behalf of the defendants and that it would be safer to rely rather on the probabilities of the case. Judging the case in this light, he holds that it is "extremely improbable that at an early date," after the plots were reserved for particular purposes, "the defendants would have been allowed to make encroachments without protest," and he adds: "In spite of the *Patwari*, I believe the encroachments are really recent." As the learned Judge had not himself seen the encroachments complained of, his belief was obviously based on, what he terms, the probabilities of the case and the unlikelihood of plaintiffs permitting the wrongful user of plots but lately reserved for public purposes. But the reservation of the plots was made in 1863 or 1865 and the crucial question really is whether the encroachments took place within 6 years of suit. It would, no doubt, be very unlikely that plaintiffs could permit encroachments at an early date after 1865, but defendants' allegation (for what it is worth) is that in the course of time all parties began to make use of the reserved plots for themselves, plaintiffs no less than defendants. Be this as it may, the question

is whether the present suit has been instituted within 6 years from the date when the right to sue accrued [Article 120 of the Indian Limitation Act: *cf. Kanakasabai* v. *Muttu* (1) and *Waziran* v. *Babu Lal* (2)]. Even if the encroachments took place only a few years before suit the case for plaintiffs could be greatly weakened, and it might well be argued that plaintiffs, who had patiently allowed such encroachments to take place and had not taken action within a reasonable time, had not suffered such injury as would justify the Court in interfering on their behalf under section 54 of the Specific Relief Act. The learned Divisional Judge has discarded the evidence on either side, but it is, in any event, for plaintiffs to prove that the encroachments were made (as they allege in their plaints) within 6 years before suit. The Divisional Judge believes these encroachments to be "recent," but that is a somewhat vague expression and this surmise is based on no evidence. In the circumstances and having in view the fact that it would be most difficult, if not indeed impossible, to get trustworthy evidence from the villagers themselves upon this point, I think the best course to adopt would be to appoint some thoroughly impartial and reliable person to report (as a local Commissioner) as to his opinion, after inspection, with regard to the approximate age of the encroachments. I accordingly remand the case to the Divisional Judge for inquiry upon this matter through such local Commissioner and I would suggest that the parties should, in the first instance, be asked to nominate a person whose opinion they are both willing to accept. If they cannot agree, the Divisonal Judge should himself appoint an independent person to make the report. As this inquiry is being made at the instance of defendants, they should be called upon to pay the fees of the Commissioner in the first instance and a time should be fixed within which such fees should be paid. In the event of the defendants failing to pay the fees within such time, the Divisional Judge will return the record to this Court with an intimation to that effect. In any event, a return to this order should be made within four months.

Case remanded.

(1) 13 M. 445. (2) 26 A. 391.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 716 OF 1910.

February 3, 1912.

***Present*:—Mr. Justice Robertson and Mr. Justice Shah Din.**

SHERU—DEFENDANT—APPELLANT

versus

JAWAHIR SINGH—PLAINTIFF—RESPONDENT.

Punjab Pre-emption Act (II of 1905), *s.* 19, *scope of—Withdrawal of deposit, effect of—Pre-emption—*Benami *suit—*Bona fide *claim—Superior pre-emptor asserting claim to defeat rival pre-emptor—Money raised by mortgage to vendees—Legitimacy—*Sikh Jat *abducting sweeperess—Subsequent conversion of both to Muhammadanism—Marriage under Muhammadan Law—First husband taking no steps to assert marital rights—Legitimacy of issue of second marriage.*

Section 19 of the Punjab Pre-emption Act does not provide for a case in which the pre-emptor, after having made the necessary deposit under sub-section (1) (*a*) of the section, has withdrawn it subsequent to the decision of the suit. The penal provisions of sub-section (3) come into operation only if the pre-emptor fails, within the time fixed by the Court, to make the deposit or furnish the security mentioned in sub-section (1). But once the deposit is made in pursuance of the order of the Court within the time fixed by it, the Court has no power to reject the plaint by reason of the subsequent withdrawal of the deposit.

In the case of rival pre-emptors, if the right of pre-emption vested in one of them is superior to that of the other, that right cannot be defeated merely because his object in prosecuting the suit is to pervent the other pre-emptor from getting the land and because he has raised funds for the purpose by mortgaging the land to the vendees.

Where the superior pre-emptor brought his suit subsequent to the suit of his rival pre-emptor, and it appeared that the money deposited in Court under section 19 of the Pre-emption Act was advanced by the vendees and that the money paid in compliance with the pre-emption decree passed in his favour was advanced on a mortgage of the land in suit by near relations of vendees:

Held, that the facts were insufficient to make the superior pre-emptor a *benami* pre-emptor and to disentitle him to a decree for pre-emption.

Ramsukh Das v. *Fazal-ud-din*, 19 P. R. 1898; *Mahmud Bakhsh* v. *Hassan Bakhsh*, 7 P. R. 1912; 11 Ind. Cas. 708, followed.

A., a *Sikh Jat*, abducted a sweeperss B. whose husband was living. B.'s husband prosecuted *A.* for abduction. Some time after that, *A.* and B. turned Muhammadans and went through the usual form of marriage prescribed by Muhammadan Law. They lived as man and wife for a long series of years and subsequent to his complaint for abduction, B.'s first husband never took any steps to assert his marital right. As the result of the marriage of *A.* and B. a son *C.* was born to them. *C.* lived with *A.* and was treated by him as well as his brotherhood as his legitimate son:

Held, that there was a strong presumption that B.'s first husband had repudiated or divorced her

before *A.* married her, and consequently *C.* was the legitimate son of *A.*

Second appeal from the order of the Divisional Judge, Amritsar Division, dated the 2nd May 1910, reversing that of the District Judge, Amritsar, dated the 20th July 1909, dismissing plaintiff's claim.

Pandit *Ram Bhaj Datta*, for the Appellant.

Rai Bahadur Lala *Sukh Dial*, for the Respondent.

JUDGMENT.—Rai Sukh Dial for the respondent, Jawahir Singh, raises the preliminary objection that as the appellant, Sheru, has withdrawn from Court the purchase-money including the sum of Rs. 300, which he had deposited in pursuance of an order passed under section 19 of the Pre-emption Act, II of 1905, his plaint must be rejected and he is, therefore, precluded from prosecuting this appeal. We do not, however, see our way to accept this contention. As laid down in Civil Appeal No. 23 of 1907 (decided by Robertson and Chevis, JJ., on the 24th May 1907) section 19 of the Pre emption Act does not provide for a case in which the pre-emptor after having made the necessary deposit under sub-section (1) (*a*) of that section has withdrawn it subsequent to the decision of the suit. The penal provisions of sub-section (3) come into operation only if the pre-emptor fails within the time fixed by the Court to make the deposit or furnish the security mentioned in sub-section (1), but once the deposit is made in pursuance of the order of Court within the time fixed by it the Court has no power to reject the plaint by reason of the subsequent withdrawal of the deposit. We, therefore, overrule the preliminary objection and proceed to dispose of the appeal on merits.

The fact of this case are fully given in the judgment of the Divisional Judge. One Dina sold the land in dispute to certain vendees on the 5th June 1908 for Rs. 5,000. On the 20th June 1908 Jawahir Singh, respondent, sued to pre-empt the land on payment of Rs. 3,900. On the 3rd July 1908 Sheru, appellant, who is a minor grandson of Dina, vendor, also brought a suit for pre-emption. Each rival pre-emptor was impleaded as a defendant in the suit of the other, and each filed certain pleas in answer to his rival's claim. Jawahir Singh pleaded, *inter alia*, that Sheru's father, Budha, was not the legitimate son of Dina, vendor, being born of a sweeperess who had not been divorced by her first husband Tabi, and that, therefore, Sheru was not a member of the *Jat* tribe to which Dina belonged and had no right to claim pre emption. He further pleaded that Sheru was a *benami* pre-emptor, who had brought his suit, not for his own benefit, but in the interests of the vendees, whose right was admittedly inferior to that of Jawahir Singh. It is unnecessary to notice the other pleas at this stage of the proceedings as no other question has been argued before us in this appeal.

The District Judge held that Sheru's father, Budha, was a legitimate son of Dina, being the lawful issue of a valid marriage between Dina and *Musammat* Saddan, and that Sheru, being admittedly the legitimate son of Budha, was a member of the *Jat* tribe and as such entitled to bring a suit for pre emption. He further held, that although Sheru had raised money for payment into Court by mortgaging the land in dispute in favour of the vendees his right of pre emption was not thereby defeated. On these grounds, the District Judge granted a decree to Sheru on certain terms as to payment of the purchase money into Court which are set forth in his judgment. In the event of Sheru not complying with those terms Jawahir Singh was declared entitled to the possession of the land as pre-emptor.

On appeal by Jawahir Singh, the Divisional Judge, without going into the question whether or not Sheru's father was a legitimate son of Dina and a member of the *Jat* tribe, held that Sheru had brought his suit for pre-emption in the interests of the defeated vendees and not for his own benefit, and on that ground he accepted Jawahir Singh's appeal and dismissed Sheru's suit.

Sheru has preferred a further appeal to this Court, and the two questions which we have to decide in this appeal are:—

(1) whether Sheru's father, Budha, is a legitimate son of Dina, vendor, so that Sheru can be held to be a *Jat* and entitled to succeed to the land in suit as Dina's heir, and

(2) whether the suit brought by Sheru has been rightly dismissed on the ground that it was not brought by him *bona fide* for his own benefit, but only in the interests of the defeated vendees.

On the first question the Divisional Judge has recorded no finding, but as the evidence

on the record is sufficient for the decision of it, we think it unnecessary to remand the case to the lower Appellate Court for a finding on this point. We have had the evidence bearing on this question discussed by both sides, and, on the whole, we agree in the conclusion arrived at by the District Judge. It appears from the evidence that a sweeperess, *Musammat* Saddan, who was the wife of one Tabi, was abducted some 50 or 60 years ago by the present vendor, Dina. He then went under the name of Baghela or Baghel Singh. Tabi prosecuted Baghela for abduction, but the result of the prosecution is not known. Some time after, Baghela and *Musammat* Saddan turned Muhammadans, Baghela changing his name to Dina, and they went through the usual form of marriage prescribed by Muhammadan Law. In 1868 *Musammat* Saddan brought a complaint against the present respondent, Jawahir Singh, under section 334, Indian Penal Code, and in the heading of that complaint she described herself as the wife of Dina. Budha, father of Sheru, appellant, was evidently born some years after the date of the said complaint, and he has been living with and treated by Dina as his legitimate son. For aught we know to the contrary, Budha has been regarded by the brotherhood also as Dina's legitimate son and heir, as no question with regard to his legitimacy seems to have arisen before the present litigation. It is not disputed that Dina and *Musammat* Saddan lived as man and wife for a long series of years; and there is nothing on the record to show that *Musammat* Saddan's first husband, Tabi, ever took any steps, after the criminal prosecution relating to her abduction by Baghela, to assert his marital rights against *Musammat* Saddan. Baghela, *alias* Dina, *Musammat* Saddan and Tabi are all dead; and at this distance of time it is extremely difficult for Sheru to adduce definite evidence of a divorce having been given by Tabi to *Musammat* Saddan and of the birth of Budha after such divorce. The conduct of Tabi in relation to *Musammat* Saddan—his having allowed her to turn a Muhammadan, to contract a *nikah* with Dina, and to live with him (Dina) as his wife until her death,— raises a very strong presumption that he had repudiated or divorced the woman before Dina married her; and that being the case, Budha, who undoubtedly was born after the marriage, was the legitimate son of Dina. We, therefore, hold that Sheru's father, Budha, was the legitimate son of Dina, and Sheru was thus entitled to pre-empt the land in suit.

In connection with the second question, the admitted facts are that Sheru's suit was brought after Jawahir Singh had filed his suit; that the money deposited in Court under section 19 of the Pre-emption Act was advanced by the vendees; that the money which was paid into Court in compliance with the decree passed in favour of Sheru by the District Judge had been advanced on a mortgage of the land in suit by the father and nephew of the vendees; that the mortgage was for a fixed period of 10 years and the conditions of the mortgage were such as to make redemption difficult after the expiry of the period fixed by the deed. In view of these facts, the respondent's Advocate has urged that the suit by Sheru, appellant, is not a *bona fide* one, that it had been brought in the interests of the defeated vendees and for their benefit, and that therefore it has been rightly dismissed by the Divisional Judge. We have every sympathy with the difficult position in which the respondent, Jawahir Singh, is placed, as we have no doubt that it is the vendees who have instigated Sheru to bring his suit and who are supplying him with the necessary funds to prosecute it. But it by no means follows that Sheru is a *benami* pre-emptor simply because he is instigated by the vendees to pre-empt the land and that he would not have been able to bring his suit without their help. If his right of pre-emption is superior to that of Jawahir Singh, that right cannot be defeated because his object in prosecutiog the suit is to prevent Jawahir Singh from getting the land and because he has raised funds for that purpose by mortgaging that land to the vendees. The right view to take in such cases is the one propounded by a Division Bench of this Court [*Ramsukh Das* v. *Fazal-ud-Din* (1)]. At page 50 of the report the learned Judges say:

"Now, there may be authority for holding that, when it is proved that a plaintiff in a pre-emption suit is acting *benami*, that is, that another person will, on the plea that

(1) 19 P. R. 1898.

he is the real purchaser, be entitled to take from plaintiff whatever may be decreed him, the Court should refuse the nominal plaintiff a decree. But there is no authority for holding that a plaintiff may not enter into any agreement with others as to what he will do with the land if he gets it, and thus raise funds for the maintenance of his suit. In such a case the plaintiff is entitled to his decree, and if, after obtaining it, he proceeds to transfer the land, a fresh cause of action will arise to other pre-emptors. It would obviously be most inconvenient and improper to try suits for pre-emption not on the true issues of the case itself, but on side issues raised by pleas of the defendant as to agreements alleged to have been entered into by the plaintiff as to the future disposal of the property." The latest authority on the subject is *Mahmud Bakhsh* v. *Hussan Bakhsh* (2).

Following the above rulings, we hold that the facts relied upon by Jawahir Singh, respondent, are insufficient to prove that the suit of Sheru, appellant, is one brought by a *benami* pre emptor. We accept the appeal and, setting aside the decree of the lower Appellate Court, grant a decree to Sheru, appellant, for possession of the land in suit on payment of Rs. 1,500 to the vendees on or before the 31st March next, failing which the suit shall stand dismissed with costs. In the event of Sheru not paying the money into Court within the period specified, Jawahir Singh, respondent, would be entitled to the possession of the land on payment of Rs. 400 to the vendees, the balance of Rs. 3,500 being payable to the prior mortgagees on redemption. As the present litigation has been fostered by the vendees, and as the appellant brought the suit at their instigation and has succeeded only on a technical view of the law of pre-emption, we direct that the appellant pay the respondent's costs throughout and that the vendees pay the appellant's costs in this Court.

Appeal accepted.

(2) 7 P. R. 1912; 11 Ind. Cas. 708.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 284 OF 1909.

February 1, 1912.

Present:—Mr. Justice Johnstone and Mr. Justice Rattigan.

CHAJJU MAL—PLAINTIFF—APPELLANT

versus

TELU MAL—DEFENDANT—RESPONDENT.

Punjab Pre-emption Act (II of 1905), *s.* 11, *proviso —"Agnate", meaning of—Widow of agnate—Widow recorded as owner—Brother owning land not inherited by plaintiff.*

A *sapinda* under Hindu Law is not synonymous with agnate.

The widow of a male agnate is not an "agnate", as the word is used in the proviso to section 11 of the Punjab Pre-emption Act.

Three *Bania* brothers, *A.*, *B.* and *C.* purchased certain land in a village *X.* and certain other villages in 1885 and were duly recorded as owners. On 7th December 1889, *A.* died leaving a widow *D.* On 22nd February 1890, a partition was effected by which the land in village *X.* fell to the shares of *B.* and *D.*, *C.* getting his share in the other villages. Mutation was sanctioned according to the partition. In 1896, *D.* died and mutation of her land in the village *X.* was effected on 5th July 1897 in favour of *B.* and *C.* In November 1907, *C.* sued for pre-emption of certain agricultural land in the village *X*:

Held, (1) that *C.* did not fulfil the requirements of the proviso to section 11 of the Punjab Pre-emption Act;

(2) that *D.* was not *C.*'s agnate;

(3) that the fact that *B.* had been continuously recorded as owner in village X. for more thad 20 years did not help *C.*, as B. did not hold *C.*'s land.

Second appeal from the order of the Divisional Judge, Ambala, dated 15th May 1908, confirming that of the Munsif, 1st class, Ambala, dated 3rd March 1908, dismissing plaintiff's claim.

Mr. *Sundar Das*, for the Appellant.

R. S. Pandit *Sheo Narain*, and Mr. *Govind Das*, (representing Bhagat *Ishwar Das*), for Mul Raj and Mr. *Balwant Rai*, for Ram Singh, Respondent.

JUDGMENT.—On 3rd December 1906, defendant No. 1 sold the agricultural land in suit to defendant No. 2. Plaintiff sued for pre-emption. All the parties are *Banias* and so are not members of any agricultural tribe as defined in the Pre-emption Act. It follows—see section 11 of that Act—that plaintiff has no *locus standi* to sue unless he can bring himself under the proviso to that section. If he can, his suit must succeed, for he is a co-sharer in the same *khata* as that of which the land in suit forms a part, while the vendee owns no land in the village. Other questions were raised in the first

CHAJJU MAL v. TELU MAL.

Court, but it is unnecessary for us to mention them, as the case can be fully disposed of on the question of plaintiff's right to sue.

The first Court has discussed the meaning of the proviso aforesaid and has arrived at the conclusion that plaintiff cannot sue. The learned Divisional Judge also has held that plaintiff cannot have the benefit of the proviso, and thus both Courts have found against him and have concurred in dismissing his claim.

This petition under section 70 (1) (*b*) of the Courts Act has been admitted as a further appeal, and we have heard arguments. The problem to be considered can be stated in a few words. In June 1885 Chajju, plaintiff, and his brothers Harnam Das and Narain Das jointly bought land in this village Damla and in other villages and were duly recorded as owners On 22nd February 1890 they effected a partition under which all the purchased land in Damla fell to the lot of Harnam Das and Narain Das, Chajju taking his share elsewhere. Narain Das never actually enjoyed his share, for he died on 7th December 1889, while partition proceedings were going on, and so mutation of his share was made also on 22nd February 1890 in the name of his widow *Musammat* Shibbi. She died in 1896 and mutation of her land was effected on 5th July 1897 in favour of plaintiff and Harnam Das. It thus appears that Chajju was entered as a land owner in *Mouza* Damla more than twenty years before suit and continued to be so recorded until 22nd February 1890, when he ceased to be so recorded, coming again on the record (upon the death of *Musammat* Shibbi) in 1897. (It is pointed out by Mr. Sundar Das that in 1893 plaintiff purchased other land in *Mouza* Damla, but we cannot see that this affects the question before us).

The aforesaid section runs thus:—"No person other than a member of an agricultural tribe shall have a right of pre-emption in respect of agricultural land."

"*Provided*, that if the vendor is not a member of an agricultural tribe, the right of pre-emption may be exercised also by a member of the same tribe as the vendor who is recorded as the *owner* or as the occupancy-tenant of agricultural land in the estate in which the property is situate and *has been so recorded* for twenty years previous to the date of sale either in his own name *or in that of any agnate who has previously held his agricultural land.*"

Plaintiff, therefore, has to show that the land, which he now holds in *Mouza* Damla (or part of it) on the strength of which he claims pre-emption, has been continuously *recorded* in the Revenue papers for twenty years before suit (*i. e.*, from November 1897) as his property or as the property of an "agnate" of his. He and his agnate Narain Das were recorded as holding their shares from 1887 to 22nd February 1890, and he he has himself been recorded as owner since 5th July 1897; but between these two dates *Musammat* Shibbi was *recorded* as owner.

If the proviso did not contain the word "recorded", if the wording of it was "who is the owner" and "who has been the owner for twenty years, etc.," it might possibly be argued that Chajju, plaintiff, became owner immediately on the death of Narain Das and so never ceased to be owner at all, though the widow's life estate prevented his stepping into possession. But the word "recorded" cannot be ignored, and thus the question for us is whether *Musammat* Shibbi can be said to have been an "agnate" of plaintiff. (We may note that the existence of Harnam Das as a co-sharer with *Musammat* Shibbi does not help plaintiff, for though Narain Das is, no doubt, an agnate of plaintiff, he did not hold plaintiff's land).

"Agnate" is a word derived from Roman Law. It included persons related through male ascendants. It may be, as Mr. Sundar Das contends, that during a certain period of Roman Law it included females related through male ascendants; but we cannot find that it ever included the wife of an agnate as such. We, however, are inclined to agree with Mr. Shadi Lal in his commentary on the Punjab Pre-emption Act, 2nd edition, page 80, where he suggests that the word "agnate" in section 11 must be taken to have the meaning usually attached to it in this Province in connection with questions of agricultural custom; and no argument is necessary to show that the writers on Punjab Customary Law and Punjab Tribal Law and the Judges of this Court, who have in countless rulings discussed that law, have never used the words "agnate" and "agnatic" so as to include the widow of a male agnate. Indeed, the whole "agnatic theory," as it has

been called, is based on principles which relegate the wife of a member of an agnatic group to a totally different category from that to which the male collaterals related through males belong.

Mr. Sundar Das further argues that we should take cognizance of the fact that the parties are *Banias* and so follow Hindu Law, under which a wife joins the *gotra* of her husband and is in law identified with him and on his death continues his existence, with the result in this case that in law Narain Das should be held to have remained owner of the land until *Musammat* Shibbi died. He refers us to paras. 502, 503 of Mayne's Book on Hindu Law and Usage, 7th Edition, but after considering the learned author's remarks we are unable to see that he in any way deals with the question of the meaning of the word "agnate." No doubt, he tells us who are *sapindas*, but *sapinda* is clearly not synonymous with agnate, as it certainly includes persons whom even Mr. Sundar Das would hardly call agnates, namely, certain persons connected with the *propositus* through females; and in our opinion, such texts, as there may be in Hindu Law declaring a wife a part of her husband and so forth, are little more than sentimental pronouncements, for the very different position from her husband's which a Hindu widow takes after his death is sufficient in itself to show that she does not continue his existence, *e.g.*, if the deceased husband was joint with a brother, the widow does not even take deceased's share.

We may note, in conclusion, that the lower Appellate Court relied upon *Muhammad Ayub Khan* v. *Rure Kh n* (1), but we do not find it of much assistance in the present case as it deals with a different problem from that before us.

We hold, then, that *Musammat* Shibbi, as widow of plaintiff's brother, was not an "agnate" of plaintiff, as the word is used in section 11, Punjab Pre emption Act, and we dismiss the appeal with costs.

Appeal dismissed.

(1) 95 P. R. 1901; 125 P. L. R. 1901.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 532 OF 1910.

February 2, 1912.

Present:—Mr. Justice Johnstone and Mr. Justice Rattigan.

MEGHA RAM—DEFENDANT—APPELLANT

versus

MAKHAN LAL PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

*Pre-emption—Decree for pre-emptor—Appeal by vendee—Transfer of property on basis of which pre-emption decreed subsequent to decree—Construction of deed—Sale or mortgage—*Criteria—*Evidence—Admissibility of oral evidence—Third party—Evidence Act (I of* 1872) *s.* 92, *scope of—Punjab Pre-emption Act (II of* 1905) *s.* 4.

Where, after obtaining a decree for pre-emption and during the pendency of an appeal against the decree preferred by the vendee, a pre-emptor parts with the property on the strength of which he was able to sue for pre-emption, the transfer does not disentitle the pre-emptor to the decree he has already obtained and the vendee cannot ask the Appellate Court to take away from the pre-emptor the benefit of the decree on the ground of his subsequent transfer.

Dhanna Singh v. *Gurbakhsh Singh*, 91 P. R. 1909 (F. B.); 4 Ind. Cas. 337; 161 P. W. R. 1909; 148 P. L. R. 1909, referred to.

The prohibition in section 92 of the Evidence Act against going behind a written deed applies only to parties to a deed and not to outsiders.

Tara Chand v. *Baldeo*, 117 P. R. 1890, (F. B.), *Parma Nand* v. *Airapat Ram*, 20 P. R. 1899, relied upon.

In order to prove that an ostensible mortgage is really a sale, what has to be shown is (*a*) that there was a positive understanding between mortgagor and mortgagee that redemption would not be demanded, or (*b*) that the terms of the mortgage are such that redemption is a virtual impossibility.

Onerous conditions in a mortgage are not in themselves sufficient to warrant the decision that it was really a sale.

A. mortgaged a building site to the nephew of her husband. The site was situated in a town in the heart of a flourshing canal colony where such property was likely in future to increase in value. The mortgage-money was not higher than the market-value of the site. The term of the mortgage was fifteen years. No interest was chargeable on the mortgage-money proper but the mortgagee was entitled to build on the site at will and to charge the expenditure, with 6 per cent. per annum interest, on the house:

Held, that these circumstances were insufficient to prove that the transaction between the parties was a sale and not a mortgage.

Jagdish v. *Man Singh*, 100 P. R. 1895; *Muhammad Umar* v. *Kirpal Singh*, 78 P. R. 1904; *Bishen Singh* v. *Musammat Paro*, 19 P. R. 1905; 78 P. L. R. 1905; relied upon.

Anwar Hasan v. *Umatul Karim*, 145 P. R. 1906; 109 P. L. R. 1907; *Parma Nand* v. *Airapat Ram*, 20 P. R. 1899, distinguished.

Second appeal from the decree of the Divisional Judge, Shahpur Division, dated the 2nd of March 1910, reversing that of the District

MEGHA RAM v. MAKHAN LAL.

Judge, Jhang, dated 30th June 1909, dismissing the plaintiff's claim.

Mr. *Beechey*, for the Appellant.

Mr. *Nanak Chand*, for the Respondents.

JUDGMENT.—This is a pre-emption suit. Megha Ram, defendant No. 1, if we look only at the deed upon which he relies, which is dated the 19th October 1907, took a certain site in Chiniot town from defendant No. 2 in mortgage for Rs. 1,900. The plaintiff's case however, is that he (plaintiff) owns the adjoining house, and that the mortgage was really a sale disguised in the form of a mortgage in order to defeat pre-emptors The plaintiff offered Rs. 400 as the real price and as the market-value. The issues were: (1) Was the alienation a sale or a mortgage? (2) Was the whole Rs. 1,900 paid in good faith? and (3) if not, what is the market-value of the property? The first Court, after consulting rulings and after considering all the circumstances of the case, came to the conclusion that the transaction was a mortgage as stated in the deed. That Court rightly laid upon the plaintiff the burden of proving that the real transaction was something different from what appears on the face of the deed. The alienation was found not to be a sale, and so the suit for pre-emption was dismissed. The first Court went on to hold that Rs. 1,900 was actually paid.

The plaintiff thereupon appealed, and the learned Divisional Judge came to an opposite conclusion. He remarked upon the near relationship of the parties, the mortgagee being the nephew of the mortgagor's husband, and he also expressed the opinion that the sum paid, *i.e.*, Rs. 1,900, was very much higher than any mortgagee would give for possession of such property for 15 years. He further read the evidence of one Hira Nand, Pleader, as proving that the parties to the transaction actually said that it was their "intention to sell the land but to conceal the fact of sale by an ostensible mortgage so as to defeat the rights of pre-emptors." Thereupon, without going into the question of the sum actually paid or the market-value, he gave the plaintiff a decree for possession on payment of Rs. 1,900. We understand that the plaintiff has paid this money without demur.

The alienee has now come up to this Court on further appeal. He argues, on the basis of the authority of rulings of this Court that there was no sufficient reason for holding this transaction to have been a sale and we have heard arguments and have also carefully gone through the record.

One objection raised by the appellant by a petition put in on 20th January 1912, *i.e.*, after the filing of the appeal, we may dispose of at once. It is to the effect that plaintiff based his suit on his possession of $\frac{1}{4}$th share of a house adjoining the house in dispute, that the plaintiff on the 12th October 1911 transferred that share to his mother by deed of gift, and that, therefore, the plaintiff has lost his *locus standi* to sue for pre-emption or to resist this appeal, and that his suit should be dismissed on this ground. In our opinion, this contention cannot succeed, because plaintiff's decree, awarded to him by the Divisional Judge, bears date 2nd March 1910, while his parting with the aforesaid $\frac{1}{4}$th share of the adjoining house took place long afterwards. No doubt, according to the authorities, a pre-emptor can only succeed if he has a right of pre-emption at the date of the sale and at the date of the institution of suit and up to the passing of a decree in his favour [*Dhanna Singh* v. *Gurbakhsh Singh* (1)], but in the present case plaintiff had his rights intact through the whole of these periods. No doubt, in a sense, the case is still *sub judice*, until the final appeal in this Court has been decided; but it is not *sub judice* in the sense in which the defendants use the phrase, nor do we think it is open to the alienee, against whom a decree for pre-emption has been passed, to ask this Court to set aside the decree of the lower Appellate Court on the ground that, after the plaintiff had secured the decree, he had parted with the property on the strength of which he was able to sue for pre-emption. Plaintiff is not asking this Court for anything; defendant No. 1 cannot ask this Court to take away from plaintiff what the latter has obtained, on the ground that the latter could not get it *now* if he was still asking for it.

But on the merits this appeal must nevertheless succeed. It is no doubt idle for Mr. Beechey on behalf of defendant-appellant to urge that section 92, Indian Evidence Act, is a bar to any attempt on the part of

(1) 91 P. R. 1909 (F. B.); 4 Ind. Cas. 337; 1 W. R. 1909; 148 P. L. R. 1909.

plaintiff to show that the mortgage-deed is not a mortgage-deed in reality, for the contention is at once met by a reference to section 4, Pre-emption Act; and even, apart from that provision of Statute Law, we think the better view is [cf. *Tara Chand* v. *Baldeo* (2), *Parma Nand* v. *Airapat Ram* (3)] that the prohibition in section 92 aforesaid against going behind a written deed applies only to the parties to the deed and not to outsiders. It is obvious, however, that we need not discuss this matter further, for section 4 of the Pre-emption Act is clear. Finding against Mr. Beechey's client on this minor point, we turn to the merits, that is to say, the question of the real meaning of the deed, a question to be answered in each case on a consideration of its own facts.

The site is situate in the town of Chiniot which is now in the heart of a flourishing agricultural canal colony, and it may be safely assumed that such property will in the future rather increase than decrease in value. Plaintiff first valued the property at Rs. 400, but he is content now before us to take the value as Rs. 1,050, as estimated by the Local Commissioner, and he has paid Rs. 1,900 without objection. Then, there is certain evidence on the record which would fix the value at Rs. 2,000 to Rs. 2,500. In these circumstances, we cannot agree with the lower Appellate Court that Rs. 1,900 was an absurdly high figure for a mortgage loan. It is not redeemable for 15 years from date of mortgage, by which time the property, even merely as a site, may not improbably be worth much more than Rs. 2,000 and so be well worth redemption.

The next point taken against appellant is that the near relationship between mortgagor and mortgagee points to the probability of collusion between them. No doubt, collusion may be more likely between near relations than between strangers, but this does not carry the matter very far: what has to be shown is (*a*) that there was a positive understanding between mortgagor and mortgagee that redemption would never be demanded, or (*b*) that the terms of the mortgage are such that redemption is a virtual impossibility. So far, we have found no facts establishing any such propositions as these.

(2) 117 P. R. 1890 (F. B.).
(3) 20 P. R. 1899.

Next, as to the statement of Hira Nand, Pleader, and its effect, which has been strangely magnified by the learned Divisional Judge. It is unlikely that persons concocting a plot would give themselves away to Hira Nand, so that anything in his statement, which looks like confession of an intended fraud should be discounted; and, further, his statement is not incompatible with the idea that the parties to the transaction intended a mortgage, but, being apprehensive lest pre-emptors should attempt to persuade the Courts that it was a sale, went to the Pleader for legal advice as to the mode of drafting best calculated to prevent their real intentions from being misunderstood.

Again, it is urged that the condition under which the mortgagee was to be at liberty to build on the site at will—"*nau tamir har kism*" and charge his expenditure, with 6 per cent. per annum interest, on the house, is incompatible with anything but a permanent alienation: but this argument is far from convincing. Mortgagee is, so far as we know, a man of ordinary means, and there is no need to credit him with any grandiose intentions in the way of bricks and mortar. In his own interests, even as purchaser, he would build merely one ordinary house, or a set of ordinary shops; and, at the end of 15 years, such structures might be well worth redeeming on payment of principal and interest. It is important to note that no interest was chargeable on the mortgage-money proper.

Virtually, the above is all that can be said for plaintiff's case, and we do not think the circumstances on which stress is laid prove either that appellant and his vendor had a positive understanding that redemption was not to be demanded or that the conditions of the mortgage are such as to make redemption a practical impossibility. The owner, or her heir, as she is very old, will have the legal right to redeem in 1922, and we think it not impossible that it may be worth his or her while to redeem then.

In our opinion, these views are in accordance with authority. It is unnecessary to discuss at length all the rulings that have been brought to our notice, as circumstances and facts vary greatly from case to case; but we may point to the decision of the Full Bench in *Jagdish* v. *Man Singh* (4)

(4) 100 P. R. 1895.

which was in some respects a much stronger case for the plaintiff than is the present one, and yet in which the learned Judges declined to hold that the mortgage-deed, then in question, was other than it purported to be; to *Muhammad Umar* v. *Kirpal Singh* (5) and *Bishen Singh* v. *Musammat Paro* (6), from which the principle may be drawn that onerous conditions in a mortgage are not in themselves sufficient to warrant the decision that it was really a sale. The cases relied upon by Mr. Nanak Chand for plaintiff are *Anwar Hasan* v. *Umatul Karim* (7), C. A. No 872 of 1901 and *Parma Nand* v. *Airapat Ram* (3) in which ostensible mortgages were held to be sales, but in them we can find no clear *dicta* exactly covering the present case. They are distinguishable by virtue of the facts in them being different, the first of the three being peculiarly distinguishable in this way.

For these reasons, we accept this appeal, and, setting aside the decree of the lower Appellate Court, we restore that of the first Court and dismiss plaintiff's suit with costs.

Appeal accepted.

(5) 78 P. R. 1904.
(6) 19 P. R. 1905; 78 P. L. R. 1905.
(7) 145 P. R. 1906; 109 P. L. R. 1907.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 953 OF 1910.

February 9, 1912.

Present:—Mr. Justice Chevis.

TOTA SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

PARTAP SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code Act (V of 1908), s. 47—Execution proceedings—Money-decree—Death of judgment-debtor—Ancestral property—Objection by judgment-debtor's heir on the ground of want of necessity—Objection to be decided in execution proceedings and not by separate suit.

The heir of a deceased judgment-debtor is entitled to object in execution proceedings that the ancestral property in his hands is not liable for a money-decree against the deceased on the ground that the debt was not incurred for necessity.

The dispute on such an objection is one for decision in execution proceedings and is not a matter for a separate suit.

Ariabudra v. *Dorasami*, 11 M. 413; *Ramayya* v. *Venkataratnam*, 17 M. 122, distinguished.

Lachmi Narain v. *Kunji Lal*, 16 A. 449, not followed.

Kashi Ram v. *Harnam Das* 47 P. R. 1887; *Ram Chand* v. *Gholu Shah*, 87 P. R. 1887; *Nathu* v. *Amir Chand*, 147 P. R. 1907, *Amar Chandra* v. *Sebak Chand*, 34 C. 642; 11 C. W. N. 593; 5 C. L. J. 491; 2 M. L. T. 2)7; *Chowdry Wahed Ali* v. *Jumaee* 18 W. R. 185; 11 B. L. R. 149, relied upon.

Second appeal from the order of the Additional Divisional Judge, Ambala Division, dated 18th April 1910, reversing that of the District Judge, Ambala, dated 27th October 1909, dismissing the claim.

Lala *Ganga Ram*, for the Appellant.

JUDGMENT.—On 20th August 1907 the respondents to this appeal obtained a decree for Rs. 1,456, and costs against Deva Singh. The suit was based on mortgages, but the decree was a simple money-decree. Deva Singh died, and the decree holders are now seeking to execute their decree by process against the estate of Deva Singh which is now in the hands of his son Tota Singh. Tota Singh objects that the land and house against which the decree-holders are proceeding is not liable on the ground that the mortgages effected by his father were not for necessity. The District Judge has decided, after inquiring in execution proceedings, that the mortgage-debt was not incurred for necessity and so the ancestral property in the hands of the son is not liable to attachment and sale. The learned Divisional Judge on appeal has held that the question of the liability of the property is one which cannot be raised in execution proceedings, and that the proper way to contest the validity of the decree is by regular suit. Tota Singh has preferred a further appeal to this Court.

The learned Divisional Judge relies on three rulings, *Ariabudra* v. *Dorasami* (1), *Ramayya* v. *Venkataratnam* (2), *Lachmi Narain* v. *Kunji Lal* (3). In *Ramayya* v. *Venkataratnam* (2) the objection was as to the liability of the share in the joint family property of two younger sons who were no parties to the suit in which the decree was passed So, too, in the earlier case [*Ariabudra* v. *Dorasami* (1)] the objection raised was as to the share in joint family property of the sons of the deceased judgment-debtor. In these cases it does not appear that there was any objection to the execution of the decree so far as the share of the judgment-debtor was concerned. In the present case, however, we have nothing

(1) 11 M. 413.
(2) 17 M. 122.
(3) 16 A. 449.

to do with shares; this is not a case of a joint Hindu family governed by the *Mitakshara*, but of an estate which belonged entirely to Deva Singh, who, so long as he lived, was the sole owner, though, no doubt, his powers of alienation were limited and his son had a right to challenge any alienations on the ground of want of necessity. The case reported in *Lachmi Narain* v. *Kunji Lal* (3) is somewhat different. There it was held that the creditor, who had obtained a simple money-decree against the father in a joint Hindu family, must, after the death of the father, if he wishes to proceed against the ancestral property, bring a separate suit against the son, in which suit the son can plead that the suit is barred by limitation or that the debt is tainted by immorality.

I find it hard to reconcile these rulings, especially the last, with other rulings quoted for the appellant in this case, *viz.*, *Kashi Ram* v. *Harman Das* (4), *Ram Chand* v. *Gholu Shah* (5); *Nathu* v. *Amir Chand* (6) and *Amar Chand* v. *Sebak Chand* (7).

In the two earlier Punjab rulings, it is held, on the strength of the Privy Council ruling *Chowdhry Wahed Ali* v. *Jumaee* (8), that where the son of the deceased judgment-debtor raises objections to the attachment and sale of ancestral property on the ground that the debt is immoral, the matter is one for decision in execution proceedings and not by regular suit. In *Nathu* v. *Amir Chand* (6) the son was brought on the record of the original suit, as his father died before the decree was passed. The son pleaded that the debt was incurred for an immoral purpose, and the lower Courts declined to entertain the plea This Court held that the plea was entertainable. The facts of this case are somewhat different and I confess that I fail to see how the son could raise in execution proceedings a plea which had been overruled in the regular suit to which he was a party. But the principle that such a dispute is not a matter for a separate suit is maintained. The case *Amar Chandra* v. *Sebak Chand* (7) is one in which it was held by a majority of the Full Bench that the question of the liability of the ancestral property in the hands of the son of the deceased judgment-debtor (a member of a joint Hindu family) was one to be decided in execution proceedings when the son had been properly brought on the record.

The cases referred to are all cases of persons governed by Hindu Law and not by custom. The principle, however, seems to be the same in either case, though here the son can question the liability of the ancestral property not only on the ground of the debt being tainted with immorality, but also on the ground that the debt was not for necessity. The weight of authority seems to me to be in favour of the view that the dispute is one for decision in execution proceedings and not in a separate suit. If the authorities were evenly balanced, I should give the preference to the rulings of this Court. It seems to me that the son is not in the present case questioning the validity of the decree (a mere money-decree) in any way, but merely disputing the laibility of the ancestral property which is now in his hands under that decree and this I regard as a matter to be settled in execution proceedings.

I hold that the matter is one for decision in execution proceedings, and I accept this appeal and, reversing the decision of the learned Divisional Judge, I return the case to him for decision in due course. Stamp on appeal to be refunded, other costs of this appeal to abide the event.

Appeal accepted.

(4) 47 P. R. 1887.
(5) 87 P. R. 1887.
(6) 147 P. R 1907.
(7) 34 C. 642; 11 C. W. N. 693; 5 C. L. J 491; 2 M. L. T. 207.
(8) 11 B. L. R. 149; 18 W. R. 185.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 1525 OF 1911 WITH CIVIL RULE NO 3499 OF 1911.

August 23, 1911.

Present:—Mr. Justice Casperez and Mr. Justice Sharfud din.

JAGAT CHANDRA MAJUMDAR—PLAINTIFF—APPELLANT

versus

MUNSEF ALI SARKAR—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (111 *of* 1885), *s.* 66, *cl.* (2)—*Non-occupancy* raiyat—*Ejectment—Arrear for more than one year—Landlord's right to eject—Waiver—Judgment—"Decretal money", meaning of—Amendment of*

JAGAT CHANDRA MAJUMDAR v. MUNSEF ALI SARKAR.

decree directing ejectment in default of payment of arrear of entire decretal money.

Section 66 of the Bengal Tenancy Act refers to an arrear for one year only. If the landlord omits to sue for ejectment in default of payment of the arrear for one year, he must be deemed so far to have waived his right to turn out the tenant.

Sita Nath Midda v. *Basudeb Midda*, 2 C. L. J. 540, relied upon.

Jegeshuri Chowdhrain v. *Mahomed Ebrahim*, 14 C. 33, referred to.

A landlord brought a suit for arrears of rent for four years and got a decree. The judgment directed that a decree for ejectment should be made in terms of section 66 in default of payment of the decretal money within 15 days. The decree directed that the defendant would be ejected in default of payment of the entire decretal money within 15 days. The plaintiff executed his decree, as the defendant did not put in the entire decretal amount but a sufficient amount to cover one year's arrears, and took possession. Subsequently the defendants asked for the amendment of the decree which was done:

Held, that the expression" decretal money" in the judgment meant the decretal money as limited and confined to the amount as specified in accordance with sub-section (2) of section 66, that it could not mean the entire decretal amount, and that the amendment was rightly granted.

Held, also, that it was open to the Court to amend the decree even after it had been executed.

Appeal from the decree of the Sub-Judge of Pabna and Bogra, dated June 23rd, 1910, modifying that of the Munsif of Serajgunge, dated November 30th, 1909.

Babus *Dwarka Nath Chakravarti* and *Hem Chandra Mitra*, for the Appellant.

Babu *Herendra Narian Mitra*, for the Respondent.

JUDGMENT.—This Rule is directed against an order of the Sub-Judge, dated the 25th April 1911, amending his decree, and the appeal is directed against the decree prepared in accordance with that amendment.

The questson for determination turns upon section 66 of the Bengal Tenancy Act.

The plaintiff obtained a decree for the arreas of rent accrued due in respect of the years 1312 to 1315 inclusive, and the decree, as originally prepared, enabled him to eject the defendant in default of payment of the entire decretal money within fifteen days. The plaintiff executed his decree and took possession; but, subsequently, the defendant asked for the decree to be amended, and it is conceded that, if the amendment, as allowed, holds good there was money in deposit from which the arrear of rent for one year only might have been satisfied; and, if it had been so satisfied, the plaintiff would not have been able to eject the defendant in terms of section 66 of the Rent Law.

It is urged on behalf of the plaintiff that it was not open to the Sub-Judge to amend his decree after it had been executed and satisfied and that his original decree was in accordance with the judgment.

In our opinion, neither of these contentions is well founded.

The cases upon the subject are *Sita Nath Midda* v. *Basudeb Midda* (1) which followed *Jugeshuri Chowdhrain* v. *Mahomed Ebrahim* (2). The facts of the earlier case are not altogether the same as in the latter decision. The facts of the case before us, however are exactly similar to those in *Sita Nath Midda* v. *Basudeb Midda* (1), because, there the suit for rents arrears was in respect of four successive years, and it was held that, in respect of the first three years, the landlord had waived his claim for ejectment. We have no hesitation in applying the principle so accepted.

The original decree prepared was not in accordance with the judgment, dated the 23rd June 1911, because the judgment directed that a decree for ejectment should be made in terms of section 66. As we have observed section 66, as interpreted, refers to an arrear for one year only. If the landlord omits to sue for ejectment in default of payment of the arrear for one year, he must be deemed, so far, to have waived his right to turn out the tenant. Consequently, it was open to the Sub-Judge to amend his decree so as to bring it into conformity with that part of the judgment which dealt with ejectment in terms of section 66 (2) of the Act. By the expression "decretal money," in the last sentence of the judgment, we understand the "decretal money" as limited and confined to the amount as specified in accordance with sub-section (2) of section 66. It cannot mean the entire decretal sum for which the decree for arrears of rent is passed.

In this view, the appeal fails and is dismissed with costs, one gold *mohur*.

The Rule is also discharged with costs, one gold *mohur*.

Appeal dismissed;
Rule discharged.

(1) 2 C. L. J. 540.
(2) 14 C. 33.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEALS NOS. 150 AND 268 OF 1908.

August 9, 1911.

Present:—Mr. Justice Coxe and Mr. Justice Teunon.

LAL GOPAL DATTA CHOWDHURY —DEFENDANT NO. 3—APPELLANT

versus

THE KHOROORIAH MAJOZILLA ZEMINDARY SYNDICATE, LD.— PLAINTIFFS—RESPONDENTS.

Contract — Mutuality — Evidence — Minor—Specific performance—Minor's benefit—Subsequent repudiation by guardian—Better offer—Company, joint stock, limited —Proprietors of zemindari *forming into limited company—Legality—Public policy.*

The mutuality of a contract does not depend on the evidence for it, and if a mutual contract existed, the fact that it would under certain circumstances have been difficult to prove it, does not affect its validity.

A contract which is for a minor's benefit may be specifically enforced against him. Therefore, a valid agreement lawfully entered into on behalf of a minor and for his benefit, cannot be repudiated if the guardian subsequently finds he can make a better bargain elsewhere.

Khairunnessa Bibi v. *Lokhinath Pal*, 27 C. 276, *Mir Sarwarjan* v. *Fakaruddin Mahomed Chowdhuri*, 34 C. 163; 11 C. W. N. 207; 4 C. L. J. 431; 1 M. L. T. 360, relied upon.

Chhitar Mal v. *Jagan Nath Prasad*, 29 A. 213; A. W. N. (1907) 25; 4 A. L. J. 24, referred to.

The proprietors of a *zemindari* being numerous and their separate interests minute, they formed themselves into a joint stock limited company:

Held, that the means adopted for the management of their property would seem to be beneficial and that the recognition of the company was not contrary to public policy, as its existence does not injure or endanger the rights of any body.

Appeal from the decrees of the Sub-Judge of Khulna, dated February 17th, 1908.

Mr. *A. Chaudhuri*, Counsel, Babus *Provash Chandra Mitter* and *Jadu Nath Kantilal*, for the Appellant.

Mr. *C. R. Dass*, Counsel, Dr. *Rash Behari Ghose*, Babus *Jogesh Chandra Dey*, *Joy Gopal Ghosha* and *Nagendra Nath Ghose*, for the Respondents.

JUDGMENT.—The plaintiffs in these suits are the Khorooriah Majozillah Syndicate Co. Ld. and the defendants are certain of the proprietors of the Khorooriah Barazillah *Zemindari*. The defendant Lal Gopal Dut had a share of one-fourth, Bhupendra of Barazillah, (so-called to distinguish him from Bhupendra of Majozillah), one of the Directors of the plaintiff Company, and Mrinmoyi had one-twelfth, Charu Chandra and Tej Chandra had one-twelfth, and Krishna Binodini Dasi had one-twelfth. Of this last mentioned sharer Jyotisman and Arindamber are grown-up sons defendants Nos. 1 and 2 in Appeal No. 263, who succeeded to one-twenty-fourth, while the other twenty-fourth fell to her minor sons, Hrishikesh and Sankarkripa, defendants Nos. 1 and 2, in the guardianship of their father Jadab in Appeal No 150. It is asserted on behalf of the plaintiff Company, that these defendanst Nos. 1 and 2 covenanted to give them a *patni* of their interest in the Barazillah, but that they subsequently resi'ed and leased their interest to Lal Gopal Dutt, defendant No. 3. The suit is for specific performance and damages and has been decreed by the Court of first instance. Defendant No. 3 appeals.

The first and principal question to be decided in these suits is whether there was or was not a completed contract between the plaintiffs and defendants Nos. 1 and 2 when the latter entered into their contract with defendant No. 3, that is to say, on the 30th September 1906.

Negotiations began at the end of 1905 and the Company called for and considered a report from their local Manager. On the 12th April 1906 the Directors of the Company had a meeting and agreed to entrust a Director named Bijoy Krista with the settlement of the whole matter. They were willing to take a lease either of an interest between 7½ annas and nine annas or of one less than 7½ annas. In the latter case they were willing to pay rent at the rate of Rs. 30,000 for the whole sixteen annas for the first five years, Rs. 31,000 for the next five years, and Rs. 32,000 thereafter. They agreed to pay as bonus 12 to 15 times the amount remitted as rent, to pay the expenses of collecting the back rents and to pay seven-sixteenths of the back rents actually collected.

According to Bhupendra of Barazillah the matter was discussed between him and Bejoy and almost settled. The next meeting was on the 29th April and was attended by Bhupendra of Barazilla who brought with him a letter, signed by himself and possibly by other co-sharers of the one-fourth share. There is some conflict of evidence as to whether this was signed by all the sharers, when it was produced, or whether it was signed afterwards, when certain alterations

had been made in it. According to the plaint it was signed by all the proprietors, when it was produced at the meeting. But as regards Jadab we have no doubt that it was signed afterwards. The next day Bhupendra of Barazillah wrote a letter to Jadab, telling him what had happened at the meeting and containing the words, "I send this letter to you, which you are to send back after signing it." No suggestion is made that there was any other letter that Jadab was required to sign, and the letter referred to is clearly the letter produced at the meeting of the 29th April.

The letter states that the owners of the one-fourth share were ready to grant a lease on a rent of Rs. 5,500 for the first five years, Rs. 5,750 for the second, Rs 6,000 for the third, and Rs. 6,200 thereafter with a bonus of Rs. 34,000. This is the same thing as rent at the rate of Rs. 30,000 for the whole sixteen-annas for the first five years, Rs. 31,000 for the second, Rs. 32,000 for the third, and Rs. 32,200 thereafter, with a bonus of 17 times a deduction of Rs. 2,000 a year. As regards arrears the owners wanted Rs 5,000 payable at the rate of Rs. 1,000 a year. The letter closed, "If you agree we are ready to make an agreement." The Directors considered this letter in the presence of Bhupendra of Barazillah, and agreed, subject to the sanction of a general meeting, to take a lease of one-sixth or one-fourth at the rent above stated. They cut down the bonus to 16½ times the remission, if that did not exceed Rs. 2,000 and 15 times any remission in excess of that sum. As to back rents the sum was cut down from Rs. 5,000 to Rs. 4,000 payable at the rate of Rs. 1,000 a year or to ten-sixteenths of the amount collected deducting cost of collections. These alterations were entered by Bhupendra in the letter except as regards the deduction of the cost of collection. Then, according to the witners Kumar Krishna, Bhupendra took the letter away and brought it back duly signed three or four days later. On the 16th May a general meeting of the Company was held, when the action taken at the Directors' meeting was approved and it was ordered that "the matter be placed in the Directors' hands for drawing up the deeds and for doing all other necessary acts in connection with the matter." These words indicate to our minds that the Company regarded the bargain as completed. Furthermore, it is clear that, if Bhupendra really represented his co-sharers, they too regarded the bargain as completed. The only points remaining undecided were (*i*) the cost of collection of the back rents, a mere detail which seems to have been omitted by oversight from the alterations to the letter, and (*ii*) the question what share was to be leased. It is true that Bhupendra wrote the next day to Jadab that nothing was settled as to arrears, but clearly the Company was willing to accept either alternative that the proprietors preferred.

Leaving aside the question of the costs of collection, as a negligible detail, the two points that we have to decide are (*i*) whether the other owners of the one-fourth share were consenting parties to the arrangements made by Bhupendra of Barazillah, and (*ii*) whether the parties were agreed as to what share should be taken. Now, as to the first point direct evidence of Bhupendra's authority to act for the others is not put in, and indeed could hardly be expected from men so shifty and evasive as the circumstances of the case prove Bhupendra and Jadab to be. But their subsequent admissions place this point beyond doubt. The witness, Sarat, who seems to be a man of position and independence and entirely trustworthy, says that Bhupendra told him in May that the bargain had been concluded. The first admission in writing is contained in Jadab's application to the Court as certificated guardian of the minors for leave "to execute the lease for and on behalf of the infants on the terms aforesaid." The terms are set out and it is distinctly admitted that "the elder brothers of the infants and certain other co-sharers of the said property, owning altogether one-fourth share of the said *zemindari*, have arranged with the said Khoorooriah Majozillah *Zemindari* Syndicate Ltd. for a permanent lease of their shares in the said *Zemindari* to the said Company in these terms." It is argued that this was merely an application to be allowed to enter into the contract and not a completion of the contract. But it seems to us to be much more than that. It recites an admission in the clearest terms that the lease had been arranged and merely prays that permission may be given to execute the lease. And it shows that Jadab fully accepted what Bhu-

pendra had arranged. If this had been all we should have been prepared to hold that after this clear admission it was idle for Jadab to contend that the bargain had not been completed. There is, however, much more, namely, a letter by all the co-sharers to the Secretary of the Syndicate, dated the 5th September, 1906, authorising him to enter into possession, an acknowledgment of the receipt of rent on the 20th September, and an authority to collect *Jalkar* rent given on the 22nd September. The former contains a clear admission that the bargain had been completed, running as follows: "At present it has been settled that a *patni* lease of the aforesaid four annas share owned by us, should be granted to the aforesaid Syndicate for the purpose of the collection of rents and the protection of the *zemindari*, but as there is some delay in the execution of the documents relating to the *patni* settlement the aforesaid Syndicate is authorised by this letter to take possession of our four annas share." On the same day a formal notice was issued to the tenants over the signatures of all the owners to pay their rents to the Company and this too recites in the clearest terms that a "a *patni* settlement of our aforesaid 4-annas share has been made with the Khorooriah Majozillah Syndicate from the aforesaid 1st *Baisakh*."

It is argued that the letter delivering possession contains a false statement to the effect that the *ijara* under which the land had been held, had been surrendered, whereas the deed of relinquishment had not been executed. But it is proved beyond doubt that this surrender had long been settled and was to take effect from the beginning of the year then current. It is stated in Jadab's application of the 7th July that the surrender was settled. The letter does not recite that any deed of relinquishment had been executed and its recital that the *ijara* had been surrendered is in practical accordance with the real facts. Then it is said that the Company were aware of the negotiations with Lal Gopal Dutt and merely had the document executed by way of creating evidence. But this contention is evidently unsustainable. How can the Company be said to have created false evidence by these documments? The defendants either were bound or were not bound to the Company on the 5th September. If they were bound the evidence of their admission is true. If not, why should they say that they were bound, and how can their admissions over their own signatures be regarded as a creation of evidence by the Company? It is impossible to suppose that they were colluding with the plaintiffs to defraud Lal Gopal Dutt, with whom at that time they had entered into no contract at all. This evidence seems to us conclusive and there is no real answer to it.

Again, on the 20th September each owner of the three shares of one-twelfth received rent from the Company and granted a receipt on the following terms:—"Having received Rs. 333 5-4 in cash from the Secretary to the Mezozillah *Zemindari* Syndicate Ltd. for the rent of the *Bhadra kist*, according to the terms of the agreement made with the Mezozillah *Zemindari* Syndicate Ltd. for the settlement of the *patni* lease of our own share out of the 4-annas share of the Barazilla, we give this receipt." The receipt for the one-twelfth share covered by the suits is signed by Jadab on behalf of his minor sons and by the two grown-up sons. This evidence is not so strong against the minors as against the others, as it appears that at this time Jadab was in considerable distress over the health of one of his sons and in need of money. Moreover, it was signed by him "subject to the approval of the *patni* draft." But these circumstances cannot wholly exempt him from being bound by this formal admission of the existence of the agreement.

We do not think that any inference adverse to this payment can be drawn from the slight confusion that exists regarding its date or from the fact that it was not sanctioned at a previous meeting. The receipts are dated 20th September, but the Secretary was authorised by the majority of Directors to pay the money on the 21st, and it appears from the evidence of Bhupendra of Barazillah and from Exhibit 54, a letter from Jadab to Kadareswar, that the money was actually paid on the 22nd. We see nothing very unusual in the formal receipt being drawn up before the payment, or even before sanction was given, if the Secretary had no doubt about obtaining the sanction. As to the fact that the payment was not previously passed at a meeting and was op-

posed by Bhupendra of Majozillah afterwards, that might affect the regularity of the payment, but could not affect the force of the admission in the receipt.

As to the authority to collect *jalkar* rent, this is alleged clearly in the plaint and not traversed. The letter is signed by Jadab on behalf of the minors and by his adult sons and contains a clear admission that all has been completed except the execution of the formal documents. The letter begins: "As there is still some delay in the execution of the necessary documents relating to the *patni* lease of the 4 annas share of the Barazillah belonging to us in respect of which an agreement to give a *patni* to the Majozillah Syndicate Co. Ltd., has been concluded."

The next point is whether the agreement can be regarded as incomplete by reason of uncertainty whether the whole of the one-fourth share was to be leased or each fraction separately. Now it is quite clear that the Company was willing to take whatever was leased to them. In the proceedings of the 12th April they were ready to take an interest between 7½ and 9 annas or one below 7 annas. At the meeting of the 2nd September, though they evidently understood that the whole one-fourth share had been leased, they were willing that the preparation of a formal document with respect to one-twelfth should stand over. The witness Peari Lal Halder, Attorney for the Company, states that on the 16th August Bhupendra of Barazillah came to his office and was asked by him to give details to show how the rents were to be apportioned to enable him to draw up the leases. It appears that the different co-sharers wanted different amounts of rent to be commuted into bonus. And that this evidence is true is shown by the fact that Bhupendra on the 25th August and the grown-up sons of Jadab on the 12th September sent in their apportionment statements. Nothing turns on the fact that alterations were made in the letter. It must be remembered that the defendants are Bengalis, having distinct and defined interests in the land, and are not a joint family governed by the *Mitakshara*. The agreement was that the whole of the one-fourth share should be leased but that does not necessarily mean that it was to be leased jointly by all the co-sharers; and clearly it was the intention of the parties that each branch of the family should lease his interest separately. It has been argued that there was no mutuality and that the defendants could not have sued the company for specific performance of their agreement to take a lease of their separate interests. But, in our opinion, there was an agreement by the Company to take these separate leases and the defendants could have sued for specific performance of it. No doubt if the Company had turned dishonest it would have been difficult for the defendants to prove the agreement to take separate leases, as this was all along more understood than expressed. But the mutuality of a contract does not depend on the evidence for it and if as in this case, a mutual contract existed the fact that it would under certain circumstances have been difficult to prove it, does not affect its validity.

The proceedings at the meeting of the 19th August do not weaken our view that the contract was complete before that day. All that was settled on that day was subsidiary points, which needed, of course, to be arranged, but did not affect the binding character of the existing contract. The form in which the arrears were to be paid was settled, as well as the questions of instalments and costs. It is alleged and not categorically denied and it is, no doubt, true that the meeting was attended by both Bhupendra of Barazillah and Arindam.

We have no doubt that on the 30th September there was a valid and completed contract subsisting between the parties and that by this contract the defendants Nos. 1 and 2 were bound to lease their interests to the plaintiff Company on the terms agreed upon. The learned Counsel for the appellant has referred us to numerous cases decided in England which deal with the question when a contract to be gathered from letters, etc., can be said to be concluded. We have carefully examined these cases, but it is unnecessary to refer to them, because in none of them are there, as there are in this case, distinct and repeated admissions that the contract has been made and concluded.

The next question that arises for decision is whether the appellant was aware of this contract when the other defendants executed the agreement of the 30th September in his favour. On this point, too, there is, in our opinion, no room for doubt. The negotiations with Lal Gopal Dutt were begun in 1905

and it is evident that Jadab, who seems to be entirely devoid of scruple, continued to negotiate with him, long after he had finally settled with the Company. The appellant and his son Manujendra, who constantly acted for him, were on intimate terms with Bhupendra of Majozillah, a Director of the plaintiff Company, who opposed the taking of the lease from the beginning. It is admitted that the appellant's son made inquiries from the Directors, and it is incredible under these circumstances that Bhupendra of Majozillah should not have told them what had happened. It is equally incredible, in the face of the minutes of the meetings, that the other Directors should, as they say, have told them that they were perfectly willing that the defendants should lease the property to them. Sarat who, as we have said, seems a trustworthy witness says that he informed Manujendra that the contract had been completed, one or two days after the letter authorising delivery of possession was written, that is to say, about the 7th of September. Admittedly, Manujendra had a conversation with Kumar, the Secretary, on the 17th September and though they give conflicting accounts of what was said, it is not likely that the Secretary concealed the fact that the bargain was concluded. Moreover, that the appellant knew on the 11th October of the contract between Bhupendra of Barazillah and the Company is clear from his letter of that date which runs as follows: "The Khorooriah Majozillah Syndicate Limited have paid you Rs. 333-5-4 for making you agree to grant them a *patni* lease of your share of the Barazillah property. Under the circumstances as you have not entered into any written agreement to grant a lease of the same to them, as you assure me, I undertake to indemnify you against all losses that you may sustain in consequence of your entering into an agreement with me and I shall, if necessary, carry on the litigation on your behalf at my expense should they bring an action against you". The appellant clearly knew, when he wrote this letter, that Bhupendra of the Barazillah had made the agreement and in that case he could hardly have remained in ignorance of Jadab's contract. The sum of Rs. 333-5-4 had been paid on the 5th September. It was returned on the 30th September and the money was taken to the Secretary of the Company by the appellant's *Darwan* and was the appellant's money. It was acknowledged by Bhupendra of Majozillah as coming from the appellant's son. The appellant must have known perfectly well on that date on what account the money had been sent to the co-sharers. We feel no hesitation in holding that the appellant, on the 30th September, knew perfectly well that the defendants Nos. 1 and 2 had contracted with the Company.

Next, it is argued that the contract should not be specifically enforced against the minors. But, clearly, the lease was for the minors' benefit. The land had been let to an *ijaradar* who made no profit out of it and desired to give it up. The Company agreed to give an enhanced rent after five years and a further enhancement after ten years. They agreed to collect and pay a proportion of the back rents. The facts that only two out of the eight owners of the one-fourth share were minors, that the other six, who were equally interested, all agreed to lease their shares on the same terms and that the minors were under the guardianship of Jadab who, whatever may be said against him, cannot justly be accused of failing to use his best endeavours to secure any money that may be obtainable, all indicate that this bargain was for the minors' benefit. That being so, the contract can certainly be specifically enforced [*Khairunnessa Bibi* v. *Lokenath Pal* (1), *Mir Sarwarjan* v. *Fakharuddin Mahomed Chowdhury* (2)]. Reliance has been placed on the case *Chhitar Mal* v. *Jagan Nath Prasad* (3). But it is not clear in that case that the first contract was really concluded, and, in any case, it would not have bound the District Judge, who on his own initiative succeeded in making the second and better bargain for the minor ward. We do not think the case is an authority for holding that when a valid agreement has been lawfully entered into on behalf of a minor and is to the minor's benefit, it can be repudiated if the guardian subsequently finds he can obtain more. In any event, this question does not arise in the present case, for the terms offered by Lal Gopal have not been shown to be appreciably better than those conceded by the plaintiff Company, and but for the prior contract with that Company would never have been offered at all. Accord-

(1) 27 C. 276.

(2) 34 C. 163; 11 C. W. N. 207; 4 C. L. J. 431; 1 M. L. T. 360.

(3) 29 A. 213; A. W. N. (1907) 125; 4 A. L. J. 24.

ingly, we hold that the contract can be specifically enforced against the minors.

Next, it is argued that the suit is not maintainable because the Company is a bogus Company; this contention, however, is to intangible to be dealt with. It has not been shown to us that the constitution of the Company offends against the provisions of the Companies Act, but it has been argued that the shareholders of the Company being indentical with the proprietors of the land, its recognition would be contrary to public policy. The learned Counsel for the appellant, however, has been unable to show us how the existence of this Company injures or endangers the rights of any body. Indeed, if the proprietors are numerous, and their separate interests are minute, the adoption of the means for the management of their property would seem to be beneficial not only to themselves but to all who may be compelled to have dealings with them.

Next, it is urged that one suit should have been brought with respect to the whole one-fourth share. These two suits were brought first and subsequently suits were brought against the other co-sharers. Those suits were compromised in favour of the plaintiff. As we have said, the co-owners were separately bound to the Company with respect to their respective interests, and separate suits were maintainable.

Next, it is urged that the decree is wrong in directing the execution of a lease similar in form to that executed in favour of the defendant No. 3. The plaintiffs, however, do not appeal and it seems to us that the appellants have no reason to complain of this. The fact that the lease is to be in that form does not mean that it is to be executed with respect to property covered by the lease to the defendant No. 3. The property to be leased is correctly described in the schedule to the decree.

Finally, it was faintly suggested that a *patni* could not be granted in more than one estate. This point has never been raised before and we think there is nothing in it. There is nothing to indicate that the parties were anxious that the provisions of the *Patni* Regulations should apply to the lease or that they ever considered the point. If those provisions would not apply to the contract that has been completed, the plaintiffs would none-the-less be entitled to a permanent lease.

A cross-appeal has been preferred but the Court-fees have not been paid.

The appeals and the cross-appeals are dismissed with costs.

Appeals dismissed.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL No. 341 OF 1910.

August 30, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

Bibi IMAMBANDI AND OTHERS—DEFENDANTS—APPELLANTS

versus

MATASUDDI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), ss. 33, 34, 155, cl. (3)—Books of account—How to prove—Witnesses—Previous depositions—Mode of proof—Conflict of testimony—How to be tested—Presumption of marriage—Long course of treatment as wife—Evidence of cohabitation—Presumption of law—How to be repelled—Resemblance of child to putative father, if competent—Admissibility of photographs of child and father—Negative evidence, weight of.

It is essential in every case where reliance is placed upon books of account to establish that they have been regularly kept in the course of business; it is not sufficient merely to prove the correctness of the books. The entries themselves have to be proved. Mere assertions that particular pages or volumes were written by this or that writer, are not sufficient compliance with the provisions of section 34 of the Evidence Act.

Hingu Miya v. *Heramba Chandra Chakravarti*, 8 Ind. Cas. 81; 13 C. L. J. 139, referred to.

In the case of witnesses who are dead, but who had deposed upon the matters in controversy in previous proceedings between the parties, the depositions may be admitted in their entirety. It is only essential to see that the requirements of section 33 of the Evidence Act are fulfilled.

Where a witness has been examined in a trial, but his previous deposition is relied upon to impeach his credit under section 155, clause (3) of the Evidence Act, the contradictory statements alone can be admitted in evidence.

Where divergent allegations are made by the parties and there is a conflict of oral testimony, the only safe course to adopt is to test the evidence in the light of facts either admitted or proved beyond the possibility of doubt.

Very little weight can be attached to the evidence of a negative character.

Where there is *prima facie* evidence of cohabitation as man and wife and a long course of treatment of the lady as wife and the children as legitimate, the presumption of marriage can be repelled only by evidence of the clearest character: for the presumption of law is not to be lightly repelled; it is not to be shaken by a mere balance of probability; the

evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive.

Piers v. *Piers*, (1849) 2 H. L C. 331; 13 Jur 569; *Morris* v. *Davies*, 5 Cl. and F. 163; 1 Jur. 9:1; 3 Car P. 215; *De Thoren* v. *Attorney-General*, (1876) 1 A. C. 686; *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie*, 6 A. C. 364; 44 L. T 895; 50 L. J. P. C. 28; *Berkeley Peerage case*, 4 Camp. 401 at p. 416; 14 R. R. 732 and the observations of Lord Cranworth in *Campbell* v. *Campbell*, L. R. I. H. L. (Sc.) 182 at p. 199, relied upon.

The evidence of the resemblance of a child to its putative father is competent; and, therefore, the photographs of both the child and the father are admissible.

Appeal from the decree of the second Sub-Judge of Saran, dated July 14th, 1910.

Mr. *A. Chaudhuri*, Babus *Umakali Mukherjee*, *Jnanendra Nath Bose*, Moulvis *Mahommad Tahir* and *Nuruddin Ahmed*, for the Appellants.

Messrs. *Hasam Imam*, *Parmeshwar Lal*, Dr. *Rash Behari Ghose*, Babu *Mohendra Nath Roy*, Moulvis Syed *Shamsul-Huda and Mustafa Khan* and Babu *Biraj Mohan Majumdar*, for the Respondents.

JUDGMENT.—This appeal is directed against a decree in a suit for recovery of possession of immoveable properties which admittedly belonged at one time to a Muhammadan gentleman by name Mahammad Ismail Ali Khan who died on the 21st March 1906. The case for the plaintiffs-respondents is that Ismail Ali Khan left three wives and children by each of them and that on the 10th June 1906 they obtained a conveyance from the fourth wife of the share which had vested in her and her infant children. The plaintiffs further allege that on the 17th June 1906 they applied for the registration of their names, in the office of the Collector, in respect of the share purchased by them; but the application was opposed by the second and third wives and dismissed on the 21st May 1907. The order of dismissal was confirmed on appeal on the 12th August 1907. The Revenue Authorities found in substance that the lady alleged by the plaintiffs to be the youngest wife of Ismail Ali Khan was never lawfully married to him and was in fact his concubine. The plaintiffs thereupon commencod this action on the 21st March 1909 for declaration of the status of their vendor and of their title by purchase and also for recovery of possession with mesne profits and costs. They joined as defendants ten persons, namely, the two admitted wives of Ismail Ali Khan (the first and fifth defendants), the children of each of them, and their own vendor (the eighth defendant) and her children. The relationship between the parties will appear upon an examination of the three annexed geneological tables. The first shows the wives of Ismail Ali Khan and their children. The second sets out the pedigree of the family from which the third wife Amir Jahan is descended. The third table furnishes the connecting link between the families and shows some of the principal persons examined as witnesses or mentioned in the evidence in the present litigation. The claim of the planitffs was resisted by the defendants who denied the title of their vendor, impeached the conveyance as a fictitious transaction, and questioned also the extent of the share, if any, to which the plaintiffs might be found entitled. Upon these pleadings eight issues were raised of which three were important. The fourth issue raised the question, whether the eighth defendant was the married wife and the ninth and tenth defendants the legitimate children of Ismail Ali Khan, and whether the latter were acknowledged by him as such. The fifth issue raised the question, whether the conveyance dated the 10th June 1906, propounded by the plaintiffs, was valid and whether the contesting defendants could question the transfer. The eighth issue raised the question as to the properties of which the plaintiffs were entitled to recover possession. With reference to this last issue, it may be mentioned that the plaintiffs obtained a conveyance from the vendor on the 9th September 1909 by way of supplement to the original deed of sale. The fourth issue, it will be observed, raises the fundamental question in the case. The Subordinate Judge has answered this issue in favour of the plaintiffs and has decreed the suit. The two admitted wives of Ismail Ali Khan and their children have preferred this appeal. The decision of the Subordinate Judge has been assailed before us on the ground that it is against the weight of evidence on the record. It has also been suggested that evidence of a conclusive character has been improperly excluded to the detriment of the defendants. Before we deal with the evidence on the record, we must examine the question of the alleged improper exclusion of important relevant evidence.

IMAMBANDI v. MATASUDDI.

The evidence which has been excluded consists of account-books of Ismail Ali Khan for a period of 19 years, *i. e.*, from 1886 to 1904. The account-books had been filed by Ismail Ali Khan in a previous litigation against the present plaintiffs, known as the Chouth case. The plaintiffs allege that they had at that time made notes of entries in the account-books, and as upon the institution of the present suit, they found that the entries would be of considerable assistance to them, they called upon the defendants to produce the account-books. The suit was commenced on the 25th March 1909 and the requisition for the production of the account-books was made by the plaintiffs on the 22nd June 1910 during the progress of the trial in the Court below. The defendants did not produce the books till the 26th June, that is, after the plaintiffs had closed their case. The plaintiffs then discovered that pages had been interpolated and alterations made in the account-books with the result that some, at any rate, of the entries were inconsistent with their case. They consequently took exception to the reception of the books in evidence. About this time, a singular incident happened. The Subordinate Judge received—no one can explain from what source they came—several sheets which purported to be pages torn from the account-books. The entries in these pages do not accord with the admitted facts of the case. The Subordinate Judge has under these circumstances considered the account-books as by no means beyond suspicion, and on the whole unreliable. It is singular that if the account-books are genuine and contain entries favourable to the case of the defendants, that the latter should not have produced them of their own accord at a much earlier stage of the proceedings. It cannot be suggested that the defendants did not appreciate the importance of these entries, they threw light upon a dispute which had broken out more than three years before and had been keenly maintained before the Revenue Authorities. The books were in the possession of the defendants from at least the 3rd August 1909 to the 25th June 1910. The unexplained omission to produce them at the proper stage of the proceedings is thus a matter for legitimate comment. The situation is not improved by the mysterious re-appearance of lost pages, while our examination of their appearance has rather confirmed than dispelled the doubts as to their genuineness which would otherwise result from the circumstances mentioned. There are in addition two weighty reasons which completely take away the evidential value of the account-books. In the first place, the books have not been properly proved, much less has any serious attempt been made to prove specific entries under section 34 of the Indian Evidence Act. Mere assertions that particular pages or volumes were written by this or that writer, is not sufficient compliance with the provisions of the law, as explained in the case of *Hingu Miya* v. *Heramba Chandra Chakravarti* (1). It is essential in every case, where reliance is placed upon books of account, to establish that they have been regularly kept in the course of business; but it is not sufficient merely to prove the correctness of the books. The entries themseves have to be proved unless, indeed, the necessity for such proof is removed by the admission of the opposite party. In the second place, it may be a matter for argument whether the books can be used for the purpose for which they were mainly intended, namely, to draw an inference adverse to the plaintiffs from the absence of the names of their vendors in the account books. The cases of *Queen-Empress* v. *Grees Chunder Banerjee* (2) and *In the matter of Juggun Lal* (3), seem to indicate that though entries in a book of account are relevant to the extent provided by section 34 of the Indian Evidence Act, such a book is not by itself relevant to raise an inference from the absence of any entry. The same view is apparently supported by the observations of Lord Davey and Lord Robertson in *Ram Pershad Singh* v. *Lakhpati Koer* (4). The contrary view, however, was taken in *Sagur Mull* v. *Manraj* (5), in which it appears to have been held that the cases just mentioned did not rule that the fact of an absence of an entry is no evidence at all under any section of the Indian Evidence Act and that evidence that there is no entry in the account books, though not admissible under section 34, may be admissible under sections 9 and 11. We are inclined to adopt

(1) 13 C. L. J. 139; 8 Ind. Cas. 81.
(2) 10 C. 1024.
(3) 7 C. L. R. 356.
(4) 30 C. 231 at p. 247; 7 C. W. N. 162; 5 Bom. L. R. 103.
(5) 4 C. W. N. ccvii.

this view, but we need not examine this aspect of the matter further, because we hold, concurrently with the Court below, that the account-books are unreliable and have been rightly discarded. We shall now proceed to examine the evidence on the record as it stands.

It may be stated at the outset that the oral evidence is hopelessly contradictory, and there are conflicting assertions by men of apparent respectability which it is extremely difficult, if not impossible, to reconcile. Our difficulty has not been diminished by the laxity with which previous depositions were received in evidence in the Court below. In the case of those witnesses who are now dead but who had deposed upon the matters in controversy in previous proceedings between the parties, the depositions have been properly admitted in their entirety. In instances where this has happened, it is only essential to see that the requirements of section 33 of the Evidence Act are fulfilled. Section 32, clause (5), is not of much assistance, because the previous statements were generally made after the present dispute had commenced. In another class of cases, namely, where a witness has been examined in the present trial but his previous deposition is relied upon to impeach his credit under section 155, clause (3) of the Indian Evidence Act, the contradictory statements alone can be admitted in evidence. In some instances, however, a previous deposition has been admitted in its entirety, and the attention of the witness has not even been drawn to the alleged contradictions so as to afford him an opportunity to explain the statements [*Sham Lall* v. *Anuntee Lall* (6) and *Queen-Empress* v. *Madho* (7). See also sections 145 and 158 of the Indian Evidence Act]. At one stage exception was taken before us to the admissibility of evidence thus irregularly received. But when it transpired that each of the parties had treated the witnesses of his opponent in this manner, they agreed to waive their objection to the evidence to which otherwise valid exception might have been taken; and they invited the Court to arrive at a conclusion upon the whole of the evidence on the record. In our examination of the evidence, we must bear in mind at the outset the respective cases of the two parties. The plaintiffs assert that Enayet Zohora had been lawfully married by Ismail Ali Khan and that the ninth and tenth defendants are his children born of her womb. The case for the defendants is an absolute and uncompromising denial of this allegation. They assert, on the other hand, that Enayet Zohora was a woman of the town and that the paternity of her two children is unknown. The defendants do not seek to prove that Enayet Zohora was the mistress of Ismail Ali Khan, that she lived in his keeping as his concubine, and that the two children are her illegitimate children by him. In view of these divergent allegations, and the conflict of oral testimony, the only safe course to adopt is to test the evidence in the light of facts either admitted or proved beyond the possibilty of dispute. We have, in the first place, the fact that Ismail Ali Khan was a man of undoubted respectability, owned considerable properties, and, as described by witnesses on both sides, was a gentleman of great pomp and dignity. Some of the witnesses also describe him as a man of piety or good character. In the second place, the family to which Enayet Zohora belonged, though poor, was of great respectability. In fact, Ismail Ali Khan and Enayet Zohora both belonged to the same *Rajput* family, once Hindus of great respectability who subsequently professed the Musalman faith. Ismail Ali Khan had married thrice. He took early in life, as his first wife, a lady named Dil Jan, from a place called Maju. On the 18th March 1890, after the death of his first wife, he took the first defendant, Bibi Imambandi of Behar, as his second wife. A little more than a year afterwards, on the 26th December 1891, he took the fifth defendant Bibi Amir Jahan as his third wife. The case for the plaintiffs is—and they are supported by the testimony on oath of their vendor—that, shortly after his third marriage, Ismail Ali Khan, in or about the year 1892, took Enayet Zohora as his fourth wife. The evidence in support of this allegation is of a three-fold character; namely, *first*, direct evidence of the marriage; *secondly*, evidence of cohabitation as man and wife and *thirdly*, evidence of acknowledgment by Ismail Ali Khan of Enayet Zohora as his wedded wife and of her children as his legitmate offspring. As regards evidence of the first class, we have a number of witnesses

(6) 24 W. R. 312.
(7) 15 A. 25.

on the side of the plaintiffs who depose that Enayet Zohora was married to Ismail Ali Khan about a year after the marriage of Amir Jahan. Muhammad Karim, *Imam* of the *Musjid* at Puranikilla, asserts that he presided over the marriage ceremony and that, when appointed *Qazi*, he took the permission of Enayet Zohora. His evidence has been severely criticised as false, because he made hopelessly contradictory statements about his age and his periods of service in different places. Some of the criticisms, specially those directed to the statements of his own age, are well founded. But upon this particular point, men of the class to which the witness belongs have, as is well-known, very inacurrate notions. His statements are supported by Mobarak Hossain, by Lalji Singh, by Jamna Singh, Jitan Mali and several other persons, amongst whom the most important is Mohmed Hossein, whose family is related to that of Hefazat Hossein, the father of Enayet Zohora. The Subordinate Judge has accepted the testimony of these witnesses as substantially true. The comment that witnesses of superior position in life have not been called, does not carry much weight, because it is unlikely that the fourth marriage of even a man of pomp and dignity could have been celebrated on an extensive scale. On the other hand, if the story of the defendants is true, that Enayet Zohora was a depraved woman of the town, it is difficult to appreciate why men of position and respectability should come forward and pledge their oath in support of what must be deemed, in that view, an invented story absolutely without foundation. We are, therefore, not prepared to discard summarily this body of evidence as to the marriage of Ismail Ali Khan with Enayet Zohora supported as it is by evidence of the other two classes to which we shall presently refer. As regards evidence of the second class we have the testimony of Mohomed Isha, who is the *Mukhtear* of Ismail Ali Khan, and related to him, though distantly, by marriage into his family. No substantial reason has been suggested as to why this evidence should be treated as wholly false. The evidence of Tarini Prasad Barman, though it does not go very far, does support the case of the plaintiffs. His evidence has not been challenged as that of an untruthful person, and it is remarkable that he should have been asked in cross-examination whether he knew that the three wives, whom Ismail Ali Khan admitted to him to have married, had been married according to religious form. He naturally declined to swear that they had been married in any form, but he adhered to his statement that Ismail Ali Khan had admitted to him that he had three wives, two of Sewan and one of Behar. This undoubtedly supports the case of the plaintiffs. As regards evidence of the third class, we have witnesses of position and respectability. Mahomed Abdul Khaujir, Abdul Razak and Abdul Hossein, Abdul Bartat, if believed, prove conclusively that Mahomed Ismail Ali Khan treated Enayet Zohora as his wife and her children as his legitimate issue. In spite of the searching criticism of their testimony, and after all allowance has been made for minor contradictions, there is a substantial residue left which supports the case of the plaintiffs and militates against that of the defendants. No good reason has been assigned why this body of evidence should be entirely discarded. We have, finally, the evidence of Enayet Zohora herself supported by that of her sister Enayet Fatima and of two other ladies, both relations of the family, namely, Bibi Wahidan, the wife of Mahomed Yusaff, and Bibi Wahidan, the wife of Abdul Suttar. As regards the evidence of Enayet Zohora, it may, no doubt, be suggested that she is deeply interested in the success of the plaintiffs and that her testimony should be received with caution. But she stood the test of cross-examination successfully though that cross-examination was not merely searching but in many places irrelevant and though, so far as we can form an estimate from the written record, her temper was not always of the very best. The evidence of the three classes we have mentioned, taken as a whole, if it stands unrebutted, is unquestionably sufficient to establish the case of the plaintiffs. But before we examine the evidence on the side of the defendants it is necessary to remember that in cases of this description the rebutting evidence must be of the strongest character. Where there is *prima facie* evidence of cohabitation as man and wife, and a long course of treatment of the lady as a wife and the children as legitimate, the presumption of marriage can be repelled only by evidence of the clearest character. In the leading case of *Piers* v.

Piers (8), Lord Cottenham said. "I have not found that the rule of law is anywhere laid down more to my satisfaction than it is by Lord Lyndhurst in the case of *Morris* v. *Davies* (9). He says, 'the presumption of law is not to be lightly repelled.' It is not to be broken in upon or shaken by a mere balance of probability. The evidence for the purpose of repelling it must be strong, distinct, satisfactory, and conclusive." To put the matter briefly, as was done in *De Thoren* v. *Attorney-General* (10), the *onus* of disproving a presumptive marriage is on those who deny its existence or validity and the countervailing evidence must not merely give rise to doubt, but must be strong, distinct, satisfactory, and conclusive. These remarks apply with special force to the present case. Here we have a fairly respectable body of direct evidence of marriage. That evidence is supported by indirect circumstantial evidence, namely, long cohabitation of the parties as husband and wife. This would tend to raise a presumption of a complete and valid marriage, as their Lordships of the Judicial Committee held in *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie* (11). We have finally a long course of treatment of the lady and her children. Much weight must necessarily be attached to reputation among the relations on both sides, among all the friends and among all the acquaintances in the locality where the parties resided. As was well said by Mansfield, J., in the *Berkeley Peerage* case (12), if a father brings up a child as his legitimate son, this amounts to a daily assertion that the son is legitimate. [See also the observations of Lord Cranworth in *Campbell* v. *Campbell* (13)]. Now, how does the evidence stand on the side of the defendants if tested in the light of these principles? On their behalf, reliance has been most strongly placed upon the deposition of Mr. Mazhar-ul Huq, a gentlman of unquestioned position and attainments. His evidence, no doubt, tends to support the case of the defendants. But it is by no means clear how much of his knowledge is based upon first-hand information and how much on hearsay. The explanation suggested on behalf of the plaintiffs that, while Counsel in the mutation case, he held statements made to him about the wives of Ismail Ali Khan which were unguardedly accepted by him as true, is certainly plausible. The evidence of Zakir Hossain is pratically of no value, because his admission that Ismail Ali might have more wives than he heard of, completely takes away from the effect of his statement-in-chief. Kissen Prasad, who was examined in the mutation case and has since then died, made statements at the time which might apparently help the defendants, but he freely admitted that Ismail might have had another wife besides those mentioned by him, and it is fairly clear that the child who saluted him on the occasion of his visit to Ismail must have been the child of Enayet Zohora. We do not propose to examine in detail the evidence of the witnesses who have been brought forward by the defendants to swear that Enayet Zohora was the mistress of Akbar Khan, who is not called and who is said to have been the Station Master of Sewan and Chapra. This evidence, as the Subordinate Judge says, is quite untrustworthy and it is inconceivable that the plaintiffs, admittedly astute and successful men of business, should have put forward a depraved woman of the town as the widow of Ismail Ali Khan and taken a conveyance from her; they must have known that, if they attempted to play such a game, evidence would be forthcoming to prove conclusively the character of the woman and the station in life she occupied. We unhesitatingly reject the story of the defendants that Enayet Zohora was a depraved public woman, and that she had no connection with the family of Ismail Ali Khan, and that she was picked up from the slums of the city, as it were, to enable the plaintiffs to set up a wholly unfounded claim to a share of the properties left by Ismail Ali Khan. It must further be remembered that her father Hefazat Hussain, though not prosperous, belonged to a family of undoubted respectability and was treated by his friends and relations as a gentleman who could be received in polite society and treated on terms of equality. If Enayet Zohora, his daughter, had been a depraved woman of the town, he would have been

(8) (1849) 2 H. L. C. 331; 13 Jur. 569.
(9) (1837) 5 Cl. & F. 163; 1 Jur. 911: 3 Car. & P. 215.
(10) (1876) 1 A. C. 686.
(11) 6 A. C. 364; 44 L. T. 895; 50 L. J. P. C. 28.
(12) 4 Camp. 401 at p. 416; 14 R. R. 782.
(13) 1 H. L. (Sc.) 182 at p. 199.

cast out and never admitted into polite society. Evidence has also been produced on the side of the defendants to throw doubt upon the theory that Enayet Zohora was married to Ismail Ali Khan at the time and place alleged by her, and that she was treated as the lawfully wedded wife, and her children, as his legitimate issue. This evidence is of a negative character, and very little weight can be attached to it, even if the statements of the witnessess are accepted as substantially true. After a careful scrutiny of the evidence on the side of the defendants we are clearly of opinion, that it does not rebut the *prima facie* case made on behalf of the plaintiffs. But much reliance was placed, and very properly, upon the conduct of the parties immediately after the death of Ismail Ali Khan. It was pointed out on behalf of the defendants-appellants, that while Imambandi and Amir Jahan at once put forward claims to the estate of Ismail Ali Khan as their husband, no such claim was advanced by Enayet Zohora and that she took no steps to conduct the litigations known as the Chouth case and the Stable case which had been commenced by Ismail Ali Khan against the plaintiffs on the 1st July 19C5 and the 16th January 1906, respectvely. Some weight, nodoubt, must be attached to this circumstance. But it has been explained that Enayet Zohora was poor and had only her old father to put forward her claim and that of her children. The explaination suggested is by no means improbable. At any rate, on the 18th June Zohora applied for substitution in the Chouth case, but her application was refused on the 26th June 1906, as she had on the 10th June divested herself of all rights in the property then in litigation by the execution of the conveyance in favour of the plaintiffs. It must not be overlocked, on the other hand, that the defendants were powerfully supported at the time in their endeavour to deprive Enayet Zohora of all share in the estate of Ismail Ali Khan. It has been established beyound doubt, that the son of Ashgar Ali, cousin of Hafiz Khan, is married to one of the daughters of Bibi Amir Jahan; that the son of Hafiz Khan is engaged to her other daughter; and that Amir Jahan had made a gift of all her properties to her two daughters. Hafiz Khan, therefore, had considerable interest in the success of the proceedings before the Revenue Authorities and of this litigation.

Upon a review, then, of the whole evidence the position may be summarised as follows:—There is a considerable body of evidence, which we are not prepared to disbelieve, to the effect that Enayet Zohora was married to Ismail Ali Khan; that they lived for many years as husband and wife; and that Ismail Ali Khan treated her children as his legitimate issue. To meet this evidence the defendants have brought forward witnesses to swear that Enayet Zohora was a depraved woman of the town, and was accessible to all comers. This evidence must be discarded as wholly false. They have not set up an alternative case that Enayet Zohora was in the keeping of Ismail Ali Khan as his mistress. But, even if such a case had been put forward, it could not have been reconciled with the admitted position and station in life of the parties concerned. Ismail Ali Khan was a gentleman of pomp and dignity, and is described by witnesses, on both sides, as a man of much piety. The religious faith he professed allowed him to take four wives; he had married thrice in respectable families; he is not shown to have kept misterses; he might, if he so desired, have taken Enayet Zohora in marriage, as she came of a family of equal distinction. He did, as a matter of fact, live for many years with Enayet Zohora as her husband and he treated her children as his legitimate issue. No Court will assume, under these circumstances, that she was his concubine. The theory becomes improbable in the highest degree when we remember that the father of Enayet Zohora was also a man of piety and respectabilty. Why should he consent to see his daughter lead a life of depravity and shame? Would Enayet Zohora herself consent to lead a life of infamy with one who had taken her own relation, Amir Jahan, as his wife? The conclusion appears to us irresistible that the defendants have failed to prove that Enayet Zohora was a depraved woman of the town; while on the other hand, the plaintiffs have proved by reliable evidence that she was the lawfully married wife of Ismail Ali Khan, and her children must be deemed legitimate [*Wise* v. *Sunduloonissa* (14)]. We have not mentioned another circumstance upon which the Subordi-

(14) 7 W. R. (P.C.) 13; 11 M. I. A. 177.

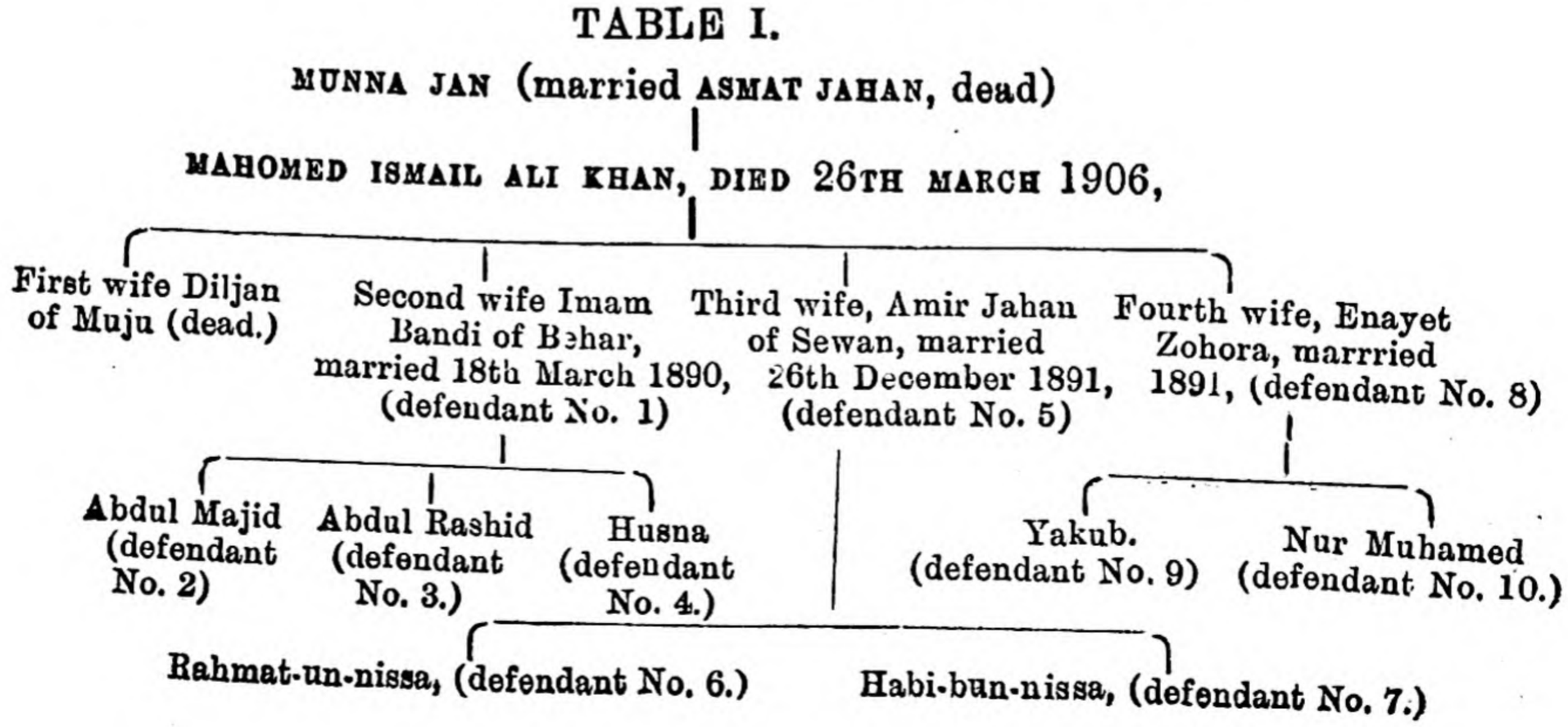
nate Judge has relied in support of this conclusion. He has stated in his judgment that the appearance of the tenth defendant, Bibi Nur Mahamdi, bears a striking resemblance to the features of Ismail Ali Khan. For this purpose, the Subordinate Judge saw the girl and received in evidence the photograph of the deceased; in this Court, a photograph of the girl has been produced, as she has meanwhile been betrothed and can no longer appear in public. There can be no doubt that the evidence of the resemblance of a child to the putative father is competent. The question has been raised more than once in the Courts of Great Britain and of the United States, and it has been ruled that such evidence is admissible [*Wright* v. *Hicks* (15), In the matter of *Jessup* (16), *Shoten* v. *Judd* (17), where for this purpose pictures of the alleged putative father and of his child were held admissible. See also Wigmore on Evidence sections 166 and 1154. *Morris* v. *Davies* (9); *Douglas Peerage case* (18), *Andrews* v. *Askey* (19), *Bagot* v. *Bagot* (20), where reference is made to Shakespear, Winter's Tale, Act II, section 3, see also, King John, Act I, section 1, *Burnaby* v. *Baillie* (21), Nicolos on Bastardy. 140, Hubbuck on Succession, p. 384.] In the case before us, our conclusion is based upon the oral and documentary evidence on the record, and the evidence of resemblance need only be considered as furnishing independent corroboration of that evidence.

It has finally been contended that Enayet Zohora, as merely the *de facto* guardian of her children, was not competent to alienate their shares, and upon this point reliance has been placed upon the cases of *Moyna Bibi* v. *Banku Behari Biswas* (22), *Mafuzzul Hosain* v. *Basid Sheikh* (23), *Ram Charan Sanyal* v. *Anukul Chandra Acharya* (24), *Durgozi Row* v. *Fakeer Sahib* (25). *Ummi Begam* v. *Kesho* (26) *Syedun* v. *Vilayet* (27), *Hunooman Persaud* v. *Babooee Munraj Koonwaree* (28). The question thus raised does not, however, properly arise in the present suit. The contesting defendants do not claim through Zohora's children; on the contrary, they completely repudiate any claim of the latter, and it is not open to them to contend that they will be prejudiced if a decree is made in favour of the plaintiffs. It is conceivable that the plaintiffs may have to face a contest with the ninth and tenth defendants when they come of age and are able to assert their own rights; but in the present legitation, the plaintiffs are entitled to succeed as against the first seven defendants, who have denied the title of their vendors. The result, therefore, is that the decree made by the Subordinate Judge must be affirmed, and this appeal dismissed with costs, to be paid by the appellants to the plaintiffs-respondents.

Appeal dismissed.

(15) 15 Georgia 190; 60 Am. Dec 687.
(16) 81 Calf. 408; 9 L. R. A. 594.
(17) 56 Kan. 43; 54 Am. St. Re. 587.
(18) 2 Hargrave Col. Jur. 402.
(19) 8 Car. & P. 7.
(20) 1878 I L. R. Ir. 308.
(21) 42 Ch. D. 282 at p. 290; 58 L. J. Ch. 842; 61 L. T. 634; 38 W. R. 125.
(22) 29 C. 473.
(23) 4 C. L. J. 485; 14 C. 36; 11 C. W. N. 71.
(24) 4 C. L. J. 578; 34 C. 65; 11 C. W. N. 160.
(25) 30 M. 197; 1 M. L. T. 433; 17 M. L. J. 9.
(26) 30 A. 462; 5 A. L. J. 474; A. W. N. (1908) 220.
(27) 17 W. R. 238.
(28) 6 M. I. A. 393 at p. 413.

TABLE I.



PRAHLAD CHANDRA GHOSE *v.* BEHARY LAL MOOKERJEE.

TABLE II.

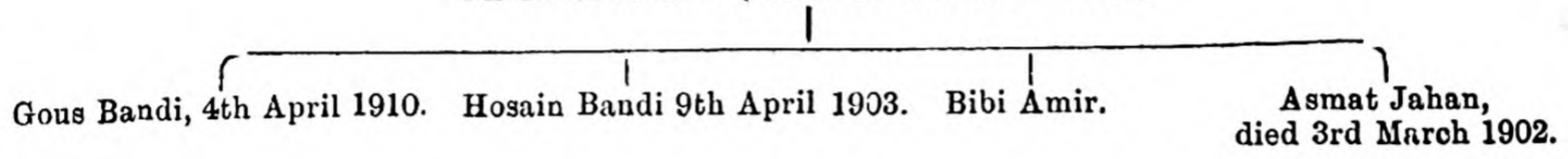
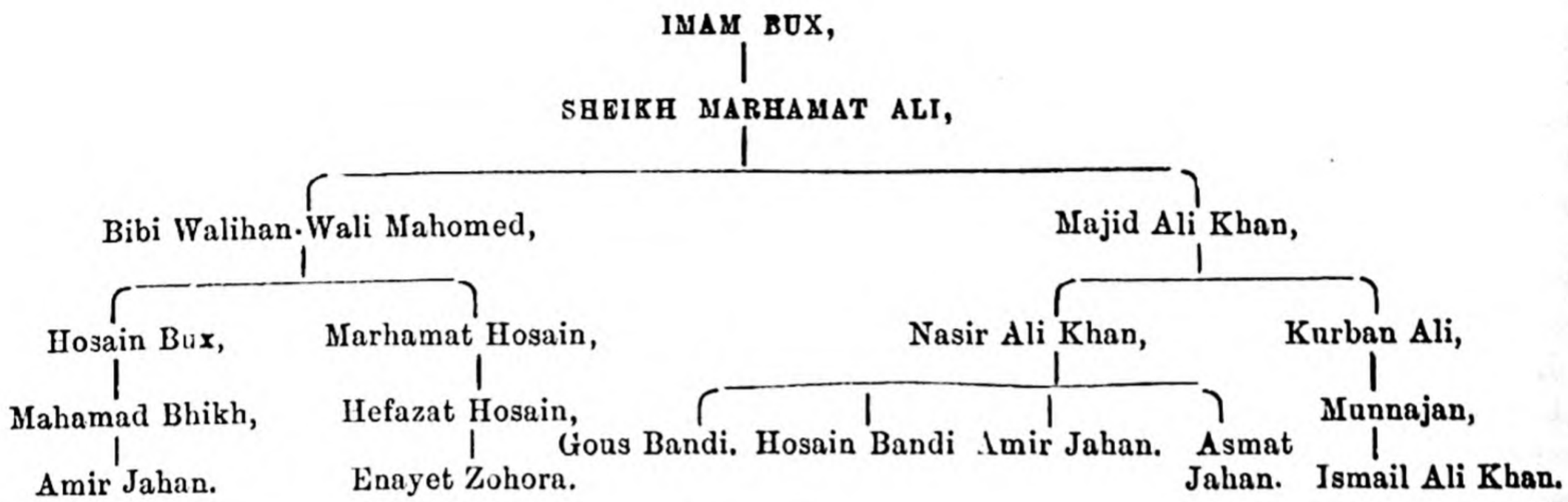


TABLE III.



CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3021 OF 1909.

January 31, 1912.

Present:—Mr. Justice Coxe.

PRAHLAD CHANDRA GHOSE—PLAINTIFF—APPELLANT

versus

BEHARI LAL MOOKERJEE AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Shebait—*Lease, permanent, granted by* shebait—*Effect of lease.*

The effect of a permanent lease of certain land granted by a *shebait*, will enable the grantee to hold the land during the continuance of the grantor's interest.

Arruth v. *Juggernath*, 18 W. R. 439, *and Ramchandra* v. *Kashinath*, 19 B. 271, followed.

Appeal from the decree of the Sub-Judge of Jessore, dated August 10th, 1909, reversing that of the Munsif of Magura, dated December 21st, 1908.

Babu *Sarat Chandra Mukherji*, for the Appellant.

Babus *Priya Sankar Majumdar*, *Broja Lal Chakravarti* and *Gunoda Charan Sen*, for the Respondents.

JUDGMENT.—The facts of the case, according to the judgments of the Courts below, seem to be that in December the defendant No. 2 agreed to sell the property in suit to the defendant No. 1 and put him in possession of it. He did not, however, sell the property to him. Two months later, he executed a conveyance in favour of the plaintiff, the plaintiff at that time being well aware of the contract with the defendant No. 1. The plaintiff sued for recovery of possession and the learned Subordinate Judge found that the plaintiff's conveyance was not a valid document and that the plaintiff had not acquired any valid right to the property on the strength of it.

I find it very difficult to understand precisely what the learned Subordinate Judge thought that the nature of the transaction in favour of the plaintiff really was. He apparently accepted the fact that the sum of Rs 75 was paid by the plaintiff to the defendant No. 2, but he said "this was not the consideration-money for the documents but more in the nature of the price paid for purchasing over the defendant No. 2 to his side." I find it difficult to understand what practical difference there is between these two suppositions. It is true that the learned Surbordinate Judge said that, considering everything, he was of opinion that there was no valid consideration for the conveyance. If he really meant that, as a matter of fact, the defendant No. 2 never intended to sell the property to the plaintiff at all but that the intention of the parties was that the defendant No. 2 should remain the owner

himself and that these documents should be executed for no consideration in order that defendant No. 1 might be ousted, that, of course, would be a finding of fact which would be binding on me under the decision in *Durga Chowdhrani* v. *Jawahir Singh* (1). I find it, however, difficult to believe that this is what the learned Subordinate Judge intended. I cannot understand why he should have thought that the plaintiff would pay the defendant No. 2 Rs. 75 to bring him over to his side in order to secure the dispossession of the defendant No. 1 if the plaintiff had no intention of purchasing the property himself; nor can I understand why the defendant No. 2 should engage in this roundabout conspiracy if it was the intention of the parties that he should remain the owner of the property. I am more inclined to think that what the learned Subordinate Judge meant was that the plaintiff, although he did intend to purchase the property, yet was not entitled to succeed because he knowingly and wilfully assisted the second defendant in his dishonesty towards the first defendant. If that be the view of the learned Subordinate Judge, it cannot be sustained. If the property, as a matter of fact, belonged to the defendant No. 2 at the time of the plaintiff's purchase, the fact that the plaintiff was aware of the contract with the defendant No. 1 and knew that he was being badly treated would not debar him from purchasing the property.

I may add that the genuineness of the plaintiff's purchase was not seriously contested in the Munsif's Court.

Of course, if the learned Subordinate Judge believes that there was no sale to the plaintiff at all, that the parties intended that the title of the defendant No. 2 should continue and no interest should pass to the plaintiff, then in that case his decision would have to be supported; but if he believes that part of the purchase-money was paid and that the purchase, although a dishonest one, was a real purchase, it would not be open to the defendant to say that the consideration had not been paid in full [vide *Achal Ram* v. *Kazim Hussain Khan* (2)].

The second point taken is, that the plaintiff was entitled to a lease of the land which was granted to him by the defendant No. 2. It it clear, however, that both the Courts below accepted the admission of the defendant No. 2, which was to the effect that he was the owner in *shebait* right of the *debutter* land and so held that a permanent lease could not be granted. It has been argued, however, that the plaintiff is entitled to a lease during the continuance of the second defendant's interest and reliance has been placed on the case of *Arruth Misser* v. *Juggurnath* (3) which has been followed in *Ram Chandra Shankarbava Dravid* v. *Kashi Nath Narayan Dravid* (4). This contention seems to be supported by authority and must be upheld.

I think, therefore, that the proper order to pass in this appeal is that the case shall go back to the learned Subordinate Judge for a distinct finding whether, in his opinion, it was the intention of the parties, at the time of the alleged sale to the plaintiff, that no sale should really take place, that the house should continue to belong to the defendant No. 2 and that the plaintiff should have no rights in it. If that was the intention then the plaintiff's suit must be dismissed. If, on the other hand, he finds that it was the intention of the second defendant and the plaintiff that the house should be sold to the plaintiff, even though the sale injured the first defendant to the knowledge of the plaintiff, then the plaintiff will be entitled to a decree.

As regards the lease, the plaintiff will be entitled to a decree for a lease during the subsistence of the second defendant's interest.

Costs will abide the result.

Case remanded.

(1) 18 C 23; 17 I. A. 122.
(2) 27 A. 271; 9 C. W. N. 477; 8 O. C. 155; 15 M. L. J. 197.
(3) 18 W. R. 439.
(4) 19 B. 271.

ANNADA PROSAD *v.* SHAM SUNDAR.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 129 OF 1910.
January 22, 1912.
Present:—Mr. Justice Coxe.

ANNADA PROSAD CHAKRAVARTI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SHAM SUNDAR ADHIKARI AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Previous suit for rent—Denial of relationship of landlord and tenant—Dismissal of rent suit—Subsequent suit for possession—Whether defendant can urge tenancy—Res judicata.

If it has been held by a competent Court that no relationship of landlord and tenant exists between the plaintiff and the defendant, it is not open to a Court, in a subsequent suit, to go into that question at all, whether it has been rightly or wrongly decided by the first Court.

Therefore, where in a suit for rent by the plaintiff against the defendant, it was found that the relationship of landlord and tenant did not exist, and the plaintiff then brought a suit for possession:

Held, that the defendant cannot urge his tenancy to defeat the suit.

Khater Mistri v. *Sadruddi Khan*, 34 C. 922, relied upon.

Srimati Mallika Dassi v. *Makhan Lal Chowdhry*, 9 C. W. N. 928, not followed.

Appeal from the decree of the Sub-Judge of Burdwan, dated October 9th, 1909, modifying a decision of the Munsif of Burdwan dated April 30th, 1909.

Babu *Jyotish Chandra Sarkar*, for the Appellants.

Babu *Shiba Prosad Bhattacharya*, for the Respondents.

JUDGMENT.—This was a suit for recovery of possession of certain land. It appears that the plaintiff brought a suit for rent against the defendant No. 1. The defendant No. 1 denied the relationship of landlord and tenant and that question was specifically put in issue and decided in the negative. The plaintiff then brought this suit which was decreed by the Munsif. On appeal, the learned District Judge held that the defendant was the plaintiff's tenant and that the plaintiff, therefore, was entitled to succeed but was not entitled to get possession of the land but only to get rent.

The plaintiff appeals to this Court; and the cases of *Khater Mistri* v. *Sadruddi Khan* (1), *Sheikh Miadhar* v. *Rajani Kunta Roy* (2) and *Ekabbar Sheikh* v. *Hara Bewah* (3) have been cited on his behalf. These cases appear to me to apply precisely to the facts of the present case and the plaintiff is entitled to succeed.

On the other hand, the case of *Srimati Mallika Dassi* v. *Makhan Lal Chowdhry* (4) has been relied on. That case, however, has not been followed in the three cases, which I have cited, though it is mentioned in every one of them. I am not at all disposed to deny that a tenant does not forfeit his tenancy under the Bengal Tenancy Act by denying the rights of his landlord, but this does not affect the operation of the rule of *res judicata*. If it has been held by a competent Court, as it has been held in this case, that no relationship of landlord and tenant exists between the plaintiff and the defendant, it is not open to a Court, in a subsequent suit, to go into that question at all, whether it has been rightly or wrongly decided by the first Court. I should have been inclined to think that in that case the plaintiff would be bound to prove possession within 12 years, and that the finding of the Courts below that the defendant's possession had not been adverse until the former rent-suit was hardly sufficient for the decision of the case. But the case of *Khater Mistri* v. *Sadruddi Khan* (1), which I have cited, seems exactly applicable to the facts of the present case; and, that being so, I cannot interfere in the second appeal with the decision of the Court below on the question of limitation. In that case, it was held that the defendant, while he was in possession of the land, had not repudiated the relationship of landlord and tenant until the institution of the rent-suit and that, consequently, his possession had not been adverse.

The result is that the appeal must be allowed. The plaintiff will be entitled to *khas* possession of the land in suit with mesne profits which will be ascertained hereafter. The plaintiff will be entitled to his costs in all Courts.

Appeal allowed.

(1) 34 C. 922.
(2) 14 C. W. N. 339; 5 Ind. Cas. 708.
(3) 15 C. W. N. 335; 8 Ind. Cas. 630; 13 C.L.J. 1.
(4) 9 C. W. N. 928.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1188 OF 1909.

January 16, 1912.

Present:—Mr. Justice Coxe.

MOULA BUX—DEFENDANT No. 2—APPELLANT

versus

Sheikh AJAHAR MOLLA—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Conveyance by husband to wife for dower—Condition that property shall remain in husband's possession during his life-time—Whether conveyance void.

A perfectly honest sale-deed was executed in good faith by a Muhammadan husband to his wife on account of her dower, with this condition that during the life-time of the husband, the land conveyed should remain in his *khas* possession and that the wife would not be entitled to alienate the property:

Held, that, under the Muhammadan Law, a stipulation of this kind did not render the whole sale invalid, although the stipulation itself might be invalid.

Muhammad Esuph Ravutan v. *Pattamsa Ammal*, 23 M. 70, referred to.

Appeal from the decree of the Sub-Judge of Hooghly, dated March 8th, 1909, affirming that of the Munsif of Serampore, dated March 31st, 1908.

Babu *Baikuntha Nath Das*, for the Appellant.

Babu *Baidya Nath Dutt*, for the Respondents.

JUDGMENT.—This is a suit for recovery of possession of a holding of 6 *bighas* which originally belonged to one Enayatulla. Enayatulla sold the land in 1301 to his wife Sakhijan in consideration of what was due to her as her dower. He subsequently sold it again to the defendant No. 2. Three days after the sale to defendant No. 2, Sakhijan executed a registered *kabuliat* in favour of the landlords in respect of the land. Subsequently, the landlords brought a suit for rent against Sakhijan and obtained a decree and in execution the plaintiff purchased the holding. The defendants are in possession of the holding and the plaintiff accordingly brought this suit which has been decreed by the Courts below.

The defendant No. 2 appeals to this Court.

The principal point taken on behalf of the appellant is that the conveyance to Sakhijan is invalid under the Muhammadan Law. This point was not taken in the written statement or in the grounds of appeal in the Court below and can only be considered in this Court, on appeal, as a pure question of law.

I have, therefore, to see what are the findings of fact in the Court below. They are to the effect that this was a perfectly honest sale executed in good faith for substantial consideration. The Courts below have apparently believed that a sum of money was due to Sakhijan on account of her dower and that Enayatulla honestly sold the property to her in discharge of that dower and she accepted it in lieu of what was due to her. The terms of the *kobala* are that the property shall be transferred to Sakhijan and that the rights of Enayatulla in it shall come to an end, but there is a condition that during the life-time of Enayatulla the land shall remain in his *khas* possession and that Sakhijan shall not be entitled to alienate the property. As Enayatulla and Sakhijan were husband and wife, it is likely enough that any transfer of the ownership of the land between the two would not have much practical effect in the manner in which the property was enjoyed. The learned Pleader, who appears for the appellant, has not shown me any authority under the Muhammadan Law which would justify me in holding that a stipulation of this kind would render the whole sale invalid. It is possible enough that the stipulation itself was invalid; but it has not been shown that the whole arrangement which the parties came to with apparent willingness on both sides is void under the Muhammadan Law; on the other hand, certain cases have been cited to show that such a transaction is allowed. I may specially refer to the case of *Muhammad Esuph Ravutan* v. *Pattamsa Ammal* (1), where the learned Judges remark: "In a case where, for example, a husband made a gift of the house, in which he and his wife were living, to her and after the gift they both continued to reside in the building, it might be held that the gift was accompanied with such change of possession as was consistent with the continuance of the relation of husband and wife between the donor and the donee." In such a case, the fact that the parties—husband and wife—continued in possession of the property in much the same way as before, would not, in any way, invalidate the transfer. The condition against alienation seems to me to stand on precisely the same footing.

(1) 23 M. 70.

KALIMUDDIN v. MAHURNI.

Probably, the husband and wife had come to an agreement that the real ownership henceforth would be in the wife but that the property should continue to be enjoyed in the same manner during the life-time of the husband. Possibly, the stipulation may not be valid, but I see no reason for holding that the existence of the stipulation invalidates the original transfer.

The observation of the learned Subordinate Judge that the decree for rent, in execution of which the property was purchased, was obtained by the whole body of landlords, has been attacked. It is argued that this is based on a mistaken impression of the learned Subordinate Judge of the effect of the deposition of a witness named Nitai. That, however, is not a point that can be taken in second appeal.

The appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 235 OF 1911.

February 12, 1912.

Present:—Mr. Justice Coxe and Mr. Justice Imam.

Sheikh KALIMUDDIN—OPPOSITE PARTY—APPELLANT

versus

Musammat MAHURNI AND ANOTHER—APPLICANTS—RESPONDENTS.

Administration-bond—Assignment—Second assignment while first is in force, whether valid—Appeal—Order assigning bond—Probate and Administration Act (V of 1881), *ss.* 78, 79, 86—*Civil Procedure Code (Act V of* 1908), *s.* 105.

There is no provision in the law which authorizes a District Judge to assign an administration-bond under section 78 of the Probate and Administration Act again while the first assignment is still in force.

There is no appeal from an order assigning an administration-bond.

Appeal from the order of the District Judge of Purneah, dated March 4th, 1911.

Babus *Shib Chandra Palit* and *Nanda Lal Banerji*, for the Appellant.

Babu *Mohendra Nath Roy* and Moulvi *Nur-ud-din Ahmed*, for the Respondents.

JUDGMENT.—The appellant in this case was granted Letters of Administration to the estate of one Maula Baksh and executed a bond in favour of the District Judge under section 78 of the Probate and Administration Act, 1881, for the due administration of the estate. As apparently he did not administer it properly, the bond was assigned under section 79 of the Act to Gyasuddin, a son of Maula Baksh. Gyasuddin, however, came to terms with the appellant and did not sue on the bond. The widow and the other children of Maula Baksh then sought to have the bond assigned to them. This has been granted by the District Judge and hence this appeal.

A preliminary objection is taken that no appeal lies. We think this contention must prevail. Section 86 of the Act enacts that every order of a District Judge under the Act shall be subject to appeal to the High Court under the rules contained in the Code of Civil Procedure applicable to appeals. One of those rules is to be found in section 105 of the Code which lays down that, save as otherwise expressly provided, no appeal shall lie from any order. There is certainly no express provision in the Code for an appeal from an order assigning a bond. This seems to be in accordance with the view taken in *Brojo Nath Pal* v. *Dasmony* (1) and *Abhiram Dass* v. *Gopal Dass* (2). It was not taken in *Uma Charan Das* v. *Mukta Keshi Das* (3), but in that case the effect of the words "under the rules contained in the Code of Civil Procedure" seems not to have been considered.

We think, however, that the order of the District Judge is altogether without jurisdiction and that we can accordingly revise it. Under section 78, the bond enured for the benefit of the District Judge. Under section 79, he can assign it on conditions. But there is no provision in the law which authorises him to assign it again while the first assignment is still in force. If there had been a condition that the assignment should be void, if the assignee failed to comply with certain requirements, in that case a re-assignment might perhaps be possible. But there is no such condition in the present assignment. All that is stipulated is that any money decreed should be deposited in Court, a condition that can hardly be said to have been broken. No doubt, the re-

(1) 2 C. L. R. 589.
(2) 17 C. 48.
(3) 28 C. 149.

spondents can apply to have the Letters revoked, if they can make out a case under section 50 of the Act, and can sue the administrator. They can also hold Gyasuddin responsible as a trustee for them under section 79 for all that he has recovered. But they cannot obtain an assginment of the bond from the District Judge when it is no longer his to assign.

Accordingly, the appeal is dismissed, but in the exercise of our revisional jurisdiction, we set aside the order of the District Judge assigning the bond to the respondents. They will be at liberty, if so advised, to proceed with the application for revocation of the Letters of Administration which the District Judge has left undetermined. We make no order as to costs.

Appeal dismissed.
Order of Court below set aside in revision.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 569 OF 1909.

August 24, 1911.

Present:—Mr Justice Mookerjee and Mr. Justice Caspersz.

BHAGABATI KOER—JUDGMENT-DEBTOR—APPELLANT

versus

SOHODRA KOER—DECREE-HOLDER—RESPONDENT.

*Personal Law—Distinct and inconsistent personal laws in respect of paternal and maternal properties—Hindu Law—Widow—Savings from husband's estate—Widow's right in savings—Accumulation—True test—Widow's intention—*Howdah, *of husband's estate, sale of, to stranger—Re-purchase by widow—Widow's right to it—Rents not realised from tenants of husband's estate—Whether accumulation—Widow's rights therein.*

The presumption is that a man carries his personal law with him.

Parbati v. *Jagadis*, 29 I. A. 82; 29 C. 433; 6 C. W. N. 490; 4 Bom. L. R. 365; *Ambabai* v. *Govind*, 23 B. 257, *Mailathi* v. *Subbaraya*, 24 M. 650, relied on.

A person cannot simultaneously have two distinct and inconsistent personal laws, one governing his rights in respect of property taken by him from paternal ancestors, and the other in respect of properties received by him from maternal ancestors.

If a Hindu widow makes no attempt to dispose of the savings from her husband's estate, they follow the estate from which they arose.

Isri Dut v. *Hansbutti Koerain*, 10 I. A. 150; 10 C. 324; 13 C. L. R. 418 and *Bhagabai Deyi* v. *Bhola Nath*, 7 B. L. R. 93; 15 W. R. 63, relied upon.

The Court will determine in each individual case whether the property in dispute is in the nature of accumulation or is merely a saving held in suspense by the widow with intent to be appropriated for her personal use later on.

The true test is to determine the intention of the widow: did she intend to treat the disputed property as part and parcel of the estate of her husband, or did she treat it as a temporary saving liable to be applied by her subsequently for her own purposes?

Where a *howdah* (seat on an elephant), which was originally a part of the estate of a Hindu widow's husband, had been sold to a stranger and the widow subsequently re-purchased it, the inference is that she intended to treat it as a part of her husband's estate.

Rents not realised from the tenants of the husband's estate are not to be treated as temporary savings liable to be applied in satisfaction of any personal debt of the widow, but they are a part of the estate of the husband.

Appeal from the order of the District Judge of Muzaffarpur, dated August 28th, 1909, affirming that of the first Sub-Judge of that District, dated September 14th, 1908.

Babu *Shorashi Charan Mitra* for the Appellant.

Babu *Dwarka Nath Mitter* for the Respondent.

JUDGMENT.—This appeal is directed against an order by which the Court of Appeal below, in concurrence with the Court of first instance, has allowed execution to proceed on the basis of a decree for money obtained by one Sohodra Koer, now respondent before us, against Bhagabati Koer, on the 22nd December 1906. Bhagabati Koer was sued as the legal representative of her mother Bechu Koer and the decree directed that the judgment-debt be recovered from the assets of Bechu Koer in the hands of Bhagabati Koer. In execution of this decree, two properties have been attached, namely, *first*, a *howdah*, or a seat on an elephant, and *secondly*, rent due to Bechu Koer from the tenants of properties which she took by inheritance from her husband Gudar Sahai. Bhagabati Koer contends that these properties are not the assets of the estate of her mother in her hands and are not liable to be attached in execution of the decree. The Courts below have overruled this contention and allowed execution to proceed. The case has been tried on the assumption that the parties are governed by the *Mitakshara* law, although they are residents of Mithila. It has been stated to us that Gudar Sahai had his ancestral home in the District of Gaya and when he suc-

ceeded by right of inheritance to the estate of his maternal grand-father in Mithila, he came to Mozaffarpur and settled there. There can be no doubt that, till the contrary is established, the presumption is that Gudar Sahai carried his personal law with him. [*Parbati* v. *Jagadis* (1); *Ambabai* v. *Govind* (2); *Mailathi* v. *Subbaraya* (3)]. It cannot be suggested that in respect of properties which he took by right of inheritance from his maternal grandfather, the Mithila law is applicable, while in respect of his paternal properties the *Mitakshara* law has operation. The view cannot be maintained that a person may simultaneously have two distinct and inconsistent personal laws, one governing his rights in respect of property taken by him from paternal ancestors and the other in respect of properties received by him from maternal ancestors. We must, therefore, decide this case on the assumption that the parties are governed by the *Mitakshara* law.

On behalf of the appellant, it has been contended, that although it is established that the *howdah* was purchased by Bechu Koer from the income of the estate of her husband in her hands, and although the unrealised rent was the profit of the estate which she inherited from her husband, they are not assets in the hands of her daughter liable to be seized in execution at the instance of a creditor who holds a personal decree against her. In support of this proposition, reliance has been placed upon the cases of *Isri Dut* v. *Hansbutti Koerain* (4), *Sheolochun* v. *Sahib Singh* (5), *Bhagabatti Deyi* v. *Bhola Nath* (6) and *Anund Chundra* v. *Nilmony Jourdar* (7). In answer to this contention, it has been argued on behalf of the decree-holder-respondent that the properties in question were absolutely at the disposal of Bechu Koer and that, consequently, after her death they were liable to be seized in satisfaction of her personal debts precisely in the same manner as they might have been applied by Bechu Koer herself during her life-time for payment of the dues of her creditors. In support of this proposition, reliance has been placed upon the cases of *Brij Indar Bahadur* v. *Ranee Jankee Koer* (8), *Soadamini* v. *The Administrator-General of Bengal* (9), *Akkanna* v. *Venkayya* (10) and *Subramanian Chetti* v. *Arunachellam* (11).

It may be conceded at once that the question of the right of a Hindu widow to accumulations from the income of the estate of her husband, which she has taken by right of inheritance, is not altogether free from difficulty. In one of the earliest cases on the subject, *Soorjeemoney* v. *Denobundoo* (12), their Lordships of the Judicial Committee appear to have laid down that all the accumulations of a fund which had descended to a widow, from the time the estate vested in her, were absolutely her own, *i.e.*, in her own right as distinct from the fund itself which she was entitled to hold and appropriate as a widow. In a later decision, however, *Mitta Kanth Audhicarry* v. *Neerunjun Audhicarry* (13), their Lordships pointed out that the previous decision was not to be regarded as conclusive or even as a direct authority upon the question. The most important decision of the Judicial Committee upon the matter is that of *Isri Dut* v. *Hansbutti Koerain* (4). In that case, their Lordships observed that if the widow had made no attempt to dispose of the savings from her husband's estate, there was no dispute that they followed the estate from which they arose. This view had in substance been taken by this Court in the case of *Bhola Nath* v. *Bhagabatti Deyi* (6), the decision wherein was subsequently reversed by their Lordships of the Judicial Committee upon another point. [*Bhagbatai Deyi* v. *Bhola Nath Thakoor* (14).] It has been suggested by the learned Vakil for the respondent that the decision of the Judicial Committee in *Isri Dutt* v. *Hansbui Koerain* (4) cannot be reconciled with the subsequent pronouncements in *Sheolochan* v. *Sahib Singh* (5) and *Soadamini* v. *The Adminstrator-General of Bengal* (9). In ous opinion, there is no conflict between the principles recognised in the cases mentioned. But it may be a queston of some nicety to determine

(1) 29 I. A. 82; 29 C. 433; 6 C. W. N. 490; 4 Bom. L.R. 365,
(2) 23 *B.* 257
(3) 24 M. 650.
(4) 10 I. A. 150; 10 C. 324; 13 C. L. R. 418.
(5) 14 I. A. 63; 14 C. 387.
(6) 7 B. L R. 93; 15 W. R. 63.
(7) 9 C. 758; 12 C. L. R. 352.
(8) 5 I. A. 1:1 C. L. R. 318
(9) 20 I. A. 12; 20 C. 433.
(10) 25 M. 351.
(11) 28 M. 1.
(12) 9 M. I. A. 123.
(13) 14 B. L. R 166; 22 W. R 437.
(14) 2 I. A. 256; 24 W. R. 168; 1 C. 104.

in each individual case whether the property in dispute is in the nature of accumulation or is merely a saving held in suspense by the widow with intent to be appropriated for her personal use later on. In two of the cases cited at the Bar, namely of *Soudanimi* v. *Administrator-General* (9) and *Subramanain Chetti* v. *Arunacheclam Chetti* (11), the widow was not in possession of the estate of her husband. That circumstance by itself was sufficient to negative any possible intention on her part to annex what was called the accumulation to the estate she had taken from her husband. The true test to be applied to cases of this description is to determine, from the surrounding circumstances, the intention of the widow. Did she intend to treat the disputed property as part and parcel of the estate of her husband or did she treat it as a temporary saving liable to be applied by her subsequently for her own purposes? If that test is applied to the case before us, it is obvious that the claim of the decree-holders cannot be sustained.

In so far as the first item of the attached properties is concerned, there is no doubt that it was originally a part of the estate of the husband of Bechu Koer. It had been sold and had passed into the hands of a stranger to the family. When the widow subsequently re-purchased the family *howdah*, the inference is irresistible that she intended to treat it as a part of her husband's estate.

In so far as the rents not realised from tenants are concerned, it has not been seriously disputed that they cannot be treated as temporary savings liable to be applied in satisfaction of any personal debts of the widow. This view may at first sight seem to militate against that adopted by Sir Charles Sargent, C. J., in *Rivett Carnac* v. *Jivibai* (15). That case, however, is distinguishable on two grounds. In the first place, the powers of the widow to deal with moveables under the Mayukha Law are not precisely on the same footing as the powers of a widow under the *Mitakshara* Law. In the second place, in the case before Sir Charles Sargent, the rent had actually been collected on behalf of the widow by her agent at the time of her death; it was, consequently, her money in the hands of her agent; no distinction could thus be drawn between the sums already expended and the balance in the hands of her agent. Under these circumstances, it was ruled that the property could be claimed by the heirs of the widow and not by the heirs of her husband.

Much reliance was placed by the learned Vakil for the respondent upon the class of cases of which the decisions of the Judicial Committee in *Beerpertal* v. *Rajender Pertab* (16), *Brojendra Prosad* v. *Janki Koer* (8) and *Ram Nundun* v. *Janki Koer* (17) may be taken as the type. In this class of cases, the question for consideration related to property which had been confiscated by the Government and re-granted to one or other member of the family. The learned Vakil for the respondent contended that as the grantee in a case of this description acquires an absolute estate, in so far as the *howdah* was concerned, it ought to be assumed that the widow upon re-purchase acquired an absolute interest therein. It is obvious, however, that there is no analogy between the two classes of cases. In the case of confiscation and re-grant by the sovereign power, the position of the grantee depends upon the intention of the grantor as evidenced by the deed of grant. In the case before us, the right of the widow must be determined from the surrounding circumstances as indicative of her true intention. We hold, therfore, that neither of the two properties sought to be attached by the decree-holder is liable to be attached in execution of the decree obtained by her against Bhagabati Koer to be satisfied out of the assets of Bechu Koer in her hands.

The result is that this appeal must be allowed and the orders of the Courts below discharged. The appellant is entitled to her costs throughout these proceedings. We assess the hearing fee in this Court at one gold *mohur*.

Appeal allowed.

(15) 10 B. 478.

(16) 12 M. I. A. 1; 9 W. R. (P. C.) 15

(17) 29 C. 828; 7 C. W. N. 57; 4 Bom. L. R. 664.

ATAL BAJADAR *v.* MADAN DAI.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 1702 OF 1909.
February 7, 1912.
Present:—Sir Lawrence Jenkins, KT, Chief Justice, and Mr. Justice N. Chatterjea.

ATAL BAJADAR—PLAINTIFF—APPELLANT
versus
MADAN DAI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Khas *possession, joint—Existence of tenants settled by co-sharer, when sufficient answer to claim for* khas *possessition—Acquisition of occupancy-right by tenant.*

The mere fact that there are tenants on the land, who have been settled there by the other co-sharers, is not itself a sufficient answer to the claim for joint *khas* possession, unless, in addition, rights have been acquired which would constitute a complete defence, as, for instance, the acquisition of an occupancy-right.

Appeal from the decree of the Sub-Judge of Jessore, dated May 11th, 1909, confirming that of the Munsif of Narail, dated August 1st, 1908.

Babu *Surendra Chandra Sen*, for the Appellant.

Babu *Brojo Lal Chakravarti*, for the Respondents.

JUDGMENT.—It has been determined by the lower Court that the plaintiff is entitled to a 4-annas share in the property, but that he is not entitled to *khas* possession of the land even to the extent of this share. The mere fact that there are tenants on the land, who have been settled there by the other co-sharers, is not itself a sufficient answer to the claim for joint *khas* possession, unless in addition rights have been acquired which would constitute a complete defence, as, for instance, the acquisition of an occupancy-right. In the circumstances, we think that it would be better that the plaintiff's right to joint *khas* possession should be determined in this suit. We must, therefore, reverse the decree and send back the case to the lower Appellate Court for re-consideration and in so doing, we would draw attention to those cases of which *Hulodhur Sen* v. *Gooroodass Roy* (1), *Naranbhai Vaghjibhai* v. *Ranchod Premchand* (2) may be cited as instances.

It will be open to the defendants to raise any objection that may seem proper to them, as an answer to the plaintiff's claim. But if those objections do not prevail, then we think, in the circumstances of this case, the right to joint possession should be decreed.

(1) 20 W. R. 126.
(2) 26 B. 141.

GUL MAHOMED *v.* ABDUL JUBBAR.

The costs of this appeal and also in the lower Appellate Court will abide the result.
Case remanded.

CALCUTTA HIGH COURT.
MISCELLANEOUS CIVIL APPEAL No. 295 OF 1910.
February 8, 1912.
Present:—Mr. Justice Stephen and Mr. Justice D. Chatterjee.

GUL MAHOMED—PETITIONER—APPELLANT
versus
ABDUL JUBBAR—OPPOSITE PARTY—RESPONDENT.

Appeal—Dismissal—Non-filing of notice to respondent—Civil Procedure Code (Act V of 1908), *O. XLI, r.* 18—*Putting in* talabana *with memorandum of appeal.*

An appeal was filed in the District Judge's Court, and at the same time *talabana* was deposited, but the notice which the appellant was required to file by the Circular Order of the Hight Court in order that processes might be issued, was not filed. On the day fixed for hearing, the appeal was dismissed:

Held, that the order of dismissal was wrong, as it could not be made under rule 18 of Order XLI as the *talabana* had been deposited.

Appeal from the order of the District Judge of Chittagong, dated March 1st, 1910.

Babu *Probodh Kumar Das*, for the Appellant.

Babus *Lalit Mohan Banerjee*, and *Smritish Chandra Ghose*, for the Respondent.

JUDGMENT.—In this case the appellant filed an appeal in the Court below on the 2nd of February 1910 and at the same time he deposited the *talabana*. On the 2nd March 1910, the case came on for hearing and notice was not filed and the appeal was dismissed. This presumably was a notice which the appellant was required to file by the Circular Orders in the Court in order that processes might be issued. The dismissal of the appeal, apparently, was under Order XLI, rule 18, Civil Procedure Code, which does not apply to the present case as the *talabana* had been deposited. The result is that the dismissal of the appeal on the 2nd March was wrong; consequently, when the matter came up on an application for re-admission, on the 18th March, re-admission ought to have been allowed. It was in fact refused on the ground that notice had not been filed, though that was perhaps through the fault of the party. We cannot hold that

the Judge in this matter exercised his discretion rightly, but as the order of the 2nd March was wrong, the application for re-admission ought to have been allowed.

It is objected that there is no appeal in this case. Taking the order to have been one under rule 18, Order XLI, the application for re-admission was one under Order XLI, rule 19, Civil Procedure Code. Consequently, there is an appeal under Order XLIII, rule 1, sub-section (*t*), Civil Procedure Code. In any case, there is an application for the exercise of our revisional powers.

The result is that the orders of the 2nd March and 18th March 1910 are set aside and we direct that the appeal do proceed according to law.

We make no order as to costs in this appeal.

Orders set aside.

PRIVY COUNCIL.

APPEAL FROM THE PUNJAB CHIEF COURT.

January 30, 1912.

Present:—Lord Macnaghten, Lord Robson, Sir John Edge, and Mr. Ameer Ali.

Nawab IBRAHIM ALI KHAN—

versus

Nawab MUHAMMAD AHSAN ULLAH—

AND ANOTHER

AND

Nawab MUHAMMAD AHSAN ULLAH KHAN AND ANOTHER

versus

Nawab IBRAHIM ALI KHAN.

*Custom—Succession—Primogeniture, rule of—Muhammadan Law—*Kunjpura *State—Impartible principality—Rights of junior members—Maintenance—Partition—Withdrawal of* quasi-sovereign *powers, effect of—Property acquired subsequent to withdrawal of powers.*

The succession to the *zemindari* rights as well as the *Jagir* of Kunjpura Estate in the Karnal District is governed by the rule of lineal primogeniture. The Estate is an impartible principaility. The junior members of the family are only entitled to maintenance and not to their shares under the Muhammadan Law.

This rule of succession applies as well to the properties acquired after 1849 as to the properties held before that year.

The withdrawal of *quasi-sovereign* civil and criminal powers previously exercised by the Chief of Kunjpura State cannot have the effect of altering the custom under which the entire estate descends by the rule of primogeniture to a single male heir.

Appeals from the judgment of the Hon'ble Mr. Justice Robertson and the Hon'ble Mr. Justice Lal Chand, dated 19th December 1907, (47 P. R. 1908).

JUDGMENT.

MR. AMEER ALI.—The sole question for determination involved in these two appeals relates to the rule of succession applicable to the Kunjpura State lying in what are called the Cis-Sutlej Districts of the Punjab.

The Kunjpura *riasat* lies about 100 miles to the north of Delhi, in the District of Karnal, and was founded in the first half of the 18th century by an Afghan soldier of fortune of the name of Najabat Khan, who, like many other adventurers, native and foreign, had taken advantage of the troublous times when the whole fabric of the Mogul Empire had fallen to pieces to carve out a small principality for himself. In 1748, he obtained a *sanad* from the Afghan conqueror Ahmed Shah Abdali, also called Durani, then in the height of his power in Northern India, granting him a "hereditary *jagir*" of the possession at the time. The villages were declared to be *inam*, or revenue-free, and he was to enjoy thenceforth the revenue payable to the Imperial Government, subject to the obligation of maintaining order in his *ilaqa* or possessions.

It is not disputed that the chiefship has from the time of Najabat descended in the male line to a single heir, and that heir has been invariably the eldest son, save in one instance, where the deceased *rais* left no issue, and was succeeded by his eldest surviving brother.

Nawab Muhammad Ali Khan, the seventh in descent from Najabat Khan, succeeded to the chiefship in the year 1849. He died in 1886, leaving several sons, three of whom only are now surviving, *viz.*, the defendant Ibrahim Ali Khan, the eldest, and the two plaintiffs, respondents in the first appeal.

He left also three daughters, but both parties are agreed that by the custom of the family they receive no share in his inheritance.

The defendant was a minor at the time of his father's death, and during his minority, the Court of Wards managed the Estate. In 1900, he attained majority and assumed charge of the properties.

The plaintiffs claim that under the Muhammadan Law, which they allege governs the succession in their family, they are entitled to shares in the Kunjpura Estate, and they brought this suit against the de-

fendant in the Court of the District Judge of Karnal for partition, possession, and "rendition of account."

The defendant contested the action on the allegation that the Estate of Kunjpura was an impartible *riasat* or principality which had been recognised as such by the sovereign power, and which had descended, under the custom governing the family, by the rule of primogeniture, and that the younger male members had no title beyond a claim to reasonable maintenance.

It will be noticed that both parties alleged the existence of a custom at variance with the Muhammadan Law with regard to succession in their family ; the plaintiffs restrict it to the exclusion of females from inheritance, whilst the defendant asserts that it extends to the younger male members.

The District Judge found in favour of the custom alleged by the defendant, and dismissed the plaintiffs' suit. On appeal, the learned Judges of the Chief Court have affirmed the view of the District Judge in respect of all property that appertained to the *riasat* prior to 1849, holding that the custom set up by the defendant, which they found established, clearly applied to it. But they were of opinion that as in that year the Government withdrew from the chiefs of Kunjpura the *quasi*-sovereign powers they had hitherto exercised, "the chiefship ceased as an independent entity," and consequently "lands and property acquired by the Nawab after 1849 were not subject to the same rule of succession as was applicable to lands which once appertained to the chief as chief."

In this view, they decreed the plaintiffs' claim in respect of their shares under the Muhammadan Law in the latter properties.

Both parties have appealed from the decree of the Chief Court. The defendant contends that the learned Judges are in error in drawing a distinction between the properties held before and those acquired after 1849, and that the custom, the existence of which has been found by both the Courts in India, applies to all property. The plaintiffs, on the other hand, urge that the custom alleged by the defendant, on whom the onus lay, has not been established; and that in any event, the effect of the withdrawal in 1849 from the chiefs of all civil and criminal powers was to reduce their status to that of private citizens, subject to their ordinary personal law. That, in substance, represents the contentions of the parties before this Board.

The Chief Court has traced the history of the Kunjpura family with much care and discrimination. Their Lordships do not, therefore, propose to discuss the evidence at any length, for they find it established beyond doubt that the Estate of Kunjpura has, ever since the time of Najabat, descended to a single heir, who has been recognised as the chief of an impartible *riasat* which is the Arabic or Mussulman synonym of the Hindu word *raj*; and that attempts by junior members of the family to obtain shares in the *riasat* properties have invariably failed. The two instances on which the plaintiffs rely as showing allotment of shares to junior cadets of the family appear to their Lordships to be clearly opposed to their contention. The first is the case of Karam Sher the second brother of Gulsher Khan, third in descent from Najabat, who obtained, under circumstances that cannot be ascertained at this distance of time, several villages which were separated from the *jagir*, and are still held by his descendants. There is nothing, however, to show that the villages Karam Sher received bore any relation to the share he would have been entitled to on partition under the Muhammadan Law. Nor does it appear or is even alleged that Gulsher Khan's brothers other than Karam Sher obtained any share of the family properties. In 1851, whilst the *dastur-ul-amal* or settlement records of these villages were in course of preparation, Nizam Ali Khan, the son of Karam Sher, applied to have his name entered as *jagirdar* of the villages in question. His application was resisted by Nawab Muhammad Ali Khan, who was then the *rais* of Kunjpura, on the ground that the villages held by the applicant had been given to him for maintenance, and that they should revert to the chief on his (the applicant's) death without male issue. The Commissioner of the Cis-Sutlej States, within whose jurisdiction Kunjpura lay, after recording the Nawab's objection, made the following recommendation to Government:—

"I think that all the villages and land possessed by the younger branches of thd family should be held and recorded to be component parts of the chief's integral estates that while the present incumbents or any

of their descendants are living, the chief be altogether debarred from disturbing or interfering with their possession, and that, on failure of issue in any branch, the lands composing the maintenance (*guzarah*) of that branch revert to the chief's integral estate, in place of lapsing to the Government, as they would do were they severed from that estate. The *dastur-ul-amal* would thus be drawn in the name of the *Nawab Rais* (the chief)."

The Commissioner's view was accepted and affirmed by Government on the 31st October 1851, and the final order was passed by him on the 17th November following. It is clear, therefore, that neither the Government nor the chief ever recognised that the villages received by Karam Sher were in lieu of his share by right of inheritance under the Muhammadan Law. On the other hand, it was alleged, on the first opportunity that offered itself, that the villages had been granted to Karam Sher and his male descendants for maintenance, and that they were to revert to the *riasat* on the extinction of his male line, and this contention was accepted and affirmed by the Government.

The other instance is that of Ghulam Muhay-ud-din Khan. Gulsher died in 1864, leaving several sons, of whom the eldest, Rahmat Khan, succeeded to the *riasat*. Quarrels then broke out between him and his second brother, Ghulam Muhay-ud-din, about the latter's claim for maintenance, which at last became so violent that the British Authorities, who had in the year 1806 assumed charge of the Cis-Sutlej districts, were compelled to interfere. The dispute between Rahmat Khan and Ghulam Muhay-ud-din was referred to the arbitration of the Resident at Delhi, Mr. Metcalfe (afterwards Sir Theophilus Metcalfe) and Mr. Fraser. As a result of the arbitration, Ghulam Muhay-ud-din obtained a number of villages yielding a considerable income. Upon the evidence, their Lordships have no hesitation in agreeing with the Chief Court that he received them in lieu of maintenance. In fact, some years later, when a younger brother applied for maintenance out of the properties in the possession of Rahmat Khan and Ghulam Muhay-ud-din respectively, the latter objected to his being made liable on the ground that he himself had obtained for maintenance the villages held by him, and he was accordingly exempted from the obligation of contributing towards the younger brother's maintenance.

Ghulam Muhay-ud-din died in 1841, and a claim was put forward on behalf of his minor son, Muhammad Yar Khan, to the possession of all the villages that had been held by him. But a part only was assigned to Muhammad Yar Khan for his maintenance, whilst the rest reverted to the chiefship.

As already observed, these two cases, far from supporting the plaintiffs' allegation, appear to their Lordships to be quite opposed to it. No other evidence has been referred to to suggest that there has ever been a division of the Estate in accordance with the rules of the Muhammadan law since the time of Najabat Khan. It was, however, contended on behalf of the plaintiffs that although the *jagir* may be impartible and descendible by the rule of primogeniture, the *zemindari* rights in the villages comprised in the *jagir* cannot be so treated in the absence of clear evidence of custom applicable to them. In support of this contention, reliance was placed on the dictum of Mr. Lawrence (afterwards Lord Lawrence) pronounced in 1852 in a case which had come before him as a member of the Board of Administration. Janbaz Khan and Shahbaz Khan, two younger sons of Rahmat Khan, had preferred a claim for shares in the *zemindari* rights in one of the villages appertaining to the Kunjpura Estate. Their application was dismissed by the Commissioner. On appeal to the Board, Mr. Lawrence expressed himself as of opinion:—

"That *zemindari* rights did not belong to the State, that, like other moveable or immoveable property, it should be given by right of inheritance according to Muhammadan law, and that all the descendants af Nawab Rahmat Khan, who had acquired this *zemindari*, had rights in it."

The other members appear to have concurred in this view. But the final decision was made dependent on the determination of the question whether Janbaz and Shahbaz had ever been in possession of the shares which they claimed should be recorded in their names. They were found, however, never to have been in possession, and their claim was finally dismissed.

The opinion of Mr. Lawrence, however

deserving of respect, affords, therefore, little assistance in deciding the question whether the *zemindari* rights are subject to a different rule of succession from the *jagir*. The opinion was, in the result, ineffective, and seems never to have been accepted or acted upon in the course of the constant claims the junior members of the family have put forward to a share in the Estate. The decisions in the later cases lay down in explicit terms that the *zemindari* rights belong to the *riasat*. Similarly, it is recorded in the *Wajib-ul-arz* that "the entire *biswadari*, *zemindari*, and *jagirdari* rights are possessed by the Nawab." Any other conclusion would not only be inconsistent with the policy which the Government has maintained for nearly a century towards these *riasats*, but in the end would prove positively destructive to the chiefships.

It remains, however, to consider whether the view taken by the Chief Court with regard to the rule of succession to aquisitions made by the chiefs after 1849 is well founded. After holding that the custom set up by the defendant Nawab is made out as regards all property which can be shown to have formed part of the State before 1849, the learned Judges proceed to say:—

"As regards lands subsequently acquired, we think the case is different. The custom owed its rise and *raison d'etre* to the existence of the State and the exigencies of chiefship. A family custom, respected by the authorities and fully established as accompanying the chiefship, must be held to obtain as regards the estates of the chiefship as such. But when the chiefship ceased as an independent entity, it was not only privileges but duties and liabilities also which were abrogated, and we do not think that lands and property acquired by the Nawab after 1849, with income, which he was admittedly competent to deal with as he pleased, can be held to be subject to the same rule of succession now as the land which once appertained to the chief as chief."

Their Lordships regret to be unable to follow the reasoning on which the view expressed by the learned Judges proceeds, or assent to the conclusion at which they have arrived. There is nothing to show that the Government, in withdrawing the civil and criminal powers the chiefs had hitherto exercised, intended to make any alteration in their status or to vary the rule which had governed the succession to the Kunjpura Estate. The withdrawal of those powers was, no doubt, due to the needs of administration, but that circumstance cannot affect the custom under which the entire Estate descended by the rule of primogeniture to a single male heir.

On the whole, their Lordships are of opinion that the appeal of the defendant Ibrahim should be decreed and the plaintiffs' suit dismissed. They will accordingly humbly advise His Majesty to discharge the decree of the Chief Court, and to restore that of the District Judge, dismissing the plaintiffs' suit.

The plaintiffs will pay the costs of the appeals.

Appeal decreed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO 2457 OF 1908.

February 12, 1912

Present:—Mr. Justice D. Chatterjee.

January 27, 1912.

Present:—Mr. Justice Chitty and Mr. Justice Coxe.

RADHA KANT CHAKRAVARTI—DEFENDANT NO. 6—APPELLANT

versus

RAMANANDA SHAHA—PLAINTIFF—RESPONDENT.

Estoppel— Pleading — Non-transferable occupancy-holding—Mortgage without landlord's consent—Sale by mortgagor to third party—Purchaser taking fresh lease from landlord—Mortgagee's suit for sale—Plea of purchaser that mortgage invalid, if tenable.

An occupancy-holding which was not transferable without the consent of the landlord, was mortgaged to the plaintiff. Defendant No. 1, who was the heir of the mortgagor, sold a part of this holding to defendant No. 6 with the consent of the landlord who subsequently gave a fresh lease to the defendant No. 6 at an enhanced rent. On a suit being brought on the mortgage, the defendant No. 6 pleaded that the mortgage was void as the holding mortgaged was not transferable without the consent of the landlord and no such consent had been obtained :

Held, (*Per Chitty* and *Chatterjee, JJ., Coxe, J., dissenting*) that the defendant No. 6 was estopped from raising the plea of non-transferability.

Doe v. *Stone*, 3 C. B. 176; 15 L. J. C. P. 234; 10 Jur. 280; 71 R. R. 311; *Doe* v. *Vickers*, 4 Ad. & E. 782; 6 N. & M. 437; 6 L. J. K. B. 266; *Hughes* v. *Howard*, 25 Beav. 575; 53 Eng. Rep. 756 and *Debendra Nath* v. *Mirza Abdul Samed*, 1 Ind. Cas. 264; 10 C. L. J. 150, relied upon.

Appeal from the decree of the District Judge of Tipperah, dated July 28th, 1903, re-

versing that of the Munsif of Comillah, dated Jaunary 17th, 1907.

This appeal at first came for hearing before Chitty and Coxe, JJ., who having differed in opinion, passed the judgment given below.

JUDGMENT.

CHITTY, J.— This is an appeal by Radha Kanta Chuckerbutty, defendant No. 6 in a mortgage suit, against the decree of the District Judge of Tipperah making him liable under the mortgage. One Maniram, or Manu Kaiburtu, husband of defendant No. 1, by a *kabala* dated 27th *Aswin* 1307 (13th October 1900), mortgaged 8 *kanis*, 13 *gandas*, 3 *koras* of land, in which he held *ryoti* rights, to the plaintiff to secure Rs. 400 and interest at Rs. 1-14 per cent. per meusem. Maniram died without having paid off the mortgage or any part of it. His widow, defendant No. 1, tranferred some portion of the land to defendant No. 2, who again sold to defendant No. 3. Defendants Nos. 3 and 4 are puisne mortgagees of those portions. By a *kabala*, dated and registered on 27th *Pous* 1313 (11th January 1907), defendant No. 1, with the consent of the landlord, sold plots 1, 2, 3, 4, 6, 7 of the lands in suit, measuring between 4 and 5 *kanis*, to defendant No. 6. The suit was filed by plaintiff on 12th January 1907. Defendant No. 6 was not at first made a party. After the institution of the suit, namely, on 13th *Magh* 1313 (27th January 1907), the defendant No. 6 took a fresh settlement from the landlord of the land which he had purchased from defendant No. 1 and a *pattah* and *qabuliat* at an enhanced rent were exchanged. Defendant No. 6 was added as a party defendant on 5th February 1907, and, with defendant No. 3, alone contested the suit.

The only points for our determination are (1) whether defendant No. 6 was a proper and necessary party to the suit and (2) whether he is estopped from pleading the invalidity of the mortgage on the ground that the *ryoti* right of Maniram was not transferable. The District Judge decided against him on both points and defendant No. 6 has appealed. As to the first point, the appellant's Pleader relied on the case of *Jangeswar Dutt* v. *Bhuban Mohan Mitra* (1), but, in my opinion, this is a very different case. There it was held that a third party, who is in no way connected with the mortgage and who claims adversely to both mortgagor and mortgagee, cannot be made a party to a suit on the mortgage in order to try the question of his title. Here defendant No. 6 admittedly acquired a title to the land in question in the first instance from the mortgagor, but claims to have exchanged it for something better by subsequently taking a fresh settlement from the landlord. The question whether he can be allowed to do this is a question properly arising for determination in the mortgage suit, and he was, therefore, rightly made a party defendant. The next question is whether he is estopped, as a representative of the mortgagor, from denying the validity of the mortgage; in other words, can he now be allowed as against the mortgagee to relinquish the title which he derived from the mortgagor and set up the title subsequently acquired from the landlord? The learned Pleader for the appellant cited the case of *Agarjan Bibi* v. *Panaulla* (2), but, in my opinion, that case has really no bearing on the present question. The question seems to me one to be decided on general principles of equity. Defendant No. 6, having previously obtained the landlord's consent, purchased a portion of this holding from defendant No. 1. He clearly derived his title to what he purchased from defendant No. 1 alone and not, as has been argued, from defendant No. 1 and the landlord together. The whole title to what defendant No. 6 purchased was in defendant No. 1, and the fact that the landlord's consent was necessary before she could part with it, does not mean that the title was derived in part from the landlord.

Defendant No. 6, therefore, took what he purchased subject to the liabilities which defendant No. 1 or her husband had incurred; that is to say, he took subject to the mortgage. If the suit had then been brought against him, he could not have denied the validity of the mortgage. Can he subsequently throw off that title and acquire a new one for the obvious purpose of defeating the mortgagee's claim? I am of opinion that it would be inequitable to allow him to do so, and it would certainly open the door to fraud in a large number of cases.

The case of *Krishna Lal Saha* v. *Bhairab*

(1) 3 3 C.425; 3 C. L. J. 205.

(2) 6 Ind. Cas. 452; 14 C. W. N. 779; 12 C. L. J. 169; 37 C. 687.

Chandra Rohat (3) was brought to our notice. The facts of that case appear to be very different from the present. There the contesting defendant had purchased the right, title and interest of the mortgagor at an execution sale. If the occupancy-holding was not transferable by custom, he took no interest in it by his purchase. That appears to me very different from the present case of a voluntary transfer by the mortgagor made with the landlord's consent previously obtained. Here defendant No. 6 obtained a perfectly good title by his purchase from the mortgagor with the landlord's consent subject only to the mortgage. There could be no possible object in his obtaining a fresh settlement from the landlord at an enhanced rent except to defeat or endeavour to defeat the claims of the mortgagee. This he ought not to be allowed to do. I would dismiss the appeal with costs.

As my learned colleague is of a different opinion, the case must be laid before the Chief Justice for reference to a third Judge.

Hearing fee 2 gold *mohurs* for each hearing.

Coxe, J.—I think that this appeal ought to be allowed. The land to which it relates was purchased by the appellant on the 9th January 1907 with the landlord's consent, and on the 27th January 1907, the appellant obtained a settlement from the landlord at an enhanced rent on payment of a premium. The land formed part of a holding which had been mortgaged to the plaintiff without the landlord's consent by the husband of the vendor of the appellant. The plaintiff sued upon the mortgage on the 12th January 1907, not making the appellant a party. But as the other defendants objected, the plaintiff made the appellant a party on the 6th February 1907. It is found that the holding was not transferable without the landlord's consent and that the sale to the appellant was effected *bona fide* for consideration.

The question for decision is whether, under these circumstances, the appellant is estopped from pleading that the holding was not transferable without the landlord's consent. That it was not so transferable is laid down in numerous rulings of which the last is *Agarjan Bibi* v. *Panaulla* (2). The mortgagee took nothing by his mortgage and all that has to be decided is whether the appellant is entitled to say so. Now, if he had purchased the holding in execution of a money decree, at which no title whatever would have passed and the judgment-debtor's interest would, in the eye of the law, have continued to subsist [*Biram Ali Sheikh* v. *Gopi Kanta Shaha* (4)], and had subsequently taken a settlement, he would have been entitled to raise the plea that the holding was not transferable by the judgment-debtor without the landlord's consent [*Krishna Lal Saha* v. *Bhairab Chandra Rohat* (8)]. It seems anomalous that a person acquiring title in such a manner should practically get the property free of encumbrances while one who regularly purchases according to the law with the landlord's consent should be bound by all that the original tenant-debtor has unlawfully done.

Doubtless, there is authority that a tenant who mortgages his property without the landlord's consent is estopped from afterwards pleading that it is not transferable. The learned Judges, who decided the case of *Agarjan Bibi* v. *Panaulla* (2), guarded themselves from expressing an opinion on this point and it has been strenuously argued in this case that there can be no estoppel against the law of the land. If it be assumed that the transferee knows the custom of the country that holdings are not transferable without consent then, it is said, he cannot be misled by the statement of the tenant that his holding is so transferable. But, undoubtedly, there is plenty of authority for the opposite view and I am not prepared now to question that authority.

But I do not think that the principle of estoppel should be extended to purchasers with the landlord's consent. If a man wants land, which he knows to be not transferable without the landlord's consent, and buys it with the landlord's consent, I do not see why he should be bound by previous transfers without consent, which he had every reason at the time of his purchase for believing or indeed knowing to be invalid. He is not, I think, a mere representative of the tenant within the meaning of section 115 of the Evidence Act, but something more than that. Two persons, the landlord and the tenant, had to join in giving him his title and he does not derive his title exclusively from either but from both. So far as he derives it from the landlord, he is not, in my opinion, the representative of the tenant

(3) 9 C. W. N., CCXLVIII.

(4) 1 C. W. N. 396; 24 C. 355.

and is entitled to question the tenant's alienations.

Taking this view, I would allow the appeal and restore the Munsif's decision.

The learned Judges then stated the point of law, upon which they differed:

In accordance with the provisions of section 98 of the Code of Civil Procedure (Act V of 1908), we state the point of law upon which we differ to be:—

Whether, on the facts found, defendant No. 6 is estopped from pleading the invalidity of the mortgage in suit on the ground that the *ryoti* right of Maniram was not transferable without the landlord's consent?

The case was then sent to Chatterjee, J., for his decision upon the point.

Babus *Harendra Narain Mitra*, and *Shashadhar Roy*, for the Appellant.

Dr. *Rash Behari Ghose*, Babus *Dhirendra Lal Kastgir* and *Gopal Chandra Das*, for the Respondent.

JUDGMENT.

D. CHATTERJEE, J.—An occupancy-holding, which has been found to be not transferable without the consent of the landlord, was mortgaged to the plaintiffs. Defendant No. 1, who is the heir of the mortgagor, sold a part of this holding to defendant No. 6 with the consent of the landlord, who subsequently gave a fresh lease to defendant No. 6 at an enhanced rent. On a suit being brought on the mortgage, the defendant No. 6 pleaded that the mortgage was void as the holding mortgaged was not transferable without the consent of the landlord and no such consent had been obtained. There being a difference of opinion as to whether defendant No. 6 was estopped from pleading the non-transferability of the holding, the question has been referred to me under section 98 of the Civil Procedure Code. I shall in this judgment call defendant No. 1 the mortgagor and the defendant No. 6 the appellant.

It is contended by the learned Vakil for the appellant that there can be no estoppel against a statute and as an occupancy holding is not transferable under the Bengal Tenancy Act, there can be no estoppel from pleading what the statute provides. The statute, however, does not provide either that these holdings are tranferable or not transferable, but leaves the question to be decided by local usage or custom. See sections 178 and 183. The existence or otherwise of the custom or usage is a fact to be pleaded and proved and I do not think that the principle relied on has any application to the present case. It is next contended that the purchaser is not a representative of the mortgagor within the meaning of section 115 of the Evidence Act as he has derived his title practically from the landlord alone without whose consent the sale would have passed nothing. The landlord alone could not, however, have given him a title. Any grant by the landlord alone during the subsistence of the tenancy of the mortgagor could not entitle him to the possession of the holding. There is some controversy in the books as to whether a sale of a portion of an occupancy-holding confers any title on the purchaser, and the matter is under consideration by the Full Bench. I would, however, take it for granted that the mortgagor alone could not confer any title and neither could the landlord by his own act and without the concurrence of the mortgagor. The two, therefore, joined to pass such title as the appellant has acquired. In this view, the appellant has derived some title from the mortgagor although he has acquired an additional title from the landlord, and to that extent at least he must be considered a representative of the mortgagor. The mortgagor was bound by his deed of mortgage not to assert against the mortgagee that he had no right to mortgage and the appellant, who derived his title at least in part from the mortgagor, cannot be allowed to make a like assertion.

Against this view of the law the learned Vakil for the appellant has relied on two cases (1) an unreported decision of Ghose and Pratt, JJ., in appeal from Appellate Decree No. 35 of 1903 [*Krishna Lal Saha* v. *Bhairab Chandra Rahat* (3)] and (2) a decision of Rampini, Officiating C. J., and Ryves, J., in *Asmatunessa Khatun* v. *Harendra Lal* (5). In the first case, an execution purchaser of the interest of the mortgagor in an occupancy-holding, who after his purchase obtained recognition from the landlord, was held to be not estopped from pleading the non-transferability of the holding in a suit by the mortgagee on his mortgage-bond; the learned Judges said that the defendant No. 2 (the auction-purchaser of the holding) stood on

(5) 12 C. W. N. 721; 8 C. L. J. 29.

a higher ground independent of the purchase and could not, therefore, be estopped from raising the plea of non-transferability. In the second case, the landlord himself purchased a mortgaged holding in execution of a money-decree and then took the plea in a suit by the mortgagee on his mortgage and was held entitled to do so.

I do not think it would be right to distinguish these cases as cases of purchase by auction-sale: for although there were some cases in the books [see *Lala Parbhu Lal* v. *Mylne* (6); *Gour Sunder* v. *Hem Chunder* (7); *Bashi Chunder* v. *Enayet Ali* (8)] which held, on the authority of certain *dicta* of the Judicial Committee [see *Anundomoyee* v. *Dhonendro Chunder* (9); *Dinendro Nath Sannial* v. *Ram Coomar* (10)], that estoppels binding upon the judgment-debtor were not binding upon the auction-purchaser, the matter has been finally set at rest by the Judicial Committee itself in the case of *Mahommed Mozaffer Hossein* v. *Kishori Mohan Roy* (11), in which their Lordships held that the auction-purchaser was bound by an estoppel which bound the person whose right, title and interest he purchased. There is, however, a material distinction and that is that in neither of those cases the mortgagor co-operated with the purchaser for creating a title in derogation of the mortgage. This, upon general principles of equity, the mortgagor should not be allowed to do and there is ample authority for this. I may refer in this connection to the case of *Doe* v. *Stone* (12), in which it was held that it was not open to a person, who has derived title from a mortgagor, to set up against the claim of the mortgagee a title which the mortgagor himself could not set up. In the case of *Doe* v. *Vickers* (13), a mortgagor of a leasehold property suffered an ejectment and took a fresh lease; he was not allowed to set up this new lease against the claim of the mortgagee. In the case of *Hughes* v. *Howard* (14), the mortgagor, in collusion with the lessor and the second mortgagee, incurred a forfeiture of the mortgaged lease-hold and took a fresh lease from the landlord, but was not allowed to set up this lease in answer to the suit of the mortgagee. The case of *Debendra Nath Sen* v. *Mirza Abdul Samed Seraji* (15) may also be referred to as supporting this conclusion.

In the result, therefore, I agree with Mr. Justice Chitty and hold that the appellant, the defendant No. 6, is estopped from raising the plea of non-transferability.

Appeal dismissed.

(6) 14 C. 401. (7) 16 C. 355 at p. 360.
(8) 20 C. 236.
(9) 14 M. I. A. 101 at p. 111; 16 W. R. 19 (P. C.); 8 B. L. R. 122.
(10) 8 I. A. 65; 7 C. 107; 10 C. L. R. 281.
(11) 22 C. 909; 22 I. A. 129.
(12) 3 C. B. 176; 15 L. J. C. P. 234; 10 Jur. 480; 71 R. R. 311.
(13) 4 Ad. & E. 782; 6 N. & M. 437; 6 L. J. K. B. 266.
(14) 25 Beav. 575; 53 Eng. Rep. 756.
(15) 10 C. L. J. 150; 1 Ind. Cas. 264.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 249 OF 1911.

January 31, 1912.

Present:—Mr. Justice Caspersz and Mr. Justice D. Chatterjee.

CHANDRA KUMAR DHAR—JUDGMENT-DEBTOR—APPELLANT

versus

RAM DIN PODDAR AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Acknowledgment—Several judgment-debtors—Acknowledgment by one, whether saves limitation against others—Application for execution for a certain sum—Acknowledgment of same—Subsequent application for additional amount not included in first application—Whether Limitation saved in respect of additional amount—Limitation Act (XV of 1877), s. 19.

If a joint claim is made against *A*, *B*. and *C*., each one of them is a party against whom the claim is made, and if any one has made an acknowledgment within the meaning of section 19 of the Limitation Act, he will start the running of a fresh period of limitation against himself alone.

Therefore, an acknowledgment made by one of several judgment-debtors cannot operate to save limitation as against any of the judgment-debtors other than the person making the acknowledgment.

Richardson v. *Younge*, L. R. 6. Ch. 478; 40 L. J. Ch. 338; 25 L. T. 230; 19 W. R. 612; *Bhogilal* v. *Amrillal* 17 B. 173 and *Dharma* v. *Balmakand*, 18 A. 458, referred to.

Narayana Ayyar v. *Venkata Ramana Ayyar*, 25 M. 220, *Valasubramania Pillai* v. *Ramanathun Chettiar* 32 M. 421; 2 Ind. Cas. 309; 5 M. L. T. 102 and *Ahsanulla* v. *Dakhini Din*, 27 A. 575; A. W. N. (1905) 108; 2 A. L. J. 287, relied upon.

The decree-holder applied for realisation of Rs. 231 as the amount of the decree, and one of the judgment-debtors acknowledged that sum. Subsequently, the decree-holder applied in execution for realisation of Rs. 845 including an additional amount of interest which by mistake was not mentioned in the first instance;

CHANDRA KUMAR *v.* RAM DIN.

Held, that the acknowledgment was only in respect of the smaller amount and could not give a fresh starting point for limitation as regards the additional amount.

Appeal from the order of the District Judge of Chittagong, dated January 19th, 1911, affirming that of the Munsif of Patiya, dated August 22nd, 1911.

Babus *Mohendra Nath Roy* and *Krishna Prasad Sarbadhikari*, for the Appellant.

JUDGMENT.—This appeal arises out of an application for the execution of a mortgage-decree passed on the 19th of December 1901 and made absolute for sale on the 4th September 1906. This first application for execution was made on the 13th of December 1906, for a sum of Rs. 231 odd annas taking the interest as Rs. 12 only, whereas it was in reality Rs. 661 *plus* Rs. 12. On the 7th of March 1907, the appellant, defendant No. 4, who was one of the purchasers of the mortgaged properties (from the mortgagor defendant No. 1), made an application that the decree-holder had claimed Rs. 231 and annas 15 including costs; that this amount could be realized by the sale of property No. 11 alone, and, in any case, that he was prepared to deposit any part of the claim not satisfied by the sale, or the whole of the claim. On the 9th March, the decree-holder, who was under the impression that his claim of Rs. 231 was in accordance with the decree as passed and that the decree must be amended, withdrew the application for execution. He found out, however, that no amendment was necessary, and that he had made a mistake, and he again applied for execution on the 24th January 1910 for Rs. 845 including Rs. 661 for interest which he had omitted to claim in his previous application. One of the judgment debtors objected that the application was barred by limitation, but the decree-holders contended that the application of defendant No. 4, dated 7th March 1907, contained an acknowledgment of liability and saved the application from the bar of limitation. The first Court held that the application was barred except against defendant No. 4 and allowed execution to proceed against him. The lower Appellate Court has upheld that decision and hence this second appeal by defendant No. 4.

It is contended by the learned Vakil for the appellant,—

(1) that the acknowledgment being made by one of several judgment-debtors in respect of a joint decree, it is of no avail to the decree-holder and the whole decree is barred; and

(2) that the acknowledgment is only in respect of the amount claimed, namely, Rupees 231 and annas 15, and cannot be extended to the Rs. 661 interest which was not claimed.

Reliance has been placed by the learned Vakil for the appellant upon the case of *Richardson* v. *Younge* (1) and two Indian cases based upon the same, *Bhogilal* v. *Amritlal* (2), *Dharma* v. *Balmakund* (3). As regards *Richardson* v. *Younge* (1), it is sufficient to say that it has no application to the present case. It was the case of an acknowledgment by one of two trustees who were mortgagees as such, and had, therefore, no several and apportionable interests in the mortgage. Sir G. Mellish, L. J., said in reference to the acknowledging mortgagee, "he was simply joint tenant with his co-trustee of the land, and jointly entitled with him to the mortgage-money. Had the mortgagees not been trustees, the case would have stood very differently, for they must almost of necessity have been entitled to some distinct interests in the mortgage-money." Sir W. M. James, L. J, said: "our decision is confined to the case of mortgagees who are trustees and are shown to be such on the face of the deed." The case of *Bhogilal* v. *Amritlal* (2) was decided upon the wording of Article 148 of the second Schedule to Act IX of 1871, which required an acknowledgment by the mortgagee or some person claiming under him and it was held that as the Act did not provide for an acknowledgment by an agent of the mortgagee, an acknowledgment by one of the heirs of the mortgagee would not suffice although he may have acted as the agent of his co-heirs. Section 20 of the Act had no application as it was not an acknowledgment in respect of a debt or legacy but in respect of the right of the mortgagor to redeem. It is true Jardine, J., referred to *Richardson* v. *Younge* (1) and to the opinion of Mr. Coot, who referred to that case as an authority for the general proposition that "where there is a mortgage to two jointly,

(1) 6 Ch. 478; 40 L. J. Ch. 338; 25 L. T. 230; 19 W. R. 612.

(2) 17 B. 173.

(3) 18 A. 458.

there must be an acknowledgment by both," but we have shown that the facts of *Richardson* v. *Younge* (1) do not support that general proposition and that the judgments of the Lords Justices are quite plain as to the distinction. The Allahabad case, *Dharma* v. *Balmakund* (3), followed the Bombay case and was based on the wording of sub-section 15 of section 1 of Act XIV of 1859, which was similar to the wording of Article 148 of the second Schedule to Act IX of 1871. Mr. Justice Banerji, who tried the case as a single Judge, said: "The mortgage was made in favour of two mortgagees jointly and it was not a mortgage in which the interests of each mortgagee could be apportioned so as to allow of the mortgage being redeemed piece-meal." The report, however, does not disclose the nature of the mortgage and, in any case, the wording of the Act of 1859 must have regulated the particular decision.

The present case, however, must be decided on the Limitation Act of 1877. Section 19 requires the acknowledgment to be by the party against whom the right is claimed. Section 21 does not lay down an exception to section 19, but enumerates those cases in which the act of one member of a class is liable to be taken as the act of all; in respect of these cases it provides that an acknowledgment of one shall not by itself be taken as the acknowledgment of the other, but that there must be something else such as authority express or implied. It does not say that the acknowledgment shall be ineffectual even against the party who made it. Such a party, if he is included in the party against whom the right is claimed, must be responsible for his own act under section 19. If a joint claim is made against *A.*, *B.* and *C.*, each one of them is a party against whom the claim is made and if any one has made an acknowledgment within the meaning of section 19, he will start the running of a fresh period of limitation. In the case of *Narayana Ayyar* v. *Venkata Ramma Ayyar* (4), Sir Arnold White, C.J., and Bhashyam Ayyangar, J., decreed a suit on a mortgage-bond against the defendant who had made an acknowledgment and not against his co-mortgagor. It may be said, however, that it was a mere opinion as the matter was not argued and was in fact admitted by Counsel, and the ultimate decision of the Full Bench that Article 147 applied to the case made the question of acknowledgment immaterial as the mortgage was of 1882 and the suit had been brought in 1897. It was, in any case, the opinion of two eminent Judges and is as such entitled to some weight. In the case of *Valasubramania Pillai* v. *Ramanathan Chettiar* (5), Sir Arnold White, C. J., and Abdur Rahim, J., set aside a decree on a bond-note so far as it affected one defendant who had not made or authorized a part payment made by another member of the family. In the case of *Ahsanullah* v. *Dakhini Din* (6), the Allahabad High Court (Blair and Burkitt, JJ.), said: "On general principles, one debtor, by acknowledging a debt or making a part payment otherwise than as the agent of the other debtors, cannot keep alive the right of the creditor against those debtors." In the result the learned Judges dismissed the application for execution in so far as it sought to enforce the decree against one of the judgment-debtors otherwise than as one of the legal representatives of the person who had made the part-payment. These cases support the view we take that the execution may proceed against defendant No. 4 who made the acknowledgment and not against the others against whom it is barred by limitation.

Then comes the second question as to the extent of the acknowledgment. The decree-holder applied for the realisation of Rs. 231 and odd annas as the amount of the decree and the petition of defendant No. 4 expressly mentioned that sum and made certain prayers for realizing it If the present claim for an additional amount of Rs. 661 had been made, there is no knowing whether defendant No. 4 would have made the application at all. Acknowledgment connotes knowledge or consciousness of the burden one assents to bear, and it cannot be said that defendant No. 4 made acknowledgment of liability in respect of the whole claim now made. "If, however, a definite sum smaller than the sum claimed is named in the acknowledgment, only the sum named, it seems, is taken out of the statute",—Darby and Bosanquet, page 99.

(4) 25 M. 220.

(5) 32 M. 421; 2 Ind. Cas. 30 5 M. L. T. 102.

(6) 27 A. 575; A. W. N. (1905) 108; 2 A. L. J. 287.

The decree-holder cannot, therefore, execute for more than Rs. 231 and 15 annas *plus* interest at the rate of 6 per cent. from the date of the acknowledgment against the share of defendant No. 4 only in the mortgaged properties. The appeal decreed to that extent, but without costs as no one appears for the respondent.

Appeal partly decreed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL NO. 35 OF 1911.

February 13, 1912.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Woodroffe.

M. S. ANGULIA AND CO.—DEFENDANTS—APPELLANTS

versus

E. D. SASSOON AND CO.—PLAINTIFFS—RESPONDENTS.

Contract—Bought-note signed by agent—Authority of agent—Power-of-attorney, construction of—Power of re-sale—Non-appropriation of goods to fulfilment of contract—Measure of damages.

The defendants authorized their agent by a power-of-attorney to direct, superintend, manage, control and carry on in Calcutta, in the name of defendants, the business of general merchants as carried on by the defendants in Singapore and elsewhere. For that purpose, the widest powers were vested in the agent, followed by the qualification that nothing therein contained should be deemed to authorize the attorney to speculate in gunnies, opium, shares or exchange. The agent under the power-of-attorney signed a bought-note for the purchase of sugar from the plaintiffs on behalf of the defendants:

Held, that the transaction, even if it was a speculation, was outside the terms of the express prohibition on speculation; that the words "as now carried on in Singapore and elsewhere" were merely descriptive of the general character of the business, and were not intended to limit the articles in which business was to be done or to define the terms on which it was to be conducted; and that mere imprudence of the act did not render it unauthorized.

In the contract, it was agreed that delivery of the sugar was to be taken on a certain date; "in default the sellers will have the option of re-selling the same * * * and hold the buyers responsible for all consequences." In a suit by the sellers for the alleged breach of the contract, they claimed as damages the difference between the contract price and the amount realised on the re-sale which took place about a month after the due date. There was no evidence as to any damage on the due date:

Held, that, as the sugar was in bulk and the vendors had not even appropriated the goods for the purposes of the agreement, it could not be said that there were goods to which the power of re-sale applied so as to make the result of that re-sale the measure of damages, and that the suit should fail.

Appeal from the judgment of Harington, J., which is reported in 10 Indian Cases at p. 895.

Messrs. *Knight* and *Pugh*, instructed by Messrs. *Pugh & Co*, Solicitors, appeared for the Defendants-Appellants.

Messrs. *S. P. Sinha*, *S. R. Das* and *N. Sarkar*, instructed by Mr. *N. C. Bose*, Solicitor, appeared for the Plaintiffs-Respondents.

JUDGMENT.

JENKINS, C. J.—This litigation has been occasioned by the alleged breach of a contract for the sale of sugar. The terms of the contract are set forth in the bought-note, Exhibit A to the plaint.

This document is dated the 28th Febuary, 1910, and is signed by M. C. Misry on behalf of the defendants' firm.

By it the defendants' firm purports to buy from the plaintiffs 750 tons of white cane Java sugar, the shipments to be made during August, September, October, November, December equally. The price was Rs. 7-14 9 per bazar maund *ex*-jetty or docks. Delivery was to be taken by the buyer *ex*-jetty or dock within 3 days and it was expressly provided as follows:

"The goods to be at the buyer's risk and peril from the time of landing of the sugar until they be removed from jetty, dock, *ghat* or godown, and should the buyers fail to take delivery of the sugar, the sellers will have the option of re-selling the same in the open market by private sale or by public auction and hold the buyers responsible for all consequences." On the 14th September, the plaintiffs wrote to the defendants' firm in reference to 150 tons of sugar on board the S. S. *Okara*, being the August shipment under the contract, and gave notice of the expected arrival of the steamer on or about that day. The steamer arrived on the 15th and on the 6th of October, delivery was taken of 25 tons under the contract, but beyond this no delivery was taken.

On the 8th of November, the plaintiffs sold the balance of 125 tons, and it is their case that this was done in exercise of the power of re-sale vested in them by the contract. On this footing, they demanded from the defendants' firm a sum of Rs. 2,341-14-9 as representing the difference between the contract price and the amount realized on the re-sale; and further sums for interest

ANGULIA AND CO. v. SASSOON AND CO.

and charges which brought the whole of their demand up to Rs. 2,745-12-6.

The claim was resisted by the defendants' firm and so this suit was brought.

The case came for trial before Harington, J., and the three following issues were raised; (1) whether the suit lies under Order XXX; (2) whether the Manager Misry had authority, and (3) whether there could be no re-sale of unascertained goods. The learned Judge decided the 1st and 2nd issues in the plaintiffs' favour, and on the 3rd against them. He, however, directed an inquiry as to damages.

From this decree, defendants' firm has appealed. The objection of want of jurisdiction embodied in the 1st issue has been abandoned, and the points made before us are these:

First, it is said that the contract was unauthorised, and *secondly*, that as the Judge decided against the plaintiffs' contention that the price on the re-sale furnished the measure of damages, he should have dismissed the suit and not directed a reference.

For the plaintiffs, it has been contended that the Judge was in error in deciding adversely to his contention as to the re-sale, and though no cross-appeal or cross-objections have been filed, it is urged that Order XLI, rule 33, empowers the Court to give effect to the defendants' contention as to the re sale.

First, I will deal with the defendants' contention that the contract was unauthorised.

I do not propose to deal with this at length for I am in complete agreement with Harington, J., on this point.

True it is, that the contract was signed not by the defendant but by Misry, his agent; but Misry was acting under a power-of attorney which authorised him to direct, superintend, manage, and control and carry on in Calcutta, in the name of M. S. E. Angulia & Co., the business of general merchants as then carried on by the defendant in Singapore and elsewhere. For that purpose, the widest powers were vested in Misry, followed no doubt by the qualification that nothing therein contained should be deemed to authorize the attorney to speculate in gunnies, opium, shares, or exchange.

It is urged that the transaction in suit was a speculation and so in contravention of the power-of-attorney.

But even if it was a speculation,—and this is a view that has not been established—it is outside the terms of the express prohibition on speculation.

But then it is said the transaction is not in accord with the manner in which business was carried on by the defendant at Singapore, and in this connection, the defendant complains that a commission for his examination should have been issued, as this would have enabled him to prove this point. In my opinion, there is no force in this contention, and I am confirmed in this view by the fact that at the hearing the request for a commission was not advanced.

And I think there was very good reason for this. The words "as now carried on by me in Singapore and elsewhere," are merely descriptive of the general character of the business and were not intended to limit the articles in which business was to be done or to define the terms on which it was to be conducted. It is not suggested that the agent could not purchase sugar, or that a forward contract could not be made; the objection when analysed is as to the prudence of the transaction, and its mere imprudence would not render it unauthorized.

Then it is contended that as the plaintiffs' claim to damages, as formulated in the plaint and the issues, rests on the re-sale, the Court should not have directed a reference as to damages on a totally different basis. I think this contention is entitled to great weight, and all the more in view of the fact that the plaintiffs, when challenged by the defendants, refused to amend their plaint so as to make a case of damages on the difference between the contract price and the market price at due date and were supported in this refusal by the Court. And there is yet another circumstance which lends strength to the defendants' contention.

The due date under the contract is the 21st September, and there is no evidence of damages on that date: on the contrary, the evidence, such as it is, points the other way.

To evade this difficulty, it is suggested that the due date was postponed, and in fact that the learned Judge treats the 20th October as the day of breach.

But postponement was not pleaded, nor was it made the subject of an issue.

Nor does the matter rest there, for Mr. Sinha, when challenged, could not point to

any agreement, or clear indication, that the due date should be postponed, all he could contend was that it might be inferred from the fact that late delivery was taken of 25 tons.

In my opinion, it would be wrong, in view of the case made by pleadings and issues, and of the mode in which the plaintiffs' case was conducted, to hold that there was a postponement of the due date or to direct a reference as to damages.

But then the plaintiffs claim that they were entitled to have the damages estimated on the footing of the re-sale. Harington, J., decided this against the plaintiffs, holding there was nothing to which the power of re-sale under the contract could attach. For the plaintiffs, it was contended that the learned Judge in so deciding failed to follow the decision of the Full Bench in *Moll Schutte & Co.* v. *Luchmi Chand* (1)

But when the essential facts of that case and the present are contrasted, they present a significant difference. In *Moll Schutte & Co.'s* case (1), the plaintiffs sold to the defendants under an indent contract 10 cases of tobacco to be shipped by steamer to Calcutta. The plaintiffs ordered ten cases only of tobacco and caused them to be shipped and consigned to themselves for the purpose of fulfilling this contract.

The goods duly arrived, but the defendants refused to pay for and take delivery of the goods on the ground that they were not the goods contracted for.

The goods were tendered to the defendants and were in accordance with the contract. Now, to use the phraseology of the Contract Act, the goods had been appropriated but possibly not ascertained. I say "possibly not ascertained" because it seems to have been thought by the Full Bench that the property in the goods had not passed. (See section 83).

The position then was that the vendors had done all in their power to make the specific goods the subject-matter of the contract.

Now in this case, it is otherwise; here there was neither ascertainment nor even appropriation. The sugar was in bulk, and the vendors had not even appropriated the goods for the purposes of the agreement. That condition of affairs continued until after the re-sale.

Can it be then said that there even were goods to which the power of re-sale applied so as to make the result of that re-sale the measure of damages? Now the answer to this depends on the construction of the agreement between the parties as did the decision in *Moll Schutte & Co.'s* case (1) turn on the construction of the agreement there under consideration.

Neither in that case, nor in this was any general principle or rule of law involved.

What then is the scope of this power of re-sale the words of which I have already read? The goods would have come within its operation if they had been ascertained or even if they had been appropriated for the purpose of the agreement. But, in my opinion, it would be going beyond the true meaning of the words to extend the operation of the clause to goods which had not even been appropriated and thus had in no sense become the subject-matter of the contract.

I do not say that a clause could not have been so framed as to have this extended operation: there would be nothing illegal in it. But I do hold that the clause as it has actually been framed cannot have this operation.

This is the view taken by Harington, J., and he too arrived at this conclusion by the same process of reasoning. I think he used the word "ascertained" not in the technical sense in which it is employed in the Contract Act but in the sence of appropriated, for I feel very sure the learned Judge had no intention of disregarding the Full Bench decision.

The result, then, is that while I agree with the view of the learned Judge as to the scope of Misry's authority and the interpretation of the power of re-sale, I think, for reasons I have already stated, that a reference as to damages should not have been granted, as this was opposed to the plaintiffs' own case. The appeal must, therefore, be allowed and the suit dismissed with costs throughout.

WOODROFFE, J.—I agree.

Appeal allowed.

(1) 25 C. 505; 2 C. W. N. 283.

ADHARI DUBAIN *v.* SHEODIHAL PANDE.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 371 OF 1911.

January 30, 1912.

Present:—Sir George Knox, Kt., Judge.

ADHARI DUBAIN—PLAINTIFF—APPELLANT

versus

SHEODIHAL PANDE AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pre-emption—Sale by vendee to a person entitled to pre-empt—Suit to pre-empt the sale by vendee, maintainability of.

L. sold his property to *D.* on 5th of June 1909. *S.* had a right to pre-empt the property and was about to bring a suit for it, when on the 4th of June 1910, *D.*, the vendee, re-sold the property to him. Thereupon *A.*, who was related to *D.*, brought a suit for pre-emption on the basis of the sale of 4th of June 1910, made by *D* in favour of *S.*

Held, that the suit was maintainable.

Hannuman Rai v. *Udit Narain Rai*, 7 A. 917, *Abdul Razzaq* v. *Mumtaz Husain*, 25 A. 334, referred to.

Second appeal from the decision of the District Judge of Gorakhpur, dated 2nd February 1911.

Mr. *Haribans Sahai*, for the Appellant.

Mr. *Muhammad Ishaq*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit brought by one *Musammat* Adhari Dubain to enforce a right of pre-emption over a 4 pie share *haq-i-adna* and 8 *chattacks haq-i-ala* in *Mauza* Brahwan. The circumstances which led to the present suit arose out of a sale made on the 5th of June 1909, by Lalta Prasad, Someshar and Kateshar in favour of one *Musammat* Dhiraji. On the 4th of June, 1910, *Musammat* Dhiraji sold a portion of the property mentioned in the sale-deed of the 5th June, 1909, to one Sheo Dihal Pande. On the 7th of June, 1910, *Musammat* Adhari Dubain filed this suit and impleaded as defendants *Musammat* Dhiraji, the vendor, and Sheo Dihal Pande, the vendee. It appears that all three persons, Dhiraji, Adhari and Sheo Dihal, are share-holders in *mahal* Brahwan. Sheo Dihal is not in any way related to either *Musammat* Dhiraji or *Musammat* Adhari who are Dubains. Lalta Prashad, Someshar and Kateshar are related and closely related to Sheo Dihal. It is admitted on both sides that the *Wajib-ul-arz* of Mouza Brahwan contains a clause whereby a right of pre-emption over the property sold runs in favour of first *hissardaran aziz qarib* and then *hisardaran aziz baid*. Lalta Parshad, Someshar and Kateshar, by selling this property to Dhiraji, contravened this clause of the *Wajib-ul-arz*. One other point remains to be noticed, namely, that the sale-deed in favour of *Musammat* Dhiraji dated the 5th of June 1909 was a sale-deed conveying 5 pies 5 *chattacks* 2 *bhars* and the sale-deed of 4th June 1910 conveyed only 4 pies out of this share. It does not appear whence came the 8 *chattacks* share of *haq-i-ala* which is mentioned in the sale-deed of 4th June 1910. The Court of first instance decreed the claim. It held that *Musammat* Adhari was a nearer relation of the vendor *Musammat* Dhiraji. On appeal to the District Judge of Gorakhpur, Sheo Dihal contended that Adhari had no right of pre-emption as against him, and that he, Sheo Dihal, had a right of pre-emption being nearly related to Lalta Parshad, Someshar and Kateshar Prasad. Sheo Dihal was on the eve of enforcing by suit his right of pre-emption when *Musammat* Dhiraji approached him and they came to terms. The terms are contained in the deed of 4th June 1910. The learned District Judge found that the relationship alleged to exist between the ladies was a ground for pre-emption. But he went on to find that the second sale was, as he terms it, an exercise of the right of pre-emption and, relying upon the case of *Hanuman Rai* v. *Udit Narain Rai* (1), he held that the sale by Dhiraji to Sheo Dihal gave rise to no right of pre-emption. He, therefore, allowed the appeal and dismissed the plaintiff's suit with costs. *Musammat* Adhari now comes to this Court and urges that the transaction in dispute being a sale and not a decree does give rise to the plaintiff's right of pre-emption. She also put forward the plea that as the respondents had left a part of the property sold in the hands of the vendee, Sheo Dihal could not succeed. No other case has been cited to me. In the course of the argument, reference was made to the case of *Abdul Razzaq* v. *Mumtaz Husain* (2). It appers to me that this second case brings out a stronger light on the real facts which led to the decision in *Hanuman Rai's* case (1) cited above. In both these cases, the Courts had before them a decree which had been passed upon a compromise in a suit. In fact in *Hanuman Rai's* case (1), the appellant was forced to urge and did urge that the compromise in the former suit had all the virtue of a private sale and that he being a nearer co-sharer, his right of pre-

(1) 7 A. 917.

(2) 25 A. 334.

emption accrued in consequence. In the case before me, there is no decree. It may be the case, as is found to be the case by the lower Appellate Court on Sheo Dihal's story of the facts, that he was on the eve of instituting a suit for pre-emption when Dhiraji came to him and persuaded him to settle the matter between them on the terms contained in the sale-deed of 4th June 1910. But we have a sale-deed duly executed and registered, and it is a sale-deed which by itself would afford a right to *Musammat* Adhari to bring her claim for pre-emption. A great deal was said in the case to the effect that by allowing Adhari's claim, which, it was urged, was by way of collusion with Dhiraji, the Court would be defeating the object of pre-emption and introducing a stranger into the *mahal*. This, however, is not the case. It is not the case of introducing for the first time a stranger who had no existence in the *mahal* before the sale took place, and if she was an evil, she had become for some time past an existing evil in the *mahal*. I am unable to give effect to the contention urged by the learned Vakil for the respondent. It appears to me that Adhari's right had accrued, and it is a right to which under the circumstances effect must be given. If Sheo Dihal wanted to make his position indisputable, he should either have obtained a sale-deed from Lalta Prashad, Someshar and Kateshar, or he should have taken his case into Court and there effected a compromise which would have brought him within the case of *Hanuman Rai* (1). He did neither. The result is that this appeal must be decreed, and the order of the Court of first instance restored. The appellant will have thirty days from this date to deposit in Court the sum of Rs. 221-15 if not already deposited. In default of her doing so, the suit will stand dismissed with costs in all Courts. She will get the costs of this appeal if she pays or has paid the money within the time fixed.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 926 OF 1910.

February 9, 1912.

Present:—Mr. Justice Chevis.

FAKIR CHAND—PLAINTIFF—APPELLANT

versus

RAM CHAND AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Hindu Law—Presumption—Burden of proof—Brahmans *of village* Chirah, Tahsil *and District Rawalpindi.*

In the case of *Brahmans*, the initial presumption is that they are not governed by custom but by their personal law.

The question whether such persons have given up their personal law and adopted the custom of the tribes among which they dwell, depends chiefly on the fact whether they are dependent *mainly* upon agriculture.

Brahmans of village Chirah, *Tahsil* and District Rawalpindi, are not proved to be governed by agricultural custom in the matter of alienations. Although many of them no longer exercise any priestly functions and actually cultivate the land with their own hands, it is not established that agriculture is their sole or main occupation.

Second appeal from the order of the Divisional Judge, Rawalpindi Division, dated 29th April 1910, reversing that of the Subordinate Judge, 1st class, Rawalpindi, dated 8th October 1909, decreeing the claim.

Bhagat *Gobind Das*, for the Appellant.

Mr. *Nand Lal*, for the Respondents.

JUDGMENT.—A preliminary objection has been taken that no appeal lies, and after referring to the value of the suit (the rights in question are occupancy-rights, and 15 times the *jama* comes to Rs. 22-8), Bhagat Gobind Das admits that the objection must prevail But he urges that the case should be heard on the revision side under section 70 (1) (*b*) as regards the question of the parties being governed by Hindu Law or custom, and under section 70 (1) (*a*) as to plaintiff not getting a decree even for his own share of the land. This seems reasonable and I allow it.

The plaintiff sues in respect of five oral sales made by his uncle Kala. The total area of the land sold is 27 *kanals*, 11 *marlas*. The details of the sales and the genealogical trees are to be found in the judgment of the learned Divisional Judge.

It is admitted before me that the land sold comprises five pieces of a joint holding, half of which belongs to the plaintiff, and half to the defendant. So the plaintiff might well have sued for possession as regards a half

share in the land and for a declaration as regards the other half. Even if the parties are not governed by custom and plaintiff cannot challenge his uncle's alienations on the ground of want of necessity the plaintiff could still claim possession of his own half of the land. But through some unexplained stupidity, plaintiff only claimed possession of 7 *kanals*, 13½ *marlas* as his own share, and asked for a declaration as regards the rest that the alienation should not affect his reversionary rights.

The first Court seems entirely to have overlooked the fact that plaintiff sued for possession of part of the land as his own. That Court held that the parties were governed by custom, that all the sales were without necessity except one which was binding on the plaintiff to the extent of Rs. 26·14, and gave plaintiff a declaratory decree as regards all the sales. The plaintiff preferred no appeal, so I am unable to give him a decree for possession of any of the land. The defendant-vendee appealed to the learned Divisional Judge who agreed with the first Court as to the extent to which the sales were for necessity, but dismissed the suit on the ground that plaintiff had failed to prove that the parties were governed by custom and that plaintiff had a right to contest the alienations.

The parties are *Brahmans* living in village Chirah, *Tahsil* and District Rawalpindi. The village is owned by *Gakkhars*, but there are about 10 or 11 houses of *Brahmans* in the village who hold land as occupancy-tenants, These *Brahmans* are not a compact village community and unless it can be shown that they are not only cultivators but that agriculture is their *main* occupation, I think there can be no question that it must be held that plaintiff has failed to prove that custom applies. Various rulings have been cited, but I do not think I need discuss them in detail; the *main* principle followed in all of them I understand to be that whether such persons have given up their personal law and adopted the custom of the tribes among which they dwell depends chiefly on whether they are dependent *mainly* upon agriculture.

It certainly does not appear that this particular lot of *Brahmans* any longer exercise priestly functions. It is also clear that they, or many of them, actually cultivate the land with their own hands. On the other hand, it is not shown that they have been land-holders for more than two or three (including the present) generations past, and, as pointed out by the learned Divisional Judge, the various members are apparently content to stay on the land only so long as they can find nothing better to do; when opportunity arrives, they are glad to take service in the Army, the Post Office, the Murree Brewery or elsewhere. It may, of course, be urged that even amongst purely agricultural tribes, such as *Jats*, the practice of some members of the family seeking their fortunes abroad in the Army or elsewhere is common. But in the case of such tribes, the initial *onus* of proof lies on him who asserts that the parties are not governed by custom; a member of such a tribe may not be an agriculturist himself, but he is none-the less governed by custom as a general rule. Here, however, the initial presumption is that the parties are not governed by custom, and in the absence of any particular facts in the past to show that they are governed by custom in the matter of alienations, I think that the Divisional Judge has rightly held that agriculture is only one of their means of livelihood.

I hold that though those *Brahmans* often follow the plough themselves, it is not established that agriculture is their sole or even main occupation, and I, therefore, agree with the learned Divisional Judge in holding that the plaintiff has failed to prove that the parties are governed by custom and that he can control his uncle's alienations.

But though the plaintiff cannot control his uncle's alienations so far as his uncle's share of the land is concerned, he has a perfect right to challenge those alienations so far as his own share is concerned. It is urged that the uncle has not alienated more than his own share, but this argument ignores the fact that plaintiff owns a one-half share in every square inch of the land. But for plaintiff's stupidity, I might have given him a decree for possession of his own share of the land; as it is, I see no reason why I should not give him a decree for a declaration. This decree, however, cannot extend to the alienation of 7 *kanals*, 1 *marla* sold on 28th January 1907, as the Divisonal Judge finds that plaintiff was present at mutation and acquiesced in this sale; this is a finding of fact which I cannot question on revision.

My decree will, therefore, extend only to the remaining four sales. The decree will be one to take effect on the death of the alienor, as I do not see what relief short of possession can be awarded to plaintiff in the presence of the alienor. What the effects of this decree may subsequently be, I cannot, of course, decide; whether in the event of the alienor surviving for some years, it may be open to the alienee to defend a suit for possession not on a title of vendee but on the strength of long adverse possession; is a matter which may perhaps never arise, and even if it should arise, I cannot decide it now.

The appeal fails and is dismissed, but in the exercise of revisional powers I grant the plaintiff a decree declaring that the sales in question (excepting the sale of 7 *kanals*, 1 *marla* for Rs. 130, dated 23th January 1907) shall not affect plaintiff's claim to possession of his own one-half share of the land after the death of Kala.

The parties will bear their own costs in all Courts.

Appeal dismissed

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 10 OF 1911.

February 13, 1912.

Present:—Mr. Justice Johnstone and Mr. Justice Chevis.

Musammat HARNAMO—DEFENDANT—APPELLANT

versus

SANTA SINGH—PLAINTIFF—RESPONDENT.

Custom—Succession—Collateral—Descendants of last founder—Proprietors of village—Sister—Property non-ancestral—Collateral residing in another village—Burden of proof—Jats of Mauza Bhadal, District Lahore—Custom, proof of—Irresponsible expression of opinion—Evidentiary value.

A collateral is not excluded from inheritance merely because he owns land in another village.

Daya Ram v. *Sohel Singh*, 110 P. R. 1906 (F. B.); 31 P. L. R. 1907; *Raj Mal* v. *Sandhi*, 41 P. R. 1909; 1 Ind. Cas. 728; 57 P. W. R. 1909, followed.

Nor can a collateral be excluded on the ground that his ancestor never held the land to which he claims to succeed.

Hamira v. *Ram Singh*, 134 P. R. 1907 (F. B.); 74 P. L. R. 1908; 85 P. W. R. 1907, relied upon.

In the presence of a collateral, however remote, neither the descendants of the last founder of the village nor the body of the village proprietors have any right of succession.

The burden of proving that a sister is entitled to succeed in preference to a collateral lies on her.

Hamira v. *Ram Singh*, 134 P. R. 1907 (F. B.); 74 P. L. R. 1908; 85 P. W. R. 1907; *Gurditta*, v. *Jai Singh*, 72 P. R. 1907; 108 P. L. R. 1908, followed.

In order to prove a custom, oral evidience consisting of irresponsible expression of opinion unsupported by instances is of little value.

Jindwadi v. *Hassan Shah*, 41 P. R. 1895, followed.

Jawala v. *Hira Singh*, 55 P. R 1903; 117 P. L. R. 1903, referred to.

Instances of succession of *daughters* in the presence of collaterals are insufficient to prove a custom of sucession of *sisters* in preference to the collaterals.

Hamira v. *Ram Singh* 134 P. R. 1907 (F. B); 74 P. L. R. 1908 85 P. W. R. 1907, followed.

Among Jats of *Mauza* Bhadal, District Lahore, a sister has no right to succeed, in the presence of a collateral however remote, even to the non-ancestral property of her deceased brother.

Hamira v. *Ram Singh*, 134 P. R. 1907 (F. B.); 74 P. L. R. 1908; 85 P. W. R. 1907, relied upon.

Sheran v. *Sharman*, 117 P. R. 1901; 182 P. L. R. 1901; *Sawan* v. *Sahib Khatun*, 44 P. R. 1909; 2 Ind. Cas 71; 69 P. W. R 1909, 67 P. L. R. 1909; *Bholi* v. *Kahna*, 35 P. R 1909; 1 Ind. Cas. 695; 32 P. W. R. 1909; 45 P. L. R. 1909; *Faiz-ud-din* v. *Wajib-un-Nissa*, 71 P. R. 1892, distinguished.

First appeal from the order of the Subordinate Judge, 1st Class, at Lahore, dated 9th December 1910, decreeing plaintiff's claim.

Sheikh *Umar Bakhsh*, and the Hon'ble Khan Bahadur *Muhammad Shafi*, for the Appellant.

The Hon'ble Rai Bahadar *Shadi Lal* and Mr. *Ganpat Rai*, for the Respondent.

JUDGMENT.—The three connected appeals Nos. 10 and 346 of 1911 and 399 of 1910 can best be disposed of in one judgment. For each appeal, there is a printed paper-book, which we have marked A, B and C. respectively, for purposes of reference, the whole of the evidence being in book A.

In the village of Bhadal, there are two *Tarafs* called Bhadal and Gil respectively, owned by *Jats* of these *gôts*. According to the Settlement Records of 1856, the village seems to have been originally founded by Rai Dolchi Bhadal, and Waryam Gil; but twice thereafter, the place was deserted, and finally was re-founded by one Charat Singh Bhadal. The pedigree-tables prepared at that Settlement are voluminous, but for our purpose the following abstract brought up-to-date will be found sufficient.

HARNAMO v. SANTA SINGH.

Taraf Bhadal.

RAI DOLCHI,

- Tarle, (In third generation below), Laugar (of *patti* Laugar), (In sixth generation below) Charat Singh (last founder), Mehr Singh, Sant Singh, Plaintiffs in B.
- Randhir, (In third generation below) Sadu (of *patti* Sadu), (In ninth and tenth generations below) some of the plaintiffs and *pro forma* defendants in C: the rest come into *patti* Laugar.

Taraf Gil.

WARYAM,

- Sura,
  - Piru, (Four generations below) Ram Singh (or Ran Singh), Attar Singh, Jawand Singh, (left widow Harkaur),
    - Partab Singh, (left widow Ram Kaur).
    - *Musammat* Harnamo, (defendant No. 1. in all the cases).
  - Chunna, (Four generations below),
    - Waryam Singh O. S. P.
    - Wazir Singh, Santa Singh, (plaintiff in A.)

Santa Singh, plaintiff in case A, sues for the property left by Partap Singh, *Gil*, who died and whose widow re-married and whose mother died, these two ladies having for a time held a life-estate. He denies, and defendant, *Musammat* Harnamo, claims, that she is daughter of Jawand Singh and sister of Partap Singh. He also pleads that, even of she is sister of Partap Singh, by custom she is no heir to him. Plaintiff, Santa Singh, claims as collateral; he is in 10th degree from Partap Singh, not 9th as the Court below has it.

In B, there are 4 plaintiffs who come in at the bottom of *Patti* Laugar, *Taraf* Bhadal. These plaintiffs claim as great-grandsons of Charat Singh (*Patti* Laugar) on the ground that he re-founded the village and so they are entitled to escheats.

In C, there are 19 plaintiffs, who claim that they and all the defendants except defendant *Musammat* Harnamo are members of *Taraf* Bhadal and are, therefore, entitled to the escheat, alleging that defendant is not daughter of Jawand Singh and would not succeed even if she were, and denying that Santa Singh is in any way related to Partap Singh, deceased. They claim that the Bhadal people gave the land to Ram Singh, *Gil*, and as his heir had died out, they are entitled to the reversion. Among the defendants are included *pro forma* the plaintiffs in case B; and indeed in each case, all the persons interested in all the cases have been impleaded.

The learned Subordinate Judge has decreed Santa Singh's claim, holding that *Musammat* Harnamo, though, no doubt, sister of Partap Singh, deceased, has by custom no case against Santa Singh, proved a collateral, albeit a remote one, of the deceased, and that there is no evidence that can be relied upon to prove that by custom the body of proprieters of the descendants of Charat Singh, last founder of the village, can prevail against a proved collateral, remote though he may be. The property was held to be not ancestral *qua* Santa Singh, plaintiff, but nevertheless the verdict was in his favour.

The three appeals are now intelligible:—

A. by *Musammat* Harnamo, sister of the last male holder;

B. by the descendants of Charat Singh, latest founder.

C. by certain proprietors of the village as such.

Our views on the facts are these:—

(*a*) Santa Singh is certainly a collateral of Partap Singh, and it may be taken he is so in the 10th degree.

(*b*) The appellants in B are descendants of Charat Singh, the last founder.

(*c*) Appellants in C are certainly among the village proprietors

(except for Santa Singh the male *Gils* seem to have died out).

As regards law and custom, we think:—

(*d*) that in the presence of a collateral, however remote, neither descendants of Charat Singh nor the body of the proprietors have any right whatever; and

HARNAMON v. SANTA SINGH.

(e) that by custom the collateral Santa Singh is to be preferred to the alleged sister, Harnamo.

A few words will suffice to explain how we have arrived at these conclusions, which involve the dismisal of all the appeals.

We have not decided whether *Musammat* Harnamo is daughter of Jawand Singh or not. In view of finding (e) no positive finding on this point is necessary and we refrain from giving a definite opinion because we have not heard Santa Singh's Counsel on it.

(a) Appellants in case B have really given up the plea that Santa Singh is not collateral of the deceased,—see especially paragraph 3 of their appeal; but appellants in case C still insists on the point—see para. 2, page 47 A and para. 4 of their appeal. Virtually, the point turns on the correctness of the pedigree-table of *Taraf Gil* already mentioned. Under section 44, Land Revenue Act, it is presumably correct. It forms part of the Settlement Record of 1856 and it was assented to by all the persons interested at that time. The tribe had a *mirasi*, whose business it was to remember the pedigree of his *jajmans*, and this man dictated the names and steps with the full concurrence of all concerned at a time when there was, as Mr. Mehr Chand admits, no motive for falsification. We cannot assent to the conjectural argument that probably the names were not really accurately known and that the relationship may be more remote even than 14 degrees, the ultimate limit of heirship even under Hindu Law. In our opinion, we must give full effect to the statutory presumption aforesaid, which is wholly unrebutted. The fact that Santa Singh's ancestors have been for generations living away from *Mauza* Bhadal does not affect the question; and we are not pressed by the Pleader's references to the remarks at page 78 in *Rajo* v. *Karam Bakhsh* (1) as to the visionary nature of pedigrees beyond the 7th or 8th degrees: in the present case, the *mirasi* only had to remember *five* names above Wazir Singh and *seven* above Atar Singh, a task well within his ordinary powers.

(b) That Charat Singh was the last founder is proved by the remark under the pedigree-table, which has not been rebutted; and there is no reason to doubt that the appellants in B are his great-grandsons.

(c) It is proved from the same table that the appellants in C are among the village proprietors, *Taraf Bhadal*.

(d) The argument here against Santa Singh is that he is too remote to be counted as an heir at all, especially as he comes from another village and as *his* ancestor never held this land; that the land was given by an ancestor of Partap Singh; and, lastly, that no issue was struck as to custom and the case should be remanded. We unhesitatingly overrule the whole of this argument. There is no authority for the proposition that among *Jats* a collateral in the 10th degree is too remote to be an heir; and their is authority to the effect that a collateral is not excluded because he lives and owns land in another village—*Daya Ram* v. *Sohel Singh* (2) and *Raj Mal* v. *Sandhi* (3). Further Mr. Nand Lal frankly admits that he can quote no authority, which excludes a collateral on the ground that his ancestor never held the land; [as to this *cf. Hamira* v. *Ram Singh* (4)] and he also admits that on the record there is no evidence of the alleged gift. Finally, in our opinion, issue 6 raises the question of custom and no remand is called for, Mr. Nand Lal's clients having had ample opportunity of attempting to prove the unusual custom which they plead.

(e) There remains the matter of the conflicting claims to non-ancestral property of a sister, and of a collateral in the 10th degree, it being assumed for argument sake, but not decided, that *Musammat* Harnamo is daughter of Jawand Singh, and clearly the important point is on whom does the *onus* lie? We think *Hamira* v. *Ram Singh* (4), re-inforced by *Gurditta* v. *Jai Singh* (5), shows it lies on the sister; see Volume of 1907, page 645, first para. and page 649, 2nd para, where the contest was as to *non-ancestral* property, between a sister and a 7th degree collateral, but the *dictum* was applied to *all* collaterals. In *Gurditta* v. *Jai Singh* (5), it was laid down, in connection with a conflict

(1) 11 P. R. 1908; 92 P. L. R. 1908; 13 P. W. R. 1908.

(2) 110 P. R. 1906; 31 P. L. R. 1907.

(3) 41 P. R. 1909; 1 Ind. Cas. 728; 57 P. W. R. 1909.

(4) 134 P. R. 1907; 74 P. L. R. 1908; 85 P. W. R. 1907.

(5) 72 P. R. 1907; 108 P. L. R. 1908.

between a sister's son and an *ala malik* that the former is not an heir at all.

The *onus* being thus on *Musammat* Harnamo, we cannot find that she has discharged it. We have been taken through the oral evidence, which is voluminous. That for *Musammat* Harnamo is full of irresponsible expressions of opinion, which are of little value—*Cf. Jindwadi* v. *Hassan Shah* (6) and many other rulings—and not only is there no documentary evidence of a single instance of exclusion of collaterals by a sister but there is not even one clear assertion of such an instance by a witness. The instances of succession of daughters in presence of collaterals are useless here. See *Hamira* v. *Ram Singh* (4), page 645 top and page 649 middle. Again, the remark at page 234 of *Jowala* v. *Hira Singh* (7), that "overwhelming" oral testimony of persons likely to be conversant with a custom may be sufficient, even without citation of instances, to establish that custom, does not help the lady here, for the weight of oral evidence of opinion is not conspicuously unevenly balanced. It would be a waste of time to analyse this evidence. We have been through it all and this is the conclusion at which we have arrived.

But in addition to this failure on the lady's part to discharge the burden of proof, there is a good deal of a positive kind in favour of Santa Singh. The records of *Riwaj-i-am* of 1868 and 1892 of Lahore alike denounce sisters, see page 10G, Question 1, a special answer for *Jats*; and see also page 3 of the same printed record of custom, and the village *Wajib ul-arz* referred to by the Local Commissioner at page 157, *l.* 18, paperbook A.

Mr. Shafi for the lady quotes such rulings as *Sheran* v. *Sharman* (8); *Sawan* v. *Sahib Khatun* (9) and *Bholi* v. *Kahna* (10), but we can derive no assistance from them. All are Muhammadan cases, in all the *Riwaj-i-am* was in favour of daughters and sisters and in the second and third, their claims were supported by positive instances. In the case of 1901, weight was also allowed to the favoured position of females, under Muhammadan Law. *Faiz ud din* v. *Wajib-un-nissa* (11) is clearly on a similar footing.

The Local Commissioner who took all the evidence on custom in this case is no doubt inclined to hold in favour of *Musammat* Harnamo, but on his record of evidence, we are unable to agree with him.

Mr. Shafi lays stress upon his client being in possession with mutation. No doubt, section 110, Evidence Act, and section 44, Land Revenue Act, come in here and *Badhawa* v. *Dewa Singh* (12), *Nasib-ul-nissa* v. *Mansur Ali* (13) may be consulted, but the presumption thus arising is at once rebutted by the Full Bench *dictum* of 1907 and the presumption arising out of that *dictum* has not been rebutted.

All the suits except Santa Singh's, therefore, rightly failed and his claim has been rightly decreed.

We dismiss all the three appeals with costs.

Certain sums of money were due on each of these three appeals from the several sets of appellants on account of printing fees. Difficulties were raised by appellants in regard to the immediate deposit of these sums with the result that Mr. Shadi Lal, Counsel for Santa Singh, at the suggestion of the Court, undertook to make good all deficiencies provided the sums in question were added to the costs due to him in the several cases respectively. We understand that he has carried out his engagement and, therefore, in drawing up the decree, the Registrar should see that due credit is given to Santa Singh.

Appeal dismissed.

(6) 41 P. R. 1895.
(7) 55 P. R. 1903; 117 P. L. R. 1903.
(8) 117 P. R. 1901; 182 P. L. R. 1901.
(9) 44 P. R. 1909; 2 Ind. Cas. 71; 69 P. W. R. 1909; 67 P. L. R. 1909.
(10) 35 P. R. 1909; 1 Ind. Cas. 695; 32 P. W. R. 1909; 45 P. L. R. 1909.
(11) 71 P. R. 1892.
(12) 141 P. R. 1893.
(13) 120 P. W. R. 1909; 4 Ind. Cas. 965.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No 1119 OF 1910.

February 6, 1912.

Present:—Mr. Justice Johnstone and Mr. Justice Chevis.

LAL SINGH—DEFENDANT—APPELLANT

versus

PALA SINGH—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), ss. 5, 12—"Time requisite for obtaining copy"—"Sufficient cause"—Extension of time on the ground of appeal being a strong one—Appli-

LAL SINGH v. PALA SINGH.

cation for copy returned for presentation at another place—Time allowed for journey.

An appeal was decided by the Additional Divisional Judge of Ferozepore sitting at Ludhiana on the 25th of July, 1910. The appellant applied for copy of judgment and decree at Ludhiana on 21st October, 1910. As the records had been sent to Ferozepore, his application was returned to him the same day for presentation at Ferozepore, only a few hours' journey from Ludhiana. The application for copy was not presented at Ferozepore till 24th October. Copy was supplied on 25th October and the appeal was presented to the Chief Court on the 27th:

Held, (1) that the appeal was one day out of time;

(2) that a full day could not be allowed for the journey to Ferozepore from Ludhiana;

(3) that the order for presentation of the application at Ferozepore was perfectly justified;

(4) that there was no ground for extending the time under section 5 of the Limitation Act, as the appellant waited till the full period of 90 days was on the eve of expiring before he took any steps to obtain copy.

Indulgence can be shown to one party in a civil case only at the expense of the opposite party and the plea that an appeal is a strong one and likely to succeed, is no ground for showing indulgence to the appellant.

Second appeal from the order of the Divisional Judge, Ferozepore, dated 25th July, 1910, reversing that of the Munsif, 1st Class, Ferozepore, dated 2nd June 1909, dismissing plaintiff's claim.

R. S. Pandit *Sheo Narain*, for the Appellant.

Mr. *Vaughan*, for the Respondent.

JUDGMENT.—In this case a preliminary objection has been raised by Counsel for the respondent that the appeal is time-barred. The judgment appealed against was delivered by the Additional Divisional Judge of Ferozepore at Ludhiana, on the 25th of July, 1910. Had no copy been applied for, the ninety days would have expired on the 23rd of October 1910. On the 21st of October, the appellant applied for copy at Ludhiana and as the records had been sent to Ferozepore, his application was returned to him the same day for presentation at Ferozepore. Ludhiana and Ferozepore are now connected by railway, and the appellant, even after spending the night at Ludhiana, could have started by the morning train and reached Ferozepore at 10 o'clock on the morning of the 22nd of October. But the application for copy was not presented at Ferozepore till the 24th October. Copy was supplied on the 25th and the appeal was presented to this Court on the 27th. Allowing the 21st October as the day on which application was presented at Ludhiana and the 24th and 25th as the days spent in obtaining copy at Ferozepore, the result is that the appeal is one day out of time.

The learned Pleader for the appellant urges that a day should be allowed for the journey from Ludhiana to Ferozepore. But section 12 of the Limitation Act only lays down that the time requisite for obtaining copy shall be excluded and we cannot admit that a separate day should be allowed for the journey when that journey could be completed at so early an hour of the day. In fact, the first explanation given to us by Rai Sahib Sheo Narain was that his client reached Ferozepore at noon on the 22nd, but found that the Divisional Judge's Court was closed on account of the death of Sodhi Hukm Singh. An inquiry by telegram, however, elicited the reply from the Divisional Judge that his Court had not been closed on the 22nd October.

So on this point, the appellant appears to have made an utterly false statement to his Counsel. The 23rd October was a Sunday, but we can find no reason whatever why the application should not have been presented at Ferozepore on the 22nd. We also fail to see why, when the appellant had obtained copy on the 25th October, he should not have come to Lahore promptly and got his appeal filed on the 26th.

Rai Sahib Sheo Narain also argues that it was the duty of the Court to which the application for copy was first presented to see that the application was complied with and not to return the application to the petitioner. But we think that the Additional Divisional Judge was prefectly justified, when he found that the records had been sent to Ferozepore, in returning the petition with directions to the petitioner to re-present it at Ferozepore.

After allowing three days as time spent in obtaining copy, and this all is that can, in our opinion, be claimed under section 12 of the Limitation Act, we find that the appeal is one day late. We are asked to extend the time under section 5 of the Act, but we do not think that this is a case in which the provisions of that section should be applied. The appellant, having waited till the full period of ninety days was on the eve of expiring before he took any step to obtain copy, is bound to satisfy us that he spent the rest of his time with all due

diligence in obtaining copy and in filing his appeal and this he has failed to do. Indulgence can be shown to one party in a civil case only at the expense of the opposite party, and the plea that the appeal is a strong one and likely to succeed on the merits, is, in our opinion, no ground for showing indulgence to the appellant at the expense of the respondent.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(s. c. 86 P. R. 1911.)

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1227 OF 1911.

October 30, 1911.

Present:—Mr. Justice Rattigan.

HANSRAJ AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NARAIN CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Wajib-ul-arz—*Construction*—"Maveshi", *meaning of*—*Grazing rights in* shamilat *land.*

Where a *Wajib-ul-arz* conferred grazing rights on non-occupancy-tenants and other non-proprietary residents of the village over *shamilat* land in respect of their *maveshi*:

Held, that the word *maveshi* should be restricted to "cattle" used for agricultural and domesti purposes, and that goats and sheep kept mainly for trading purposes are not included in the term.

Second appeal from the order of the Divisional Judge, Hoshiarpur, dated the 24th March 1909, confirming that of the Munsif, 1st Class, dated the 21st August 1908, dismissing the plaintiffs' claim.

Lala *Dwarka Das* and Pandit *Rambhaj Datta*, for the Appellants.

Bakshi *Tek Chand*, for the Respondents.

JUDGMENT.—Eight occupancy-tenants, out of a total of 109, sued for an injunction restraining the proprietors of the village from preventing plaintiffs exercising grazing rights over 18, 348 *kanals* 13 *marlas* of *shamilat* land. The defence was that an area of 1,600 *kanals* of this *shamilat* land had been reserved by the Revenue Authorities, when sanctioning a general partition of the *shamilat* among the proprietors, for such grazing purposes and that this reserved area was amply sufficient for these purposes. The Munsif and the Divisional Judge are agreed that the said area is sufficient to enable the non-occupancy-tenants and other residents of the village, who possess the right of grazing, to graze their "cattle" and that the plaintiffs are not entitled to claim grazing rights for sheep and goats kept for trading purposes. The claim for an injunction has, therefore, been dismissed and plaintiffs apply for revision of the order of the lower Courts.

I have heard arguments at some length in support of plaintiffs' case but I am not impressed thereby. In the first place, relief by way of injunction is discretionary with the Courts, and the exercise of such discretion should not be interfered with on the revision side by this Court, except on substantial grounds. In the present case, the Courts have given the matter in issue every consideration and they are agreed that the relief must be refused as the area reserved for grazing purposes is amply sufficient. I am asked to set aside their orders on the following grounds:—

(*a*) that unless and until the proprietors break up and cultivate the former *shamilat* land, plaintiffs have the right to graze their cattle thereon, and that up to date, no attempt has been made by the proprietors to enclose and cultivate that land;

(*b*) that the Courts have blindly accepted the views of the Revenue Authorities as to the sufficiency of the reserved area and have made no independent inquiry into the matter;

(*c*) that according to the *wajib-ul-arz*, plaintiffs are entitled to claim grazing rights for all animals that come within the meaning of *maveshi*, and that goats and sheep are included in that term;

(*d*) that the lower Courts acted with material irregularity in not insisting upon the *Patwari* answering the interogatories that were issued for his examination; and, finally,

(*e*) that plaintiffs were in any event entitled to an injunction to restrain the proprietors-defendants from interfering with their grazing rights in respect of the area of 1,600 *kanals*, which had been expressly reserved for grazing purposes. I fail to find any force in these arguments, with which I shall deal briefly and in due order.

(*a*) This is an entirely new point, raised for the first time in this Court, and Mr. Tek Chand is quite justified in replying to its irrelevancy by pointing out that there is no evidence on the record to the effect that the proprietors have not actually broken up and begun to cultivate the land. He tells me that, according to his instructions, the proprietors

have commenced to cultivate the land and I see no reason to doubt the statement.

(*b*) The lower Courts have referred, and I think quite rightly, to the views of the Revenue Authorities as regards the sufficiency of the reserved area, but they have also considered this matter independently. If goats and sheep are to be excluded, they held that an area of 1,600 *kanals* for the grazing of 680 head of cattle is ample and I see no reason to differ, even if I were justified in revision in so doing. This is a question of fact and the finding of the lower Courts must be accepted by this Court.

(*c*) The term *maveshi* used in the *Wajib-ul-arz* is of somewhat wide meaning, but having regard to the fact that the right of grazing, which proprietors in villages concede to non-proprietors, impinges largely upon the rights of the former, I think the Courts below have acted not unreasonably in restricting the right in respect of "cattle" used for agricultural and domestic purposes. I cannot believe that it was ever intended in such cases that a non-proprietor should have the right to graze any animal he might happen to possess upon the *shamilat* land. I know of no case in which it has been held that this right is claimable in respect of animals, other than those used for agricultural or domestic purposes, and in the present case, the Courts find that the sheep and goats, for which the right is claimed, are kept mainly for trading purposes. I might note that in Civil Appeal No. 1259 of 1908, this Court expressly restricted the right of grazing to "cattle required for agricultural and domestic purposes."

(*d*) It is true that interrogatories were issued on behalf of plaintiffs to the *Patwari* and that they were returned unanswered. I find, however, that the Munsif refused to re-issue the interrogatories on the ground that they were sent to the *Patwari* under a misapprehension, the Court having overlooked the fact that plaintiffs had closed their case before applying for the examination of that official. In the circumstances, I can find no material irregularity on the part of the Court in declining to allow plaintiffs to re-open their case.

(*e*) The last point is easily disposed of. The defendants-proprietors have never denied plaintiffs' right to graze cattle over reserved area of 1,600 *kanals* and in the circumstances, I do not think that the Courts would have been justified in granting an injunction *pro tanto*. Moreover, no objection in this respect was taken in the lower Appellate Court to the decree of the first Court, and it is too late to raise the point now.

For the reasons given, I reject this petition which was admitted as a further appeal under clause (*b*) of section 70 (1) of the Punjab Courts Act, with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 130 OF 1910.

November 11, 1911.

Present:—Mr. Evans, J. C.

RAMADHAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SHEO NARAIN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Separation between members—Effect of separation of one member.

Where it is proved that at the time of the separation of one member of a joint family, other members of the family had also received their respective shares in the family property, there is no presumption that they still continued to hold the property so received as members of the joint family.

Appeal against the order of the Additional Judge of Hardoi, dated the 30th August 1910.

Pandit *Gokaran Nath Misra*, for the Appellants.

Mr. *H. C. Dutt*, Mirza *Samiullah Beg* and Babu *Ishwari Dayal*, for the Respondents.

JUDGMENT.— By order of this Court, dated the 1st August 1911, this case was remanded to the Court below for a fresh finding on the 6th issue. The sixth issue was whether Amar Nath was separate from his brothers and nephews. The learned Additional Judge, after taking further evidence as directed, has found this issue against the appellants, that is to say, he has found that it is not proved that Amar Nath was ever separate from his brother Karta Kishun. This finding is contested on behalf of the appellants.

It is conceded before me that there is no controversy about the following facts. I refer to the pedigree set out in the

RAMADHAR v. SHEO NARAIN.

finding on remand. On the 18th October 1883, two deeds were executed by Amar Nath and his brother Karta Kishun and it is conceded that at that time there was a division between the three branches of the family, that is to say, between (1) Chandika Prasad, (2) Amar Nath and Karta Kishun, sons of Gulal Chund, and (3) Someshar and his son Jugal Kishore, but the point in dispute is whether Amar Nath and Karta Kishun separated *inter se*. The documents Exhibits 4 and 5 are to the same effect. One was executed by Amar Nath and the other by Karta Kishun. It is stated that in consequence of a dispute between the executant and the other persons, whose names are given above, about the partition of moveable property, which belonged to the common ancestor Sivanand, valued at Rs. 17,491-15-6, the executant agrees to divide of his own share of one-sixth to the extent of Rs. 2,915-5-3 from the firm Jugal Kishore-Karta Kishun and it was stated that the share would be divided and that no further dispute would exist. It is conceded on both sides that these documents show that the executant received Rs 2,915 5-3 from the firm Jugal Kishore-Karta Kishun. The learned Additional Judge was of opinion that these documents merely showed that Amar Nath had received a share of moveables and had given a discharge in favour of Jugal Kishore and Karta Kishun who were managers of the firm: that although Amar Nath and Karta Kishun gave separate discharges, there was no presumption that they did not continue to hold the property belonging to them as members of a joint family. A great many arguments have been addressed to the Court on the question whether, when it is proved that there has been a partition amongst some of the members of the family, there is any presumption that there has been a partition also amongst each particular member of that family. The contention of the respondents is that there was only a partition between the three branches representing the three sons of Sivanand, namely, Chandika Prasad, Gulal Chand and Ram Lal, and there was no partition between the sons of Gulal Chand (Amar Nath and Karta Kishun) *inter se*. For the purposes of this appeal, I may assume that, in this particular case, it is necessary to show by any reasonable evidence that Amar Nath and Karta Kishun were not members of a joint family after 1883. It is for this reason unnecessary to refer to the various rulings cited by the parties. Upon this particular question of fact, I am unable to uphold the decision of the learned Judge. To my mind, as it is admitted that Amar Nath and Karta Kishun executed separate documents in 1882 admitting that they had received their share of moveables from the firm, there is no presumption that they would still continue to hold the property which they received [from] the firm as members of the joint family. We have also in this connection the evidence of the only adult members of the family surviving when the case was under trial. These witnesses are Sheo Vinayak, son of Karta Kishun, and Har Kishore, who was apparently a minor in 1883, brother of Jugal Kishore. Sheo Vinayak was called by the appellants. He merely stated, "Amar Nath died about four years ago. He was separate from us." It may be presumed that he meant that Amar Nath was separate from his father Karta Kishun. In cross-examination, he stated that his mother lived separate from Amar Nath. On remand, Har Kishore was called on behalf of the appellants. In cross-examination he stated that no other property was divided between Amar Nath and his co-sharers except what is noted in the deeds and he added that some immoveable property was kept joint and also it was agreed that outstanding debts were to be jointly realised. The property was divided into five lots and this statement appears to me to have misled the Court below. The five persons who were parties to the deeds of 1883 were the adult members of the family then existing, namely, Chandika Prasad, Amar Nath, Karta Kishun, Someshar and Jugal Kishore. If there had been merely a division of the three branches of the family, one would have expected to find three shares, (1) Chandika Prasad, (2) Amar Nath and Karta Kishun together and (3) Someshar and Jugal Kishore together. The division of property into five lots indicates that there was a division between Amar Nath and Karta Kishun *inter se*. The fact that there was no physical division of immoveable property held by the family,

in 1883 is to my mind no proof that Amar Nath and Karta Kishnu continued to carry on a joint business. I am of opinion that they separated their cash in 1883 and, therefore, there is every presumption that Rs. 1,300, which were advanced by Amar Nath to the predecessor of the respondents in August 1895, were part of the money which he had received in 1883 as his share and the fact that the mortgage was executed in his favour only is an indication that Karta Kishun was not interested in the deed. I find upon this issue that Amar Nath and his brother Karta Kishun separated their moveable property after 1883 and did not carry on joint business after that date.

It is conceded that, upon this finding, the appellants' appeal must prevail as the widow of Amar Nath, *Musammat* Sitala, who succeeded to her husband's property, transferred the mortgage-deed to the appellants. It is conceded further, that according to the finding of the learned Additional Judge under issue 3, the appellants can only claim compound interest for two years after the date of suit and upon this calculation the amount due to them under the mortgage-deed of the 29th August 1895 is as below:—

	Rs.	a.	p
Principal ...	... 1,300	0	0
Interest ...	... 1,802	15	2
TOTAL	... 3,102	15	2

I accept the appeal and grant the appellants a decree for Rs. 3,102 15-2 together with interest at the contract rate of Rs. 7-8 per cent. per annum on the principal sum of R. 1,300. Six months are allowed for payment. If payment is not made within the period fixed, the total decretal amount so calculated will carry interest until realisation at Rs. 6 per cent. per annum and the appellants will be entitled to sell the property to realise the amount due. The appellants are entitled to their proportionate costs throughout. A decree will be prepared in the usual form.

Appeal accepted.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 467 OF 1910.

February 15, 1912.

Present:—Sir Arthur Reid, KT., Chief Judge.

Mistri HARI SINGH—DEFENDANT—APPELLANT

versus

Musammat BHOLI AND ANOTHER—PLAINTIFFS—RESPONDENTS

Custom—Pre-emption—Mohalla Multani Darwaza *in the Ferozepore City*—Kucha Nihal Singh.

Kucha Nihal Singh is a part of the recognized sub-division, *Mohalla Multani Darwaza*, in the Ferozepore City.

The custom of pre-emption prevails in the *Mohalla* as well as in the *Kuchas* comprised therein.

Second appeal from the order of the Additional Divisional Judge, Ferozepore, dated the 27th August 1909, confirming that of the Munsif, 1st class, Ferozepore, decreeing plaintiffs' claim on 19th May 1909.

Lala *Dwarka Das*, for the Appellant.

The Hon'ble Rai Bahadur *Shadi Lal*, for the Respondents.

JUDGMENT.—The lower Appellate Court has recorded in its judgment that *Mohalla MultaniDarwaza* is a fairly well known entity in the city of Ferozepore and that *Mohalla* or *Kucha Dholian* is in *Mohalla Multani Darwaza*.

On the plan on the record, the accuracy of which is not contested, the house in suit, in *Kucha* Nihal Singh, which is admittedly a street or lane of not more than 12 or 13 houses, is shown to be separated by one house and a Police Guard room only from the *Multani* Gate.

The *Purana Bazar* is a street which is the main street through and from the *Multani* Gate, the Police Guard-house of that Gate being on each side of it. *Kucha Dholian* (or *Daula*) runs into this street on one side, and *Kucha* Nihal Singh runs into it from the other side, the two *Kuchas* being nearly opposite to one another.

The lower Appellate Court has recorded that in 1876 part of the plaintiffs-respondents' house was acquired by them by pre-emption and thought that it was established in the neighbourhood. In *Muhammad Nawaz* v. *Babo Sahib* (1), there is a finding of a Divisional or District Judge that the right of pre-emption prevailed in *Mohalla Dholian*, though the sub-division in which *Kucha Dholian* is situate, is described as *Jamuwali*

(1) 44 P. R. 1903; 75 P. L. R. 1903.

ABDUL RAHMAN v. BHAGWAN DAS.

Masjid. The lower Appellate Court has recorded that this *masjid* is within the city walls; it has not been shown to be distant from the house in suit. The ruling above cited is authority for holding that the existence of the right of pre-emption in *Kucha Dholian* entails its existence in *Kucha* Nihal Singh. The finding therein that *Mohalla Kassaban* was an independent sub-division was based on the fact that the *mohalla* was a fairly considerable area comprising several streets and lanes and the lower Appellate Court's finding of fact that *Mohalla Multani Darwaza* is "a well known entity" in the city justifies the conclusion that it comprises *Kuchas* as near the gate as are *Kucha* Nihal Singh and *Kucha Dholian* and I see no reason for differing from the lower Appellate Court's conclusion that these two *Kuchas* are in the same sub-division of the city. For these reasons, I maintain the finding that the house in suit is subject to pre-emption and I see no reason for interference, under section 70 (1) of the Courts Act, with the assessment of the sum payable on pre-emption.

The appeal fails and is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No 1081 OF 1911.

January 30, 1912.

Present:—Mr. Justice Chevis.

ABDUL RAHMAN—DEFENDANT—PETITIONER

versus

BHAGWAN DAS—PLAINTIFF—RESPONDENT

Revision—Technical error—Discretion.

It is discretionary with the High Court to interfere on revision, and it will not exercise its powers merely because the lower Court has erred on a technical point if it appears that the lower Court's decison does substantial justice between the parties.

Ghasita v. *Sultan*, 93 P. R. 1911; 11 Ind. Cas. 445; 228 P. L. R. 1911; 151 P. W. R. 1911, followed.

Petition under section 25 of Small Cause Courts Act for revision of the order of Judge, Small Cause Court, Lahore, dated 24th April 1911, decreeing plaintiff's claim.

Lala *Moti Lal*, for the Respondent.

JUDGMENT.—The defendant mortgaged the house in question to plaintiff's father for Rs. 500. It was agreed in the deed that the mortgagor was to remain in possession and pay Rs. 5 per mensum. To make the position clearer, a rent-deed was written the same day. This was on 3rd April 1907.

On 2nd April 1908 a fresh deed was written, defendant taking Rs. 50 more mortgage-money and agreeing to pay eight annas per month on the same terms as before.

On 26th July 1910, plaintiff sued for recovery of the mortgage-money and on 1st August 1910 he sued in the Small Cause Court for rent. The latter suit having been decreed defendant applies for revision on the ground that the suit is barred by Order II, rule 2 (rule 3 is written by mistake in the grounds of revision) of the Civil Procedure Code.

Defendant argues that the present claim is for what was really interest and not rent, and he quotes *Altaf Ali* v. *Lalta Prasad* (1); *Ganga Ram* v. *Abdul Rahman* (2) and *Ruttun Chund Paree* v. *Musammat Goojree* (3) and argues that this claim should have been included in the former suit.

In the last of the above three rulings, no separate lease had been executed, so this case is clearly distinguishable. The other two cases seem rather more to the point, though not quite on all fours. But, even if technically the Small Cause Court's decision is wrong, and the present claim should have been included in the claim for the principal mortgage-money, still I do not think I should interfere on revision. As is pointed out in *Ghasita* v. *Sultan* (4), it is discretionary with this Court to interfere on revision, and this Court will not exercise its powers merely because the lower Court has erred on a technical point if it appears to this Court that the lower Court's decision does substantial justice between the parties. The defendant is seeking to evade liability by appeal to a technicality. On appeal I should have to decide carefully whether the lower Court's decision on the technicality was correct or not, but on revision I decline to do so.

The application is dismissed with costs.

Application dismissed.

(1) 19 A. 496.
(2) 28 P. R. 1907.
(3) 53 P. R. 1868.
(4) 93 P. R. 1911; 11 Ind. Cas. 445; 228 P. L. R. 1911; 151 P. W. R. 1911.

PEARY MOHAN DAS *v.* WESTON.

CALCUTTA HIGH COURT.

EXTRAORDINARY ORIGINAL CIVIL SUIT NO. 5 OF 1910.

August 7, 1911 *

Present:—Mr. Justice Fletcher.

PEARY MOHAN DAS—PLAINTIFF

versus

D. WESTON AND OTHERS—DEFENDANTS.

Criminal Procedure Code (Act V of 1898), *ss.* 154, 167, 172 - *First information, object of—How to be recorded—What is—First information drawn up by Police Officer after commencement of investigation and settled by attorney, if legal—Special diaries, object of—Explosive Substances Act (VI of* 1908), *s.* 5 - *Bomb found in joint family house—Whose possession—Liability of managing member—Presumption of liability—How to be rebutted—Jail Code—Rules in Jail Code, whether have force of law—Remand of accused—Accused to be produced before Court—Application for remand, by whom to be made—Conspiracy—Suit for damage, whether maintainable—Standard of proof—Plaintiff to be kept strictly to cause of action set forth in plaint—Pleading - Criminal conspiracy, when gives rise to Civil liability—Arrest of father to induce son to confess crime—Civil Procedure Code (Act V of* 1908), *s.* 80 —*Suit against public officer for act done in bad faith—Notice to Government, whether necessary—Limitation Act (IX of* 1908), *Sch. I, Arts.* 23, 36, 120 - *Suit for damages for conspiracy—Special damage to be proved by plaintiff—Pecuniary loss to be proved—Counsel retained by party - Examination of Counsel as witness, if proper—Professional ethics.*

The object of a first information being to show what was the manner in which the occurrence was related when the case was first started, it should always be carefully and accurately recorded.

Emperor v. *Kampu Kuki*, 11 C. W. N. 554 at p. 556; 6 Cr. L. J. 86, relied upon.

The law requires that the first information should be the statement of the person himself giving the information, and it becomes valueless if it is drawn up by some person other than the proper informant.

A statment recorded several days after the commencement of the investigation and after there had been some development, is not only no first information, but has very little or no value at all.

A first information drawn up by a Police officer and finally settled by an attorney, is not a first information within section 154 of the Criminal Procedure Code.

The object of the special diaries under section 172 of the Criminal Procedure Code is to enable the Court to have the means of ascertaining what was the information which was obtained from day to day by the Police officer who was investigating the case and what were the lines of investigation upon which the Police officer acted.

Queen-Empress v. *Mannu*, 19 A. 390, relied upon.

It is not the law that every person in a joint family should, merely on the ground that a bomb is found in the joint family residence, be liable to be tried for an offence under the Explosive Substances Act. If the article is found in a portion of the house of which one member of the family has the exclusive use, then such member must *prima facie* be held to be liable, But if it is found in a portion of the house of which all the members of the family have the use, then *prima facie*, the managing head of the family is responsible. But in either case it is only a presumption which may be rebutted; and if the Police act on information showing that an article found in a house is in the exclusive possession of one member of the family and the article is found in a portion of the joint family residence of which all the members of the family have the use, then the head of the family is not liable to arrest merely on the ground that the article is found in a portion of the house to which all the family can resort.

Queen Empress v. *Sangam Lal*, 15 A. 129, relied upon.

The rules contained in the Jail Code are framed by the Local Government under the powers contained in the Prisons Act and subsequently sanctioned by the Governor-General in Council. Rules when so framed and approved have the same force as the statute, and it is not open to any person to set aside the provisions of such Rules.

Section 167 of the Criminal Procedure Code requires that before a Magistrate remands an accused person to Police custody, the accused must be produced before him and he shall record his reasons for doing so.

An application for remand to Police custody must be made personally by the Chief Police Officer present to the Chief Magisterial Officer present, unless this is impossible owing to the absence of one of the officers concerned or through some other exceptional cause.

The law does not permit of a man being arrested in order to put pressure on his son to confess, even if the person causing the arrest believes that by so doing he will get evidence that will lead to the conviction of persons engaged in a huge conspiracy.

There is no rule in the Indian Evidence Act that the standard of proof of a conspiracy in a suit for damages in consequence of injury resulting from the conspiracy, must be the same as if the defendants were being tried on a criminal charge.

Gopessur Dutt, In the goods of (unreported,) relied upon.

A suit to recover damages resulting from a conspiracy is maintainable in British India.

Quinn v. *Leathem*, (1901) A. C. 495: 1 S E C. (N. S.) 97; 70 L J. P. C. 76; 56 J. P. 708; 50 W. R. 139; 85 L. T. 289; 17 T L. R. 749, relied upon.

The plaintiff in a suit on a conspiracy must be kept strictly to the cause of action that he has set out in his plaint.

A criminal conspiracy gives rise to civil liability if special damage has been suffered by the plaintiff.

Quinn v. *Leathem* (1901) A. C. 495: 1 S. E. C. (N. S.) 97; 70 L. J. P. C. 76; 65 J. P. 708; 50 W. R. 139; 85 L. T 289; 17 T. L. R. 749, followed.

A public officer sued in respect of an act done in bad faith is not entitled to notice under section 80 of the Civil Procedure Code, 1908.

Shahunshah Begum v. *Fergusson*, 7. C 499; *Raghubans* v. *Phool Kumari* 32 C. 1130; 1 C. L. J. 542 and *Muhammad* v. *Panna*, 26 A. 220, relied upon.

A suit to recover damages resulting from a conspiracy, falls within Article 36 or Article 120 of the Limitation Act 1908 and not within Article 23.

In order to sustain such a suit, the plaintiff must

*The hearing of this suit commenced on August 17th, 1910, and lasted till July 21st, 1911. The judgment was delivered on August 7th, 1911.

PEARY MOHAN DAS *v.* WESTON.

prove special damage; and the conspiracy must be the proximate cause of the damage or the damage must be such as to have been in the contemplation of the parties.

Pecuniary loss caused directly by the conduct of the defendants must be proved in order to establish a cause of action; but the amount of damage need not be limited to the precise sum so proved.

Fitzgibbon, L. J's statement in his charge to the Jury in *Quinn* v. *Leathem*, (1901) A. C. 495; 1 S. E. C. (N. S.)97; 70 L. J. P. C. 76, 65 J. P. 708; 50 W. R. 139; 85 L. T. 289; 17 T. L. R. 749, adopted.

It is a rule of professional ethics of almost universal application that having taken up the position of an Advocate he should refrain from testifying on a trial which was being conducted by him.

This action was originally brought in the Court of the Sub-Judge of Midnapur, but transferred by the Court in its extraordinary Original Civil Jurisdiction.

Messrs. *K. B. Dutt, H. D. Bose, B. C. Mitter, A. N. Chowdhury, S. C. Roy, B. L. Mitter, P. K. Sen, A. C. Dutt* and Dr. *A. Suhrawardy* and Mr. *A. Dutt*, instructed by Mr. *J. C. Dutt*, Attorney, appeared for the Plaintiff.

Mr. *G. H. B. Kenrick, K. C.*, Advocate-General, and Messrs. *Eardley Norton* and *Gregory*, for Mr. Weston.

Messrs. *Garth, Ali Imam, P. N. Dutt* and *Ahmed Sharfuddin*, for the other Defendants.

The Counsel for the defendants were instructed by Messrs. *Orr, Dignam & Co*, Attorneys.

JUDGMENT—This is a suit to recover damages resulting from an alleged conspiracy.

The present suit is one of five analogous suits brought against the present defendants arising out of a criminal case which was commonly known as the Midnapore Bomb conspiracy Case. [*The Emperor* v. *Santosh Chunder Dass* (1)].

The plaintiff, Peary Mohan Das, is about 68 years of age. He appeared to me to be older. He was formerly in Government service as a Sub-Registrar of deeds—but in the year 1884 his services were dispensed with owing to his having returned to the person presenting the same a deed which was believed to be forged.

Since the year 1884 the plaintiff has lived in Midnapore where he appears to be held in respect and esteem.

The first defendant, Mr. Donald Weston, is a member of the Indian Civil Service and was formerly District Magistrate and Collector of Midnapore. The second defendant, Moulvi Mazaharul Huq, is a Deputy Superintendent in the Bengal Police. Having been employed for some time in the Ciriminal Investigation Department, towards the end of 1907, he was appointed as Deputy Superintendent of Police at Mindnapore. The third defendant, Babu Lal Mohun Guha, is an Inspector in the Bengal Police, and in the year 1908 was Inspector of Police at Mindnapore.

The plaintiff's wife is Basanta Kumari. Basanta, who is old and infirm, is mother's sister (*mashi*) to Dr. Rash Behari Ghose, C. S. I., one of the leading Vakils of this Court.

The plaintiff has three sons, Ashutosh, Santosh Chandra and Paritosh.

In the early part of the year 1908, his household consisted of himself, his wife, his three sons, a grandson (daughter's son) Jotindra Nath Sen, a cook, a maid servant and a boy servant, Boncmali Das. In addition to these there were the young ladies in the zenana. On the 14th January 1908, Santosh who had obtained the appointment of a probationary Sub-Inspector in the Bengal Police went to the Police Training College at Ranchi.

On the 3rd May the plaintiff's house and six other houses at Midnapore were searched by the Police but nothing incriminatory was found. What the reason for this search was or from whom the information emanated which led to the search we do not know, but apparently it had been intended by the authorities that these searches should take place simultaneously with the searches in Calcutta in connection with the Alipore Conspiracy.

On the night of the 13th of June Santosh returned to his father's house owing to the vacation at Ranchi. On the 3rd July the plaintiff's son Ashutosh, who was a mail clerk in the Midnapore Post Office, was transferred on six hours' notice from Midanpore to Mozufferpore.

On the night of the 7th July, the Moulvi applied for search-warrants to search the plaintiff's house and Hanumanjee's temple of which one Surendra Nath Mookerjee was the *pujari*.

The application for the search-warrants was made to Mr. Nelson, late at night. On the morning of the 8th July, the search of

(1) 13 C. W. N. 861; 9 C. L. J. 063; 2 Ind. Cas. 681, 10 Cr. L. J. 125.

the plaintiff's house was conducted by the Moulvi and Lal Mohun, assisted by others of the Police—the house being surrounded by the Military Police. Almost at the end of the search a bomb was discovered in the plaintiff's *baitakhannah* and Santosh was arrested. The search party was in charge of Mr. Brett, the Assistant Superintendent of Police.

The bomb was subsequently taken to Mr. Weston and afterwards opened by Captain (now Major) Weinman, I. M. S., then Civil Surgeon at Midnapore. Upon the bomb being opened by Major Weinman, it was found to contain a large number of shots and brownish-yellowish powder which on examination by the Chemical Examiner proved to be a mixture of sulphide of arsenic and chlorate of potash. This mixture is used in what are commonly known as "throw-down" bombs much in use in this country. The bomb, however, contained almost one ounce of the powder. The evidence of the Chemical Examiner proves that the bomb was a dangerous article if thrown down at close quarters.

The bomb, however, apparently was not an article requiring much skill in its manufacture. The powder and shot were contained in a leather covering over which was wrapped some cloth—the bomb being encased in a jute wrapping. It is said by the plaintiff that the bomb was placed in his *baitakhannah* at the instigation of the defendant, the Moulvi, by the boy Bonomali.

On the 9th July, Santosh was produced before Mr. Nelson, Joint Magistrate of Midnapore, and after the Magistrate had recorded a statement of Santosh's he was remanded to jail until the 23rd July. On the 23rd of July, Santosh was again produced before Mr. Nelson and on the same day either in the Court room or in the Court premises the plaintiff was arrested. The plaintiff alleges that between the 9th and 23rd July interviews took place between him and the defendants, at which threats were held out to him that unless he induced Santosh to confess he himself would be arrested and that it was owing to his failure to induce Santosh to confess that he, the plaintiff, was arrested on the 23rd July.

On 29th July, Santosh made a confession at the defendant Weston's house, the confession being recorded by Mr. Nelson. Mr. Weston was present at the recording of the confession. It is said that this confession was not a genuine confession but was made by Santosh after being tutored by the Moulvi and Lal Mohun with a view to obtain his father's release. On the 26th July another bomb is said to have been found by a *mehtrani* in a drain near the Moulvi's house. On the 31st July further searches took place and in the record-room of Baroda and Saroda Dutt a bomb was discovered by Lal Mohun.

This bomb is alleged to have been placed there by the Police. The bombs found in the drain and in the record-room were despatched to the Chemical Examiner and found on examination to be similar in composition to the bomb found in the plaintiff's *baitakhannah*.

On the 31st July, the following persons were arrested;—Baroda Prosad Dutt, Saroda Prosad Dutt, Jotindra Mohun Banerjee, Nirapada Mookerjee, Madhu Sudan Dutt, Sham Lal Shaha, Nikunja Maiti and Surendra Nath Mookherjee.

Further arrests were made on the 28th and 29th of August, the net result being that including one or two persons who subsequently surrendered, thirty persons in all were arrested in connection with an alleged conspiracy. Amongst the persons who were arrested on the 28th of August were Babu Abinash Chandra Mitter, Babu Upendra Nath Maiti, the Rajah of Narajole and other persons who are persons of position and wealth in Midnapore. Surendra Nath Mookherjee on the 7th August was remanded to Police custody for seven days. On the 13th August, Santosh was taken out of jail into Police custody for three days.

On the 15th August, Surendra made a confession which was recorded by Babu Surendra Nath Chakravarti in the house and presence of Mr. Nelson, the Joint-Magistrate at Midnapore. This confession is said to have been made by Surendra after being tutored by the Police whilst he was in Police custody. On the 16th August, Mr. R. B. Dutt telegraphed to the Government of Bengal complaining of the methods adopted by the Police in connection with the case and on the 27th August he wrote to the Government enclosing statements of Ashutosh (the plaintiff's son), Jotindra Nath Sen (the plaintiff's grandson) and

Upendra Nath Mookerjee (brother of Surendra Nath Mookherjee). On the 21st August, some of the accused who were then under arrest were produced before Mr. Nelson not in Court but in a room at the Court premises. Sanction to prosecute twenty-seven of the accused was procured from the Local Government on the 31st August and on the same day the accused that had been arrested earlier than the 28th August were produced before Mr. Nelson.

On that occasion the plaintiffs, Nirapada Mookerjee and Jotindra Nath Banerjee, were discharged. According to plaintiff's case on that occasion Santosh and Surendra both presented petitions to the Court which amounted to retractation of their confessions.

On the 4th September, the plaintiff's son Ashutosh Dass was arrested and produced before the Joint Magistrate who remanded him to jail until the 7th September. On the 7th September the accused were produced in Court and then it is agreed that Santosh and Surendra presented petitions to the Court alleging that their confessions had been extorted from them.

On the 7th September the first information report was filed in connection with the case.

This report implicated 154 persons in the conspiracy.

No evidence having been offered against the accused the Vacation Bench of the High Court admitted most of the accused to bail between the 13th September and 2nd October.

On the 4th November Mr. Sinha, then Advocate-General, appeared for the Crown before the Magistrate. On that day and the next day the informer, Rakhal Chandra Laha, was examined and stated that the story he was alleged to have given to the Police was wholly untrue and that the story had in fact been invented by the Police.

On the 9th November Mr. Sinha withdrew the prosecution against all the accused except Santosh Chandra Dass, Surendra Nath Mookherjee and Jogjiban Ghosh.

The Magistrate subsequently committed these three accused for trial.

Mr. Smither, the Additional Sessions Judge of Midnapore, convicted all three on 30th January, 1909. Santosh, Surendra and Jogjiban all presented appeals to the High Court. The appeals were heard by a Bench consisting of the Chief Justice and Mookerjee, J.

On the 1st of June 1909, the High Court set aside the convictions against Santosh, Surendra and Jogjiban. Within a few days after the acquittal of Santosh, Surendra and Jogjiban, the Lieutenant-Governor directed Mr. Macpherson, the Commissioner of Burdwan, to hold a departmental inquiry into matters relating to the case. The report of that inquiry has not been produced.

But portions of the evidence given before that inquiry have been produced and have been used by the defendants' Counsel for the purpose of endeavouring to contradict the witnesses for the plaintiff. The foregoing remarks give in brief outline the principal events in the Midnapore Conspiracy Case.

This suit was instituted by the plaintiff on the 15th November, 1909.

The substance of the plaintiff's case is that his arrest and the other events that followed thereon were done in furtherance of a conspiracy to injure or cause damage to him and not in the *bona fide* belief or with a reasonable suspicion that the plaintiff was connected with the alleged Midnapore Bomb Conspiracy Case or with the bomb found in his house. The object of the conspiracy is alleged to have been that unless the plaintiff induced his son Santosh to make a confession the defendants would cause the plaintiff to be arrested. The plaintiff also alleges that in furtherance of such conspiracy he was arrested and that damage as such has resulted to him. This is the sum and substance of the plaintiff's cause of action as set out in the plaint.

Each of the defendants filed separate written statements.

The reason for the arrest of the plaintiff is stated in the same terms in the written statements of the defendants Weston and Moulvi and is in the following terms:—

"That on the 23rd July 1908, an information was laid by the defendant, Moulvi Mazaharul Huq, before the Joint-Magistrate of Midnapore, a Judical Officer, of there being reasonable grounds for the belief that the plaintiff had been accessory to the

commission of an offence under the Explosive Substances Act in connection with the said bomb which was found in his house and an application was made for the issue of a warrant for the arrest of the plaintiff. The said information was laid and the said application for the issue of a warrant made by the said defendant, Moulvi Mazharul Huq, in good faith, lawfully and in discharge of his duty and this defendant (*i.e.*, the defendant Weston) and other superior officers of the defendant Moulvi Mazharul Huq in good faith approved of the said information being laid and of the application for the issue of a warrant of arrest being made."

The defendant, Lal Mohun, in his written statement states that he had nothing to do with the application for the issue of the warrant to arrest the plaintiff, but that he arrested the plaintiff under instructions from the Moulvi.

The defendants also admit in their written statement that the application of the 7th July for the warrant to search the plaintiff's house was made with the approval of the defendant Weston. On this suit being called on for hearing an application was made by Counsel to amend the written statements by striking out this admission.

The other defences raised in the written statements, except as to the service of notices on the defendants with which I will deal later, may be summarised shortly, *viz.*, that the defendants acted with reasonable and probable cause and in good faith.

And, at the Bar, the learned Advocate-General has stated that the defendants say that the story as told by the informer in the Midnapore Bomb Conspiracy case was not only believed by them to be true but that the same was in fact true.

Issues were settled between the parties as follows:—

1. Did the defendants or any two of them in concert or in conspiracy with each other conspire to injure or cause damage to the plaintiff or did they or any two of them in furtherance of such conspiracy cause injury or damage to the plaintiff ?

2. Did the defendants or any two of them in furtherance of such conspiracy maliciously, wrongfully or illegally

(*a*) Search or cause a search to be made in plaintiff's house on the 8th of July ?

(*b*) Trespass or cause a trespass to be made upon the premises of the plaintiff ?

(*c*) Arrest or cause the plaintiff to be arrested ?

(*d*) Imprison or cause the plaintiff to be imprisoned ?

(*e*) Institute or continue a prosecution against the plaintiff ?

3. Are the defendants entitled to notice under section 80, Civil Procedure Code ?

4. If so, have the provisions of section 80, Civil Procedure Code, been complied with or have the defendants or any of them waived the right under section 80, Civil Procedure Code, or are they estopped from raising the plea that notice in accordance with the terms of the statute has not been duly served ?

5. Is the suit barred by limitation ?

6. What damages is the plaintiff entitled to ?

The defendants carry the story back to the Partition of Bengal in the year 1905 in order to show what was their knowledge of the state of the district when they say that information of the Midnapore Bomb Conspiracy came to their knowledge.

Following on the Partition of Bengal it cannot be doubted that there was in Midnapore and other parts of Bengal great political agitation.

Speeches were delivered against the Partition, the Swadeshi movement came into being, *Akras* and *Samities* were formed or extended and in some cases attempts were made to enforce the Swadeshi movement by criminal intimidation, force and violence. Volunteers were enrolled originally for the purpose of keeping order at meetings and of performing similar duties but whose duties were subsequently extended to picketting the bazars in order to enforce the Swadeshi boycott. There also came into being literature samples of which have been exhibited in this case. This literature included periodicals and books which preached revolutionary doctrines and destruction of Europeans.

Amongst this literature was the *Medini Bandhub* published by one Deb Das Karan at Midnapore and two books known as *Bartaman Rananiti* (The Art of Modern Warfare) and *Mukte-kon-Pathe* (The Way of Salvation lies), the two latter being published in Calcutta. The *Medini Bandaub*

was a newspaper appearing regularly at Midnapore.

The *Bartaman Rananiti* and the *Mukte-kon-Pathe* were not published in secret but bear the imprint of the publishers and the price, 12 annas.

There can be no doubt that this class of literature preached to the youth of the country must have had a grave effect. The defendants also rely upon the prosecution of Khudiram for sedition and his being dragged through the town subsequently to the withdrawal of the prosecution in a carriage said to belong to Mr. K. B. Dutt as part of the information in their possession prior to the relation of the informer's reports. That the article which Khudiram was said to have been distributing was highly seditious there can be no doubt. But the prosecution appears to have been in a difficulty to prove that Khudiram distributed the leaflet. Too much reliance has, I think, been attempted to be placed by the defendants on this incident. On the 6th December, 1907, an attempt was made to blow up the train of the Lieutenant-Governor at Naraingarh not far from Midnapore. The two defendants, the Moulvi and Lal Mohun, and one Rai Ram Saday Mookerjee Bahadur of the C. I. D. were deputed amongst others to inquire into this case.

The Moulvi says Mr. Westom gave him instructions in writing particularly asking him to ascertain whether any person had come back from abroad after learning mining. Those instructions have not been produced. Certain coolies engaged as plate-layers on the railway were arrested. One of these, Sibu, having first confessed became an informer. The others also confessed, but one of them Nepal not until he had been handed over to the custody of the defendant, Lal Mohun.

The confessions went to show that those coolies placed gun-powder under a pot-sleeper on the line, the motive for the crime being that the coolies wished to injure one of the head coolies by blowing up one of the pot-sleepers for which he was responsible. The Police also produced from the hut of one of the coolies some gun-powder in a piece of newspaper. The expert evidence, however, showed that the explosive used was picric acid. It may be noticed that this was the first anarchist outrage in India in which picric acid was the explosive used. The accused when brought before the Court immediately retracted their confessions.

The evidence as to the commission of the offence, apart from the retracted confessions, consisted of the evidence of the informer that the explosion was caused by the gun-power placed under the pot sleeper and the expert evidence that the explosion was caused by picric acid.

The coolies were convicted both in the Sessions Court and by this Court on appeal.

Subsequently, the appeal in the *Alipore Bomb Case* (2) came on to be heard in this Court before the Chief Justice and Carnduff, J. I take the following extract from their judgment:—"Indeed, it may be a question whether such a confession has not come to light in the course of these proceedings as it has been stated before us by Mr. Norton that for one of the attempted outrages on the late Lieutenant-Governor disclosed by the confessions in this case certain coolies have been tried and convicted and are still in prision, part of the evidence against them being their own confessions. If the confessions in this case are true then as Mr. Norton has remarked there may be reason to apprehend that those coolies have been improperly convicted. Mr. Norton who appeared for the Crown in that case as well as this has submitted that the Government should be moved by us to release those coolies. It is, however, outside our province to investigate this matter but, no doubt, it will be made the subject of careful inquiry by the Government if this has not already been done and the representation of Counsel for the Crown will be brought to the notice of the Government."

Mr. Norton now says that he made no such statement. The Chief Justice and Carnduff, J., tell me that they are positive that he did.

There can be little doubt that the recollection of the learned Judges supported by their judgment written at the time ought to be preferred.

The case against the coolies is, I think, open to suspicion and the evidence that has been given in this case leaves me unconvinced as to its being a genuine case.

(2) 14 C. W. N. 1114; 11 Cr. L. J. 453; 7 Ind. Cas. 359; 37 C. 467.

PEARY MOHAN DAS *v.* WESTON.

In the Midnapore case it is alleged in the first information that "In course of the investigation of the Naraingarh train wrecking case, Midnapore, which occurred on the morning of the 6th December last, a clue was obtained of a conspiracy by a secret society working at various places at Midnapore and elsewhere and having as one of its objects the assassination of the District Magistrate by means of bombs, explosives or fire-arms."

Nothing has been disclosed in this case to suggest that such a statement has any foundation. The discovery of the Midnapore Bomb Case depended, if true, solely on the evidence of an informer, Rakhal Chandra Laha, who was appointed informer in the middle of May 1908.

It may be mentioned that the coolies who were convicted in the Naraingarh case were, after the determination of the appeal in the Alipore case, released by order of the Government.

On the 7th and 8th December 1907 was held at Midnapore what is called a District Conference in connection with the Indian National Congress.

Mr. K. B. Dutt, who appears as leading Counsel for the plaintiff in this case, was Chairman of the Conference. Amongst those who attended were Mr. Surendra Nath Banerjee and Mr. Arabinda Ghose.

Mr. Dutt appeared at the Conference dressed in European style and declined to allow a discussion on the question of Swaraj as being inopportune at that time.

This produced a split in the Conference, the result being that Mr. Arabinda Ghose and the majority calling themselves "Extremists" left the Conference and held a separate meeting, whilst Mr. Dutt, Mr. Surendra Nath Banerjee and a few others who have been called "The Moderates" were the remnant of the original Conference. The evidence shows that Mr. Surendra Nath Banerjee on this occasion as on other occasions was during his stay at Midnapore a guest in Mr. Dutt's house. With regard to the volunteers whose duty it was to welcome and see to the comforts of the delegates it appears that Mr. Dutt had ordered that none of them were to appear with *lathies*. This apparently offended Satyendra Nath Bose who was then the captain of the volunteers. This Satyendra is the same Satyendra who was subsequently hanged for the murder of the informer in the Alipore Conspiracy case.

Satyendra handed over the captaincy of the volunteers to Santosh, one of the plaintiff's sons.

In this manner Santosh, I think, became possessed of the lists of volunteers' badges, etc., which were found at the search of the plaintiff's house on the 8th July 1908.

Santosh very quickly, however, resigned the captaincy of the volunteers, his father the plaintiff having warned him that it would be unwise for him to have anything to do with them as he (Santosh) was then a candidate for appointment as a Probationary Sub-Inspector in the Bengal Police.

On the 14th January 1908, Santosh having been appointed a Probationary Sub-Inspector in the Bengal Police went to Ranchi Police Training School. Now, that Santosh at this time was known to the local authorities as an "Extremist" I do not believe. The papers relating to his appointment as a Probationary Sub Inspector were sent by the Inspector-General of Police through the local authorities at Midnapore. It is hardly conceivable that if the local authorities knew that Santosh was an unfit person for appointment they would not have called the Inspector-General's attention to the fact.

In the year 1906 when the Moulvi had for some time been stationed at Midnapore he had lodged in the house of Abdur Rahman who has been called as a witness in this case.

Some time early in January 1908, relations between the Moulvi and Abdur Rahman were renewed which ultimately led to Abdur Rahman being appointed a paid informer. The Moulvi fixes the date of the conditional employment of Abdur Rahman as early in January.

On the 19th January according to the Moulvi's evidence Abdur Rahman who, it had been arranged, should proceed to Naraingarh came and informed him that Khudiram Bose and Sarat Chandra De were missing from Midnapore with Jogjiban's revolver and that he feared that they had gone to shoot Mr. Weston who was then at Jhargram.

On the next day, the 20th January, the Moulvi went and informed Mr. Cornish

who went that day to Jhargram by the Bombay Mail having the train specially stopped at Jhargram. The Exhibits LXIV, LXXII, 7A and CLXXVIII show conclusively that Mr. Weston was in Jhargram at that time and that Mr. Cornish went there to him.

That the Moulvi reported this to Mr. Cornish and that he proceeded to Jhargram is clear. But whether Rahman did in fact obtain that information is another matter. No reliance, in my opinion can be placed upon any statements made by Rahman or the Moulvi unless they receive independent corroboration. On the 21st January, Rahman was definitely appointed as a paid informer and he is said almost immediately to have produced to the Moulvi the revolver, Exhibit XXI, which he says he got from Satyendra Nath Bose on the pretext that he wished to kill Mr. Cornish for having stopped some Mohamedan religious ceremony. Satyendra, it is said, told Rahman that Mr. Weston was responsible as Cornish acted under his orders and suggested that Rahman should shoot Mr. Weston. Rahman says he feigned assent and Satyendra lent him this revolver, Exhibit XXI. The Moulvi says he produced this revolver to Mr. Cornish.

Mr. Cornish made the sketch Exhibit 73.

By some extraordinary oversight no date or description of the revolver appears on Exhibit 78.

This revolver was subsequently found upon Khudiram when he was arrested after the Mozufferpore murder. The evidence, I think, establishes that at some time this revolver found on Khudiram was produced to Mr. Cornish. The different dates that have been given of the date when the revolver was produced make it difficult to state with certainty when this revolver was produced to Mr. Cornish; but on the whole I think that the balance of the evidence is in favour of the date given by the Moulvi. How Rahman got hold of the revolver is another matter. I do not think that he was anything like as much in the confidence of Satyendra, Sarat and Khudiram as he wishes to make out, although there is no doubt he knew them as being instructor at the *Akra* in which they played.

Rahman, on 28th January, was taken to Calcutta and subsequently produced before Mr. Plowden, Deputy Inspector-General of Police, at the Railway Police Office at Howrah. At the interview there were also present Mr. Weston, the Moulvi and Mr. Cornish. It is said, at that interview Rahman gave information which led to the discovery of the bomb factory at Manicktollah. Mr. Plowden says, he rather thinks that Rahman did say something about a bomb, but denies that Rahman gave him information as to the bomb factory. I think from the other evidence that Mr. Plowden is mistaken in his recollection that Rahman may have said anything about a bomb. I am satisfied that Mr. Plowden is correct that Rahman did not tell him about the bomb factory. That would, indeed, have been a piece of information so important that Mr. Plowden would not have forgotten the time, place and source from which he obtained it. The fact of production of two other revolvers to Mr. Cornish is, I think, well established. But from what source did they come? I am not prepared to accept without corroboration the statement of Rahman as to where these revolvers come from or the dates of their production. For instance, in the lower Court he said he was at Mourbhunj when Jogjiban was arrested, *i.e.*, on the 3rd May. If that be so, he could not be in Midnapore on the 2nd May when he says he obtained the revolver "Young America". Moreover, the second revolver is stated to have been shown to Ram Saday Mookerjee on the 26th January who made a sketch of it. Ram Saday has not been called as a witness in this case. Then with regard to the "Message to the Punjabis" which Rahman says he stole from Satyendra, the document as printed in the paper-book looks all right, but if one looks at the original it appears that it is a corrected printer's proof. When a bundle of the "Message to the Punjabis" is sent to Satyendra for distribution why should the corrected printer's proof be sent? Moreover, the document apparently was for distribution amongst Punjabis.

There can be but few Punjabis in Midnapore to whom to distribute this document. Rahman's statement how he obtained this document is far from satisfactory. Similar remarks apply to the

pamphlet "India Arise" and the book *Bartman Rananiti.*

The next incident in Rahman's evidence is the alleged obtaining, from Satyendra, a letter to Calcutta so that Rahman might obtain a bomb.

The letter is Exhibit 57 and was said to have been written by Satyendra in Abdur Rahman's pocket-book.

According to Rahman he took his pocket-book to Calcutta, showed it to the addressee of the letter and returned with the letter still in his pocket-book to Midnapore; Moulvi tore the letter out and took charge of it.

Abdur Rahman was, however, unable to get a bomb, one of the reasons given why he could not get a bomb being a shortage of ice in Calcutta. This story is to my mind wholly untrue. A man of Satyendra's education would not write a letter to a friend in a note book of Rahman's nor would the friend having read the letter leave it in the note-book to be taken back by Rahman to Midnapore.

No doubt, the Moulvi's travelling allowance bill shows that he, the Moulvi was in Calcutta from the 23rd to 26th February, but as I consider neither the Moulvi nor Rahman to be reliable witnesses and the probabilities of the story being untrue are so great that I reject it. I wholly disbelieve Rahman's story of the visit to the Anushilan Samity or to Bose's Circus on the *maidan.*

The next document alleged to have been produced by Rahman is the bomb recipe, Exhibit IX. This document is alleged to have been dictated to Rahman while Jogjiban was out on bail during the pendency of the charge against him under the Arms Act. Jogjiban was let out on bail twice during the pendency of that case, once on the 20th June and again on the 18th July. Rahman says that he was asked to lend his house for the purpose of preparing bombs, but before agreeing to do so he consulted the Moulvi who in turn consulted Mr. Weston. Mr. Weston says he advised that Rahman should not do so but told Moulvi to go to Rahman to obtain the formula for making bombs.

This story is again highly improbable. If Rahman's story be accepted then Jogjiban who had been released on bail on 18th July was so intent on making bombs that on the very next day he was trying to find a place to manufacture them.

Moreover, I think that the Moulvi in his evidence in the Sessions Court clearly intended to fix the date of this document at about the 20th June when Jogjiban was out on bail for the first time.

The endorsement now on the document giving its date as the 20th July with the impossible Hindu name of Pattopadhya is, I am satisfied, not genuine. Mr. Hadril says he cannot say if the pencil writing containing the date was on the document when he had it with him in the lower Court. There can be little doubt but that Mr. Dundas, D. I. G. of Police (Ranchi Range), took a correct view of this document when it was shown to him. He said, "That appeared in the *Juganter*" and took no further notice of it. The probabilities are that the Moulvi would also know of this recipe having appeared in the *Juganter* more especially owing to his close touch with the officers in the C. I. D. I reject Exhibit IX as a genuine document prepared as mentioned by Abdur Rahman. Nor am I inclined to accept the statements of Rahman and the Moulvi as to the advance by Rahman of Rs. 50 to Satyendra on a note of hand. Their statements are highly improbable and are not supported by Mr. Cornish. Moreover, if this document had been in fact given by Satyendra it is quite certain that the authorities would never have allowed it to pass out of their possession without taking a photograph of it so as to establish the fact that Rahman had close relations with Satyendra. Then, on the 2nd of May evening according to Rahman, a dark man came to Satyendra's house speaking "in mixed English and Bengali," said the factories had been raided in Calcutta and that all had been arrested except Khirode and Noresh. As Rahman according to his evidence in the Sessions Court was in Mourbhunj on the 3rd May it is hardly possible that he could be in Midnapore on the 2nd May evening. Abdur Rahman appeared to me to be a witness who had learnt his lesson before coming to Court. When being examined-in-chief by Counsel for the defendants he gave his evidence with surprising alacrity and readiness, but when he was cross-examined there were long pauses, hesitation and confusion.

He is a witness on whose testimony, unless corroborated by good and independent testimony, I decline to place the slightest reliance. The only thing that one can say for certainty is that Rahman by reason of having been the instructor at the *Akra* where Satyendra played was acquainted with Satyendra. When Satyendra disappears from the scene Rahman ceases to supply any information true or false except Exhibit IX which I have already found not to be a genuine document. Nor is he able to give any connecting link between Satyendra's conspiracy and the alleged conspiracy known as the Midnapore Bomb Conspiracy. This is more specially to be noticed as Jogjiban with whom Rahman says he was on terms of intimacy is alleged to have been a conspirator in both Satyendra's conspiracy and the Midnapore Bomb Conspiracy and was one of the accused in that case who were ultimately acquitted by the High Court on appeal.

Neither do I accept the statement of Rahman as to Satyendra having told him that they had sent a bomb through the post to Mr. Kingsford.

One other point as to the position in life of Rahman. That he is a man of no social position cannot be doubted. The statement of the Moulvi that Mahomedan gentlemen of position used to sit down with him whilst he read to them passages from a sacred book and afterwards gave his guests light refreshments, is, I am satisfied, absolutely untrue.

Syed Zia Uddin who has been called as a witness for the defence in this case and is a Zemindar and Honorary Magistrate says quite clearly that the Mahomedan gentry would not sit down with Abdur Rahman. This evidence is, I am convinced, correct. Rahman appears to be the son of a butcher and was a petty trader in a very small way until he became an informer.

One other matter before parting with Rahman. It appears from Exhibit V (Extracts from the proof of Rahman in the Crown brief used at the Sessions Court Trial) that Rahman was to be examined as to a statement that Santosh had made to him that arms were being collected at Purulia. Rahman said in his evidence here that he never made such a statement to any body. How then did this statement find its way into the proof in the Crown brief? Rahman's statement for the Crown brief was recorded by the defendant, Lal Mohun. Nor do I think that the statements of Rahman as to his reasons for visiting Mourbhunj and Mahisadal satisfactory.

Abdur Rahman now goes out of the story altogether.

Mr. Weston for some time prior to this had been receiving anonymous threatening letters and letters as to arms being concealed. It is also a fact that Hem Chandra Das and some of the others charged in the Alipore Conspiracy came from Midnapore. Much stress has been placed on the fact that the *zemindars' samiti* at Midnapore made a grant of Rs. 200 to Hem Chandra Das to assist him in studying *silpa* (mechanical arts) abroad.

Doubtless, it is unfortunate that the *zemindars* have made this grant as events have proved. The mechanical arts which Hem Chandra was studying abroad have subsequently been proved to be the manufacture of explosives.

But, on the other hand, we have the statement of Inspector Nagesh Chunder Mookherjee, who was Inspector in charge of Midnapore from 1904 to 1908, that the *zemindars' samiti* was not a seditious body. The Rs. 200 was forwarded to Hem Chandra through the Society for Promoting Scientific and Industrial Education amongst Indians.

Moreover, this is not the only case in which a Midnapore gentleman has assisted financially a young man from the town who has gone abroad to advance his studies. For the evidence shows that Abinash Chandra Mitter, the plaintiff in one of the other suits, assisted Mr. Birendra Nath De with a sum of Rs. 8,000 to enable him to proceed to Cambridge where Mr. De graduated amongst the Wranglers and subsequently passed into the Indian Civil Service and is now an Assistant Magistrate in the Central Provinces.

Mr. De's house is alleged to be one of the place where the conspirators in the Midnapore Bomb Conspiracy Case used to meet and conspire together.

On the 30th April 1908, Mrs. and Miss Kennedy were assassinated at Mozufferpore by Khudiram by means of a bomb.

Following on this, on the 2nd May, a cy-

pher telegram came to Mr. Cornish from the C. I. D., Calcutta. Mr. Cornish was unable to decipher the telegram and sent Moulvi up to see Mr. Plowden.

It had been the intention of Mr. Plowden to have simultaneous searches made at Calcutta and Midnapore but owing to the failure of Mr. Cornish to decipher the telegram this intention was frustrated.

On that day the Alipore gang were arrested in Calcutta and the garden at Manicktollah raided. The Moulvi returned to Midnapore late on the night of 2nd May or early on the morning of the 3rd May.

On the 3rd May seven houses were searched in Midnapore. It is only material to give the names of two of the owners of the houses, namely, the plaintiff and Satyendra.

The plaintiff refused to open his door to the Police and kept them waiting 15 or 20 minutes. Ultimately, the Police sent for Mr. Nelson, the Joint Magistrate, and the plaintiff permitted the Police to come in and make the search. The plaintiff strictly was entitled to refuse the Police admission into his house to search it as no warrant to search the plaintiff's house had been obtained.

Nothing was found in the plaintiff's house on that occasion.

Certain *Bande Mataram* flags and badges which were taken possession of by the Police at the search of 8th July are said by the plaintiff to have been in the house on 3rd May. The defendants deny this.

Mr. Norton suggested that during the delay in opening the door these articles had been taken to the house of Jogendra Mullick. That suggestion had, however, to be abandoned as it is admitted that the Police when about to search a house first of all surrounded it to prevent anything from being taken from the house.

At the same time, it is to be noted that the search of the plaintiff's house was under the order of the Criminal Investigation Department in Calcutta so that the plaintiff or his family must have been under some suspicion at the time. On the other hand, when you find a system of espionage so complete as has been spoken to by the defendant, Lal Mohun, in this case, *viz.*, that every police officer has his *spy* who is paid out of the secret service fund, one must not assume that every information given to the Police is true or well-founded.

Pausing here for one moment, it seems to me very obvious that on the information then in the possession of the authorities Mr. Weston was bound to be very watchful over the district of which he had charge. It is not denied that at this time in fact there existed a criminal conspiracy at Midnapore which included Satyendra and Khudiram, both of whom were subsequently hanged. They had also the fact that on the searches of the 3rd of May were found Swadeshi documents (some of them violent), copies of the *Bartman Rananiti* and *Mukte kon Pathe*, swords, a bayonet and some other articles of a doubtful nature.

About the middle of May 1908, one Rakhal Chunder Laha was appointed by the Moulvi with the consent of Mr. Weston to be a paid informer.

There is a contest on the evidence as to whether the informer was a man of bad character or not. It is admitted that there are two men each called Rakhal Chunder Laha, and that one of them is a man of bad character. In fact, the Moulvi says that the Rakhal Chunder Laha of bad character was "a desperate character." The evidence is clear that the informer was the man of bad character. Mr. Cornish says the Moulvi told him that the informer was a drunkard and 'a bad lot.' Mr. Plowden says also that he was informed that the informer was a drunkard.

In Rakhal's proof for the Crown brief for use in the Sessions Court (Exhibit S. S.) drawn up by Lal Mohun it is stated that Asadulla, Head Constable, took him to the house of the Moulvi. The reason Mr. Weston approved of the appointment of Rakhal as an informer he states was because he was a friend of Jamini Mullick's and also a relative of Baroda and Saroda Dutt. Whether Rakhal was at that time on terms of friendship with Jamini may be doubted for I find at page 14 of Exhibit S. S. the following statement: "For this I had a quarrel with him (that is Jamini Mullick) and I gave up going there and did not mix with them."

This is in accordance with the vernacular statement but Lal Mohun altered this in the translation as follows:—"For this I had the quarrel with him and I gave up

going to the *Akra* and discontinued my visits to him." Doubtless two pages further in Exhibit S. S. the informer says: "I frequently go to his house", but this hardly seems to be consistent with the previous statement. The informer was, as I have said, appointed according to his own statement on the 20th May and on the 23rd May he is said to have commenced giving informations to the Moulvi. Up to the 31st May the Moulvi says that Rakhal used to come to his house and give his reports which the Moulvi wrote out in his confidential diary. From the end of May, the Moulvi says, fearing that the fact of Rakhal's coming to his house might become public he directed Rakhal to go in future to Asadulla, Head Constable, who would record his statement. Why Rakhal who is a man of education was not permitted to write his own reports has not been satisfactorily explained. The explanation that they were written by Asadulla because he could write more quickly than Rakhal hardly seems to be satisfactory.

When the Moulvi says that Rakhal was appointed because he was known to be one of the leading "Extremists" may be doubted, because in the proof of Rakhal (Exhibit S. S.) prepared by Lal Mohun I find the following speech said to have been addressed by Moulvi or Asadulla to Rakhal on the 20th May at the Moulvi's house (Exhibit S. S., page 16) "you work on the side of the Government. It is a great sin to work against Government and it is an ill omen to the country. You mix with the Swadeshi agitators and let me know their doings." This coupled with the statement on page 14 of Exhibit S. S. that after the quarrel with Jamini Mullick the informer "did not mix with them" raises doubts as to the Moulvi believing that the informer was a conspirator deep in the confidence of his fellow-conspirators. There is, moreover, a remarkable fact that the reports said to have been given by the informer open on the 23rd May with the reports of meetings of a fully organised conspiracy. One can hardly imagine that an officer with the experience of the Moulvi in criminal investigation would not have questioned the informer as to the origin and growth of such a formidable conspiracy. Before the Committing Magistrate the informer stated that he never gave the reports at all, but they were drawn out by the Police and signed by him at one and the same time. We have two records of the reports said to have been given by the informer, Rakhal.

One is Exhibit 56 which is said to contain the reports made from day to day. These reports commence from the 1st June. The other document Exhibit G is said to have been written in October 1908 by Asadulla to assist the informer to give his evidence. It is said Exhibit G was dictated by Rakhal the informer to Asadulla from four note-books in Rakhal's possession and that Asadulla added the marginal notes in red ink. Why, if Rakhal had four note books containing contemporaneous records of events and which he might use in Court to refresh his memory, Asadulla should draw him up a document which he could not so use is not apparent. Moreover, if Asadulla's story is correct, it would appear that Asadulla was so anxious to save the informer trouble that he signed Exhibit G for him, but the name he signed was "Ram Saran Laha" instead of Rakhal Chandra Laha. The words "Ram Saran" have been attempted to be erased from Exhibit G but the words are still distinctly visible. Exhibit G was subsequently handed over to the defence by the informer and Exhibit 56 was disclosed by Mr. Sinha before the Committing Magistrate after the informer had failed the prosecution.

I must now glance shortly—for space will not permit more than a hurried glance—at the reports given by the informer Rakhal.

In order, however, to get an introduction to the reports it is necessary to go to the informer's proof drawn up by Lal Mohun (Exhibit S. S.).

There we find, on the 23rd May, the first information given by Rakhal after his appointment as an informer on the 20th May.

From Exhibit S. S. we find that on that day the informer went to the house of Jamini Mullick. He states:—"I saw some strips of jute, sulphur and shots scattered there. Surendra said we shall prepare a bomb. The Police have arrested Satyendra, Jogjiban and Sarat Day for nothing. If we can kill Lal Mohun, Moulvi and Mr. Weston, all obstacles will be removed." This is how the document reads in the original translation

and the vernacular but Lal Mohun in the translation has struck out the last sentence and substituted: "We must do away with the Police and the Firinghees." "This evening Kissen Saha, Jotindra Nath Sen and Sachindra Mohun Sen will return from Calcutta after learning the art of manufacturing bombs. This night I shall consult with them."

Then on the same evening we are introduced to the first secret meeting held at the Basanta Malati *Akrah*.

The report of this meeting appears in Exhibit G. The speaker at the meeting is said to have been the plaintiff's son Ashutosh:

"There was a bench for sitting."

"Ashutosh Das slapped his chest and held forth 'Driving away the Firinghees and Police, &c."

In Rakhal's proof prepared by Lal Mohun, the vernacular and orginal translation read, "Ashutosh Das gave a stirring and inflamatory speech. Lal Mohun has altered this to, "Ashutosh Das jumped up, struck his chest with his hand and said."

Then we find, "There was no mattress but a bench only." Then in Exhibit G we find a report dated the 27th May that on that day the informer was entrusted with a letter that Jamini Mullick had received from his nephew, Krishna Prosad Dey, from Calcutta. Now this clearly establishes that the letter was dated not later than the 27th May.

This letter is said to have been subsequently shown to the Moulvi on the 1st of June, when the Moulvi purported to take a copy of it. The copy shows that the alleged letter is dated the 28th May. Counsel for the defendants admit that there is a difficulty as Exhibit G purports to show that the letter was in the hands of the informer on 27th May and suggests that the date copied by the Moulvi is a mistake. This does not seem to me to be probable; the terms of the letter and the way it is said to have been produced suggested far more strongly that the letter never in fact existed.

The terms of the letter are as follows:—

"Youngest maternal uncle, my respectful salutation to you. Besides what has been used in our work we have got 25 implements (bombs) for putting down the Europeans in excess prepared in our factory. If you require them send a man as soon as you get this letter. If you cannot come please send a man as soon as convenient. If you cannot send any man write to me and I shall hand over the implements for putting down Europeans to the man who will come and show me letter in your handwriting. Why the three or four men of your Basanta Malati *Akrak* who learnt from us the art of making instruments for putting down the Europeans are sitting down silently? Can the enemy be submitted in this way? We shall wait for your letter or man two or three days and shall go away then with the implements towards any line (some Railway line). What more shall I write? It is useless to say further. 28th May 1908.

Krishna Prosad De,
Jorasanko."

One would have imagined that 25 bombs would have been sufficient for the purpose of exterminating the Europeans in Midnapore. But in the report of the 4th of June (Exhibit 56) we find the men who are alleged to have been taught bomb-making in Calcutta saying, "when we ourselves have come (here) let us have a house, 25 is a most insignificant number, we shall prepare 2,000 even. Kristo asked us to go within three or four days and that time has been over simply in showing the letter to the members. Probably by this time Kristo has gone out towards any line (some Railway line)."

This story about the 25 bombs and the proposed 2,000 bombs is, in my opinion, unbelievable. If this story were believed in, it is quite certain that an urgent communication would have been made to Mr. Plowden to endeavour to seize the 25 bombs which the Midnapore conspirators considered to be an insignificant number before Kristo Prosad De went towards some Railway line. An anarchist outrage on a Railway with 25 bombs at one time seems also to be novel.

To this the defendants say, we ascertained the address of Kristo Prosad De and found it correct. That, however, seems to me to come to nothing. Whoever gave the report was hardly likely to be so foolish as to give a name and address which on the slightest inquiry would be found to be false.

To return to the informer's reports, having got the man from Calcutta who had learnt bomb making the next thing is a question of ways and means.

PEARY MOHAN DAS v. WESTON.

The report of the 2nd June (Exhibit 56) is the first mention of proposed subscription. The gentleman who is said first to have offered to pay is Babu Satkari Pati Roy, a Sub-Deputy Magistrate.

The defendants rely on this largely. It appears that on the 2nd June this gentleman was on leave and it was not impossible for him to be in Midnapore. It is quite possible I think that he was in Midnapore on that day. Having regard to the *spies* and informers that were in the employ of the Police I think it quite possible if Satkari Pati Roy was in Midnapore that a report to this effect was made to the Moulvi.

This gentleman still remains in Government service.

On the 3rd June according to the report in Exhibit No. 56 Jamini Mullick goes to Mr. K. B. Dutt with reference to subscriptions for making bombs and a place for making them.

Mr. Dutt is said to have written to the Raja of Narajole for a place. Then on the 5th June (Exhibit 56) we find that Mr. K. B. Dutt had sanctioned Rs. 3,000 for manufacturing bombs.

Then on the 8th June (Exhibit 56) we find Jamini Mullick saying that "K. B. Dutt, Barrister, sent Annada Charan Pal to the Raja of Narajole for the house, but as the Raja's house at Narajole has been searched the Raja has got frightened and does not agree to give his house at Gope."

The Raja's house at Narajole at this time had not been searched nor is there any reason to suppose that at the time he believed it was likely to be searched. Next, under the same date we find a list of subscriptions for making bombs. The list is headed by Mr. K. B. Dutt with Rs. 100, but in Exhibit S. S. (the informer's proof prepared by Lal Mohun) Lal Mohun has struck out Mr. Dutt's name. The 3rd subscription is Pleaders' Bar Library Rs. 400 (money raised by selling *vakalatnamas*)—this, of course, means the Bar Association at Midnapore from funds of the Association. The learned Advocate-General has described the Midnapore Pleaders as unscrupulous. But even if that were so—a term I should hesitate to apply to gentlemen belonging to an honourable profession—it has not been suggested that they are fools.

That they were going to pay money out of their Association funds for making bombs when each and every Pleader would be aware of the fact and the risk of detection would be great is not probable.

Then, on the 11th of June (Exhibit 56) there is said to have been a meeting at the house of the Raja of Mahisadal. There were 45 or 46 persons present at that meeting. The name of the informer appeared originally as being present at that meeting, but his name has been struck out apparently at the time that the report was written. Against the informer's name the Moulvi has written "stet."

It is a fact not unworthy of notice that neither in Exhibit 56 nor in Exhibit G does the name of the Raja's Manager, Nalini Kanta Sen Gupta, appear as one of those who were at the meeting. But a far more significant fact is that the presence of the Raja of Mahisadal's Manager at the meeting of the 11th June is not given in the reports alleged to have been given by the informer until the 26th August, the very last report said to have been given by the informer. That report is in these terms:

"Raja's Ammuktear Nalini Kanta Sen attended the secret meeting which was held in the lodging of Mahisadal on 11th June 1908."

Why such a report should have been given on the 26th August or why the informer's mind on that day was fixed on the meeting of the 11th June and the presence of the Raja's Manager at that meeting one cannot imagine.

At the meeting there is singing and speech-making. Gosto Behari Chandra and Nikunja Maiti sang together to a harmonium accompaniment a Swadeshi song. Then a speech about bombs was delivered.

Meetings advocating the making of bombs one would presume are held in secret. Doubtless this meeting at the Raja of Mahisadal's house is described in the informer's reports (Exhibit 56) as "secret." But how far does a meeting at which there is singing, playing on the harmonium and speech making answer one's ideas of a secret meeting? Besides, where were the Police and the *spies* of the Police officers that they did not hear of this meeting which must have been noticed by everybody in the neighbourhood? Lal Mohun in his evidence

here stated "my *spy* generally kept me informed of the doings of the Swadeshi extremists from time to time." But as at many of these secret meetings there was music and a large gathering it seems remarkable that the *spies* were not able to detect the fact that the meetings were held.

Next, we come to the information of the 12th June (Exhibit 56).

Deb Das Karan is said to have reported that "he went to Mr. K. B. Dutt, Barrister, and has made him write and post a letter to Surendra Babu in (or of) Calcutta to send bombs. . . . . The moderate and extremists have all united."

We find the same thing set out in Exhibit S. S. at page 17. That Surendra Babu of Calcutta would to any Bengali mean Babu Surendra Nath Banerjee is clear from the evidence. We also know that at the Conference in December 1907 Surendra Babu and Mr. Dutt were two of the small remnant that remained as "Moderates" and it is also in evidence that Surendra Babu and Mr. K. B. Dutt are on terms of intimate friendship. In Exhibit S. S. where the passage occurs I find the remark by Lal Mohun "omit." When the Moulvi was cross-examined as to this passage he said "Babu Surendra Nath Banerjee is not Surendra Babu of Calcutta, but Surendra Babu of Barrackpore." But no person that has lived in Bengal would accept such a statement; although it is true that Surendra Babu does in fact live at Barrackpore but the whole of his public life has been associated with Calcutta.

Then much reliance has been placed on the statement in Exhibit O. O. O. "Suren Babu not known." The Moulvi's evidence is that subesquent inquiries were made by the Police in Calcutta and they found out that it was another man altogether. But curiously his name also happens to be Surendra Nath Banerjee.

Mr. Plowden did not appear to know anything about this inquiry at all.

I think there can be little doubt that in the first instance at any rate it was intended to implicate Babu Surendra Nath Banerjee of the *Bengali* newspaper. Then we find under the same date "Deb Das Karan will settle (take on lease) the two storied house of Paramananda Shaha to be let on hire for manufacturing bombs. There will be four houses for manufacturing bombs. If any one gives information to the Police and gets it detected the remaining three will serve the purpose." The next infromation to which it is necessary to call attention is the one reported on the 14th June (Exhibit 56). This gives the return of Santosh and his drilling of the boys who become "excited." Then on the 15th June there was a meeting, said to have been intended to be held at the house of the Maharaja of Mourbhunj but the meeting was postponed as Deb Das Karan could not attend owing to the rain.

On the 16th of June (Exhibit 56) the informer was informed that in accordance with the letter written by Mr. K. B. Dutt a bomb had been forwarded from Calcutta and it was being kept as a sample by Deb Das. I very much doubt whether bombs are made from a sample. Moreover, the young men who had returned to Midnapore after learning the art of bomb-making at the Anushilan Samiti in Calcutta could hardly require a sample before setting to work. Then on the 17th June (Exhibit No. 56) we find "on the day fixed Rash Behary Ghose will come from Calcutta to conduct the case against Satyendra Bose and others. He will not charge any fees for conducting the case." This, of course, is intended to implicate Dr. Rash Behary Ghose, the eminent Vakil, with Stayendra by showing that he was on such terms with Satyendra that he would come and defend him without fees. Every one in these Courts is aware that Dr. Ghose does not practise in the Criminal Courts.

Next we come to the 18th June (Exhibit 56). This purports to relate the story of the first production of the bomb by Surendra Nath Mookerjee at the house of Rajabala, a prostitute, where in the presence of the informer, Nikunja Maiti and Jnanendra Sircar, the bomb was placed on the bed of the prostitute and supported by two pillows. This is said to have taken place some time after 10 o'clock at night and it is evident both from Exhibit 56 and Exhibit S. S. and Exhibit G that the prostitute was present.

The discussion that took place at the prostitute's house before the arrival of Surendra Nath with the bomb was "whether India might be free some time or other." The hour is somewhere after 10 o'clock at night.

I doubt whether the house of a woman of the town is either the place or a late hour of the night the time where these young men would meet to discuss "whether India might be free some time or other." On this incident as set out in Rakhal's proof as drawn up by Lal Mohun (Exhibit S. S.) there is one matter worth noting.

The Moulvi and Asadulla have both sworn in this suit that after the end of May all the reports of Rakhal, the informer, which were drawn up by Asadulla were drawn up by him at his own house and that the informer on those occasions never come to the Moulvi's house. This the Moulvi says he did in order to avoid the public finding out the employment of Rakhal.

Now the account of the meeting at Rajabala prsostitute's house is drawn up by Asadulla and signed, so is the report on the day previous. But look at Exhibit S. S. and see how far the Moulvi and Asadulla's story is supported by that statement. The informer there says as taken down by Lal Mohun: "At about 10 P. M. (on the 17th June) when returning home from the house of Moulvi Saheb, Deputy Superintendent of Police, I saw Jnanendra Nath Sircar, brother of Jogendra Nath Sircar sitting at my door." The informer then proceeds to relate how he went with Jnanedra to Rajabala's.

It is certainly very curious that if the Moulvi and Asadulla's evidence is true that the informer should say he was coming from the Moulvi's house and that this fact was to appear in the proof of the informer upon which he was to be examined by Counsel in Court.

Under the entry of the 18th June in Exhibit 56 there also purports to be a description of the wrecking of the train of the Lieutenant-Governor. This part of the alleged information is, however, omitted from Exhibit S. S. (Rakhal's proof). The report states that the information as to the date of the journey of the Lieutenant-Governor was furnished by the elder brother of Khagendra Nath Banerjee (one of the plaintiffs in the other suits) who was employed in the office of the Lieutenant-Governor.

It appears from Khagendra's evidence that none of his brothers is so employed. Between the 19th and 29th June there are no reports made by Asadulla as it is said he was ill. The Moulvi says that during this time he recorded Rakhal's information in his confidential diary. That diary has not been produced.

Exhibit G, however, does give reports of two meetings—one said to have been held at Kamini prostitute's on 23rd June and the other held at the house of Trailokya Nath Paul on the 28th June. At the first of these two meetings Satyendra Nath Bose was not only present but he was the speaker at the meeting and at the second meeting Jogjiban Ghose was present. At that time both Satyendra and Jogjiban were out of jail. But one naturally asks what was the first informer, Abdur Rahman, doing that he did not find out about these two meetings? He was then drawing his pay as a *spy* and according to his evidence he was on such terms with Satyendra and his party that they had supplied him with revolvers, given him a letter to get a bomb in Calcutta, etc. Moreover, according to Rahman the first thing that Jogjiban did when he came out of jail on the 18th July was to try and get Rahman to lend his house for the preparation of bombs. Hence Exhibit IX.

On the 29th June (Exhibit 56) the informer reports that Jamini Mullick said to him, "S. P. Sinha, Barrister, was engaged by the Government in the case against Khudiram and Mr. Cotton, Barrister, was engaged on behalf of Khudi Ram and that S. P. Sinha wants to have Khudiram hanged while Cotton says if Khudiram be hanged there would be disturbance in India."

Mr. Sinha did not appear in the case against Khudiram and Mr. Cotton had left India some years before.

Then on the 30th June (Exhibit 56) the informer relates an account of a meeting at which the bomb was produced. In Exhibit S. S. (the informer's proof) the informer says nothing about a bomb being produced. It is suggested by Counsel on behalf of the defendants that the informer has made a mistake as to dates in this report and that he was only relating on hearsay what he had been told. I may pass over the report of the 1st July stating that a wealthy *zamindar*, Iswar Chandra Chowdhury, had said, "Now our work lies in killing the Firinghees" and subscribing Rs. 20 towards the manufacture

of bombs and the report of the 2nd July stating that Santosh drilled the boys of Swadeshi Samiti.

Then we come to the report of the meeting of the 3rd July (Exhibit 55) said to have been held at the house of Upendra Nath Maiti, the leader of the Bar at Midnapore.

This meeting is called in Exhibit S. S. "a secret meeting." There were 37 people present at the meeting. There was again singing to the accompaniment of a harmonium and speech making. Then it is reported, "A photo of Magistrate's house was shown." The defendant's Counsel rely much on that statement. But at that date Hem Chandra Das's album which contained a photograph of Mr. Weston's house had been exhibited in the Alipore case and it is probable that the Police at Midnapore had been informed of this fact. The next statement, said to have been made by Rash Behari Bose, is, "my friend Hem Chandra Das has given me these photos and he has also taught me to make revolvers. I cannot start a workshop for want of funds." The suggestion that in a few days Hem Chandra Das had taught Rash Behary Bose to "make revolvers" is, of course, absurd. The suggestion by Mr. Norton that what the report means is that Hem Chandra Das had taught Rash Behari to clean up rusty revolvers does not seem probable as it is not likely that Rash Behari would want to open a workshop for that purpose.

At this meeting on the 3rd July at Upendra Maiti's house the bomb found at the plaintiff's house on the 8th July is alleged to have been produced. Therefore, the meeting is an essential link in the chain of reports. Now the name of Upendra Nath Maiti does not appear in the earlier reports nor does it appear in the later reports. I take the following remarks from the judgment of the Chief Justice and Mookerjee, J., on the hearing of the appeal in the bomb conspiracy case:—"But Upendra Maiti is apparently a man of excellent character and high standing at Midnapore and though originally placed before the Magistrate as one of the conspirators, the Advocate General, Mr. Sinha, withdrew the charge against him. The Additional Sessions Judge in his judgment has stated that in his belief Upendra Maiti has not done and said what was alleged against him—and before us the Advocate-General, Mr. Gregory, has conceded that the story of the meeting at Upendra Maiti's house must be discarded as false."

Mr. Gregory stated before me that he made no such admission at all. All that he says he did was to state that if he was asked what portion of his case he would abandon he said he would abandon the case against Upendra Maiti. I think Mr. Gregory's recollection is at fault. The case against Upendra Maiti had been abandoned by Mr. Sinha months before. The learned Judges who heard the appeal are clear in their recollection that Mr. Gregory made this statement and are supported by their judgment as to which no exception was taken until the hearing of this present suit.

Of course, Mr. Gregory's statement cannot bind the defendants in this suit. But the Moulvi was present in Court whilst the appeal was being heard and Mr. Gregory's statement must have been made in his presence. If the meeting at Upendra Maiti's did not in fact take place it creates such a break in the chain of the reports as almost to destroy the story.

Then the defendants rely much on the statement in the report of the 5th July (Exhibit 56) as to the list of the witnesses in the case against Jogjiban under the Arms Act. But such list, if known to anybody, would be known to the Police. Then we come to the report of the 7th July (Exhibit 56) when the Raja of Narajole is said to have come to Jamini Mallick's to see the bomb. Now what was the Raja coming to see?—to all outward appearances a ball wrapped up in jute.

This story does not seem very probable but when I turn to Exhibit G. which was drawn up by Asadulla, Head Constable, to enable the informer to get up his evidence, I find that the date of 7th July is written and then a blank space is left so that the incidents of the 7th July may be written in subsequently. But this is not all. For when I go to the proof of the informer drawn up by Lal Mohun (Exhibit S. S.) I find in the vernacular that report of the incidents of the 7th July as originally written were different to those contained in Exhibit 56 for the same date. But subsequently the vernacular of Exhibit S. S. has been considerably altered in a different ink to

bring the story into line with that set out in Exhibit 56.

Before proceeding to consider the application for the search warrant of the plaintiff's house on the evening of the 7th July I will refer to the transfer of Ashutosh from Midnapore to Mozufferpur on the 3rd July.

Ashutosh was a mail clerk in the Midnapore Post Office and was transferred on six hours' notice to Mozufferpur by order communicated by telegram from the Post Master-General. That the the transfer took place at the instance of Mr. Weston cannot be doubted. The only question is whether Mr Weston took action on the representation of the Moulvi and Lal Mohun or on his own initiative.

Before the Sessions Judge Mr. Weston stated, "The Police in charge of this case suggested to me that Ashu should be transferred. I took action on that representation."

Mr. Cornish's evidence is to the same effect.

But here Mr. Weston goes back from the statement he made in the Sessions Court and says that he asked Mr. Plowden to get Ashu transferred as letters sent by him got lost in the post.

If it was suspected that Ashutosh was stealing letters at Midnapore it hardly seems a good reason to transfer him to another post office on six hours' notice where he could do the same.

Moreover, the request for Ashutosh's transfer coming through the Criminal Investigation Department suggests that the reason given by Mr. Weston before the Sessions Court and Mr. Cornish in his evidence here is the true one.

On the 5th July, Noresh, Sub-Inspector, and Mohendra, Sub-Inspector, called at the plaintiff's house to inquire about Ashu. Noresh says the Moulvi told him to find out where Ashu was. Santosh says that Noresh came and inquired about Ashu as he said he wanted to deposit money in the Post Office Savings Bank and he wanted Ashu to tell him the rules.

Santosh gave the Police officers a *chillum* of tobacco which they sat and smoked in the plaintiff's *baitakhannah* within a few feet of the bomb if the informer's story be correct.

I now come to the incidents on the night of the 7th July. On that night the Moulvi applied for and obtained from Mr. Nelson a warrant to search Santosh's house.

It is in dispute whether this application was made with the approval of Mr. Weston. The defendants in their written statements admit that it was so made, but on this suit being called on for hearing Mr. Norton applied for leave to amend the written statements by striking out this admission. The evidence, however, satisfies me that Mr. Weston did know beforehand of the intention to apply for the warrant to search Santosh's house.

Mr. Cornish so stated in his evidence and on the 3rd March (Friday) the Moulvi in cross-examination also so stated. But on the following Tuesday (7th March) he resiled from his previous statement. In my opinion the evidence of the Moulvi given on the 3rd March on this point is the true version.

Then early on the morning of the 8th of July the search party consisting of constables and Military Police under the command of Mr. Brett, Assistant Superintendent of Police, started from the Sub-Inspector's quarters. The party was broken up into two—one party under the command of Mr. Brett proceeding to the plaintiff's house, the other party in charge of Asadulla going to surround Hanumanjee's temple.

On arrival at the plaintiff's house the Military Police surrounded the house and then knocked at the door. After some little delay the door was opened. There has been a good deal of evidence as to how long this delay was. However, in my view of the evidence the delay lasted some minutes, quite long enough to enable Santosh to get rid of the bomb if he knew of its existence and he so desired. It is said that this could not be done because some of the Military Police were posted on the roof of the plaintiff's house before the door was opened. This evidence I do not accept. It is put forward in this Court for the first time. The Subadar, Mr. Wilson, who was in charge of the Military Police and who spoke as to the placing of the Military Police on the roof was not a satisfactory witness. The door being opened the Police

entered with their search witnesses. The Moulvi pointed out Santosh to Mr. Brett. Then the boy Bonomali who had been sleeping either on a *khat* or on the floor beside a *khat* in the *baitakhannah* was immediately placed under guard by the Moulvi.

The plaintiff said that before the search commenced he must have his own witnesses to the search. These were sent for and having arrived the search commenced. Santosh's room was searched first. Certain *Bande Mataram* badges and flags, lists of volunteers and some other papers were found there. Then the rest of the house was searched and lastly the *baitakhannah*. While the *baitakhannah* was being searched neither Mr. Brett nor the plaintiff was present. Asadulla at that time came from the Hanumanjee's temple and was permitted to enter the plaintiff's house. Asadulla's evidence is that as they had been kept waiting so long at the Hanumanjee's temple (about two hours) he came to see why the search party were taking such a long time. He says that Mr. Wilson, the Subadar, searched him before he allowed him to enter the house. This I do not believe. He made the statement voluntarily and not in answer to any question and Mr. Wilson was never asked anything about this in his evidence. Almost immediately after the arrival of Asadulla the bomb was discovered. It is said to have been first seen by a constable Chuni Singh and then by Asadulla. Asadulla ran to Mr. Brett and informed him that something round has been found.

The constable, Chuni Singh, has not been called as a witness in this case.

The bomb was found amongst some loose door frames which were leaning against the wall ; near the door frames was a *palki*.

Now the information of the informer that Asadulla says he recorded on the evening of the 7th July states that " Santosh took the bomb to his *baitakhannah* the doors of which he shut up from inside." It is a remarkable fact, as I have already pointed out, that Exhibit G contains no account of the incident of the 7th July, only the date of the 7th July being written, a blank space being left below to write in the incidents later.

In Exhibit LXXXIIIA, a statement of Rakhal recorded by Mr. Weston on the 22nd August 1908, Rakhal in relating the incidents of the 7th July says he saw Santosh get the bomb from rear the *palki* and when Santosh was taking the bomb back from Jamini Mullick's house the same day he said, "I followed to see where the bomb was put and the same night I gave information to the Police."

Santosh when he saw the bomb said it was a *benari* ball (a ball used in some game) and then a *langota* (that is loin cloth worn when wrestling)—and Santosh wanted to pick up the bomb but he was prevented from doing so.

Then Santosh was arrested. Mr. Brett placed the bomb in his handkerchief and carried it so suspended.

Santosh after the excitement felt thirsty and wanted a drink of water and Mr. Brett took him into the inner apartments to his mother where he was given a drink of water and some refreshment as he had not broken his fast that morning. The old lady took hold of Mr. Brett's hand with which he was holding the bomb and raised the back of it a few times to her forehead. Unfortunately, Mr. Brett at that time did not understand the vernacular and cannot, therefore, say what the old lady said. Mr. Norton suggests that the old lady was performing an act of reverence towards Mr. Brett imploring him to save her son Santosh and that the old lady's story ought not to be accepted. The old lady's story is that she told Mr. Brett that her son was innocent and that she was willing to stake her life on his innocence and if permitted would strike the bomb against her forehead to show that the article was not a dangerous one.

I have no hesitation in accepting the mother's story as to this. Then Santosh was taken away by the Moulvi and Lal Mohun. They went to the Hanumanjee's temple where a short search was conducted by Lal Mohun, after which Santosh was sent to the *thanah*.

Then there is a conflict on the evidence as to whether the Moulvi returned to the plaintiff's house that day. I am of opinion that he did and that the old lady's evidence on this point is substantially accurate. Her story is that in about half an hour after Santosh had been taken away the Moulvi returned and found her in tears. She said that her son was innocent and that this was the second time within a short period that her

house had been searched by the Police. However, she said she was the aunt (*mashi*) of Dr. Rash Behary Ghose and she would lay all the facts of the case before him and see her son righted. She says that upon her mentioning the name of Dr. Rash Behary Ghose the Moulvi said that Dr. Ghose was an old class friend of his own and, therefore, if she was Dr. Ghose's *mashi* she must be his *mashi* also. That all Santosh had got to do would be to follow the advice of the Police, and all would be well—and that he would call the next morning and tell her how to act. The Moulvi denies this interview with the old lady altogether.

I accept not only the fact of the interview but also substantially the old lady's account of what took place. Later, on the 8th of July, other house searches took place. Amongst the houses so searched was that of Jamini Mullick. The bomb was subsequently opened by Major (then Captain) Weinman, I. M. S., who found that the "core consisted of a yellowish brownish powder mixed with shot" and it was then taken by Mr. Brett and handed over in Calcutta to the Chemical Examiner. Major Weinman gave his certificates on the 9th July (Exhibit 36). On the 8th July Santosh was kept at the *thanah hajut*. Santosh's evidence is that there the Police tried to induce him to confess both on the night of the 8th July and the morning of the 9th July.

The mother's evidence is that on the morning of the 8th July the Moulvi saw her and latter she visited Santosh at the *thanah*.

It is said that in consequence of this Santosh was put up before Mr. Nelson as a confessing prisoner it being hoped that the mother had induced him to confess.

Now what do we find when Santosh is put up before Mr. Nelson, Joint Magistrate, on the 9th July? Mr. Nelson denies that Santosh was put up as a confessing prisoner, but what do the records of the Court show?

First of all, Mr. Nelson had handed to him by a Police officer, the Court Inspector Rash Behari Sen, a form headed "Form for recording the confession of an accused person." He then proceeds to put to Santosh the question that is usually put by a Magistrate to a confessing prisoner:

"*Q.*—Do you understand that I am a Magistrate and that any statement you may make may be used in evidence.

A.—Yes."

Santosh's statement so far from making a confession stated that the article found on the 8th July was not a bomb.

Mr. Nelson's order sheet for 9th July is also very instructive:—

"Date. Order.

9 7-08. Santosh Das makes no confession."

Mr. Nelson's memory is, I am sure, at fault in stating that Santosh was not produced before him on the 9th July as a confessing prisoner. The documents seem to me to be absolutely conclusive to the contrary. There is also the evidence of Lackhi Narain Sarkar, Mr. Nelson's bench clerk, who has been called as a witness for the defence in this case. He states that on one occasion Santosh was produced before Mr. Nelson in Court as a confessing prisoner and that he was placed at the side of the Magistsate's table to have his confession recorded. It is not suggested that this could be on any other occasion except the 9th July. The Court Inspector, Rash Behari Sen, though cited as a witness and present in the Court premises has not been called as a witness.

But if Santosh was produced before the Court on the 9th July as a confessing prisoner, why was it supposed that on that day he would make a confession? The only reasons that can be suggestd are that after the visits of the Police to Santosh and his mother and the visit of the mother to the son at the *thanah* it was hoped that Santosh would make the desired confession.

On the 9th July, Mr. Nelson remanded Santosh to jail till the 23rd of July.

Now it is alleged by the plaintiff that the bomb was placed in his house by the boy Bonomali at the instigation of the Moulvi.

Bonomali's story is that on a day just at the end of June a constable Kartick Singh came and took him to the house of the Moulvi where the Moulvi asked him if he was willing to enter his service and that Bonomali expressed his willingness to do so and the Moulvi said he would send for him when he wanted him. Bonomali's story is that on the 7th July the Moulvi again sent for him and the Moulvi gave him the bomb. Bonomali says that the Moulv

directed a constable to accompany him back to the plaintiff's house. He says he was unable to place the bomb in Santosh's room as requested as Santosh was occupying his room, but he placed it in the *baithkhannah* on a loose door frame that was resting against the wall and then informed the constable who left. Next morning the search of the plaintiff's house took place.

Bonomali says that after the search he went to his mother's house and subsequently was taken by a constable to Santragachi where the constable left him. There he met a boy who took him to a place called Podra where he entered into service of one Kally Kristo Bose. There he says he remained for about three months, and then returned to Midnapore at the time of the *puias*. The defendants deny the story altogether. They say that there is only one constable named Kartick Singh in Midnapore District and he was transferred from Midnapore Town to Ramjibanpore on the 24th May, 1908, and there he remained until long after the end of June. The boy Bonomali identified the witness constable Kartick Singh as the man who took him to the Moulvi—so there is no doubt as to the constable the boy means. The Moulvi in his evidence before me at first tried to get out of the story told by Bonomali by stating that from the 27th June he was away from Midnapore undergoing medical treatment in Calcutta. That story has been conclusively demonstrated to be incorrect.

Is the evidence sufficient, therefore, to show that the constable Kartick was in Midnapore at the end of June? The evidence shows that one constable Kartick was transferred to Ramjibanpore on the 24th May. But Mr. Dutt suggests this is a different Kartick.

The grounds he puts this suggestion on are, first, why should Bonomali say that Kartick out of the 600 constables in Midnapore District took him to the Moulvi if Kartick was not in fact in Midnapore? Next it appears from the District Order Book that a constable named Kartick Singh was censured for keeping a pistol without license. This ought, if it refers to the Kartick Singh at Ramjibanpore, to have been communicated to the Police Station at Ramjibanpore for communication to Kartick there. It appears from the evidence of the Police officers from Ramjibanpore that no such censure was communicated to them and, therefore, Mr. Dutt says that the censure does not relate to the Kartick Singh at Ramjibanpore but to some other Kartick. Then, before the Committing Magistrate the Moulvi in cross-examination stated:—

"I have no constable by the name of Kartick. There was one of that name at the *thanah*. I don't remember if he was there in July. I had to have him removed to the *thanah* as he used to give out our secrets to the Extremists. I do not know if he was dismissed but he was reported against and sent away. I do not know where he is now. I do not know what Kartick's duties were. He was not working under me. I never sent Kartick constable to bring the boy to my house. He never brought the boy to my house." In the Sessions Court the defence summoned Kartick as a witness for the defence. The prosecution did not call Kartick, neither did the defence. The case was closed. The defence Counsel had finished their addresses when the unusual procedure was adopted by the Sessions Judge at the suggestion of the Crown Counsel of calling not only Kartick as a witness but also two other witnesses, Mon Mohan Roy and Mahomed Amir Khan, to corroborate him.

The Sessions Judge then allowed the defence to call a witness Gyanda Nandan Sen and also to recall a witness Kishoripati Rai.

Kishori deposed that the reason Kartick had been summoned as a witness was because Kishori had met him at his (Kishori's) uncle's, an Honorary Magistrate, where Kartick told him he had taken the boy to the Moulvi and that after Kartick had been summoned as a witness for the defence at Sessions he went to see Kishori. Kishori said Kartick told him then that as he was in Police service he could not speak against the Police. That Kartick on coming to Midnapore after receiving his summons did go to see Kishori is not denied by Kartick in this Court although Kishori was not one of the Pleaders engaged for the defence.

The evidence seems to establish that Bonomali's story about going to Kali Bose's at Podra after the search is true. But, after all, the whole of the story as to whether the

Moulvi had the bomb introduced into the plaintiff's house hinges on the fact whether Kartick took the boy Bonomali to the Moulvi as alleged. Doubtless, as I have pointed out, there are some circumstances that may suggest that the Kartick that was transferred to Ramjibanpore on the 24th May 1908, is not the Kartick referred to by Bonomali.

The witness Kartick has denied that he was transferred for misconduct as alleged by the Moulvi before the Committing Magistrate.

There was also the desire of the Moulvi in his evidence to show that he was absent from Midnapore at the time it was said that Kartick took Bonomali to him but which had to be abandoned.

Then Mr. Dutt complained that none of the orders relating to the constable Kartick which were passed by Mr. Cornish were put to Mr. Cornish although he gave evidence before me, but that they have been proved by a subordinate officer who was not even stationed at Midnapore at the time the orders were passed.

The onus, however, of proving that Kartick took Bonomali to the Moulvi is on the plaintiff. There may be some matters of suspicion on the evidence. I am of opinion, however, that the plaintiff has not discharged the onus that is on him. As I have already said that the whole of the story of the bomb having been placed in the plaintiff's house at the instigation of the Moulvi rests on the plaintiff being able to prove that Kartick took Bonomali to the Moulvi. This the plaintiff has not proved. On the evidence before me, I am unable to say who placed the bomb in the plaintiff's house but in my opinion Santosh did not.

I shall now deal very shortly with the rest of the reports said to have been given by the informer after the 8th of July.

Now one would have thought, after the searches on the 8th of July, the conspirators would be somewhat careful as to their movements, for if the story related by Rakhal be true they must have thought that the Police had got information as to the conspiracy. But one finds on the 10th July (Exhibit 56) there is a meeting of 31 persons at the house of Mr. Birendra Nath Dey of the Indian Civil Service.

Again Gosto Behary is there singing to the harmonium. The song he sings is "the song of the 3rd July." If the meeting said to have been held at Upendra Maiti's on the 3rd July did not take place, as both the Sessions Judge and the High Court appeal held, "the song of the 3rd July" is a somewhat serious difficulty. For if the song was not in fact sung on the 3rd of July it may well be argued that it was not sung on the 10th July.

Then speeches against the Firingees and in favour of bombs are delivered. All this takes place between 6 and 7 in the evening.

Again, on the 12th July (Exhibit 56) there is a report of a meeting at the house of Jamini Mullick at which 42 persons were present.

Gosto Behari again sings a seditious song to the accompaniment of a harmonium. Then there are speeches against the Firingees and about bombs. All this takes place between 11 and 12 in the morning. One cannot help asking, what were the Police of Midnapore doing if they did not find any trace of these meetings held in the day time at the houses of leading citizens? Moreover, with regard to Jamini Mullick at whose house this meeting is alleged to have been held it has to be remembered that his house had been searched on the 8th of July. It was, therefore, highly improbable that he would hold a meeting at his house in broad daylight four days afterwards at which there would be singing and speech-making. There is also a significant fact with regard to Jamini Mullick that it is common ground that on the 9th July, the day after his house was searched, a meeting took place between him and the Moulvi at the latter's house. Jamini's account of the meeting at the Moulvi's is that the Moulvi sent for him and demanded Rs. 10,000 and said it was better to pay Rs. 10,000 now than spend a lakh hereafter. The Moulvi's account is that Jamini came and asked him why his house had been searched and the Moulvi informed him he could not give him the reasons as it was by the Magistrate's order. During the cross examination of Jamini by Mr. Garth he put it to him that he (Jamini) had told Dr. Bankim Chandra Ghose that the story about the Moulvi demanding Rs. 10,000 was untrue and that this interview between Dr. Bankim and Jamini was overheard by Sub-Inspector Noresh. Both Dr. Bankim and Sub-Inspector

PEARY MOHAN DAS v. WESTON.

Noresh have been examined here as witnesses on behalf of the defendants. Not a single question was put to either of them with regard to the alleged interview between Jamini and Dr. Bankim or of Noresh overhearing the conversation. I am inclined to think that Jamini's account of the interview he had with the Moulvi is the true one. But whichever account one accepts of the interview it is highly improbable that Jamini would hold a large meeting at his house on the 12th July. Then on the 13th of July (Exhibit 56) the informer reports that Jamini has sent a letter by post to his nephew at 4 P. M., with envelope and paper on which was written *Bande Mataram*. This letter asked his nephew to keep ready "gunpowder" and other things necessery for preparation of bombs.

Space forbids me to do more than to deal shortly with the rest of the alleged reports of the informer. But the report of the 17th July cannot be passed over. The portion I refer to is as follows:—"Surendra Mookerjee prepares bombs, etc. The one he made on the terrace of Hanumanjee's temple exploded when being wrapped up. He has thrown that off (away) and is preparing a new one. He will prepare it within 4 or 5 days." One may doubt whether Surendra, the temple having been searched on the 8th July, was likely to be making bombs on the terrace of the temple on the 17th July. But the story that the bomb exploded whilst Surendra was wrapping it up and, therefore, he threw away the remnant is so absurd that it is impossible to ask any one to believe it. The bomb that was subsequently found at the Dutts' record-house is said to have been substituted by Surendra in place of the bomb that exploded.

On examination by the Chemical Examiner this bomb was proved to be of a highly dangerous character. If the bomb had exploded in Surendra's hand, there can be no doubt that not only would there be no part of the bomb left for him to "throw away" but that Surendra must have been terribly injured. But so far from being injured we find Surendra industriously working away at the new bomb, so much so that on the 19th July at 2 P. M. Surendra showed the informer on the terrace of the temple the new bomb "half prepared." Then at a meeting at Saroda Dutt's on the 23rd July at 9-30 A.M. Surendra produces the new bomb which was ultimately found in the record-room of the Dutts on the 31st July.

Between the 23rd July and the 30th July that bomb was going about from place to place. On the 30th July (Exhibit 56) the informer reportes: "Last night Govinda Mookerjee and Nikunja Maiti went to kill the Magistrate, the Deputy Superintendent of Police and the Jamadar Asadulla with the bomb prepared by Surendra. But their work was unsuccessful. This morning at 7 or 8 A.M., Nikunja Maiti told me these words at the house of Nishi Goalini where Rajabala prostitute kept by Nikunja Maiti lives. I shall cause to be seized to-day the bomb prepared by Surendra Mookerjee which Baroda Dutt has kept."

This again seems to be improbable. That Govinda and Nikunja were likely to find the Magistrate, the Moulvi and Asadulla together at night so as to be able to kill them with one bomb is improbable. It may be noticed for what it is worth that Exhibit G which was prepared by Asadulla to assist the informer in giving his evidence states that it was Nikunja Maiti alone who went with the bomb to kill the Magistrate and the Moulvi. Exhibit S. S, the proof of Rakhal for the Crown brief prepared by Lal Mohun, states that Nikunja Maiti took the bomb with intent to kill the Magistrate only. This closes Rakhal's reports so far as we have the originals. The last words written by the informer at the end of his report of the 30th July are, "All these are false" (Everything that I have written down is false).

At what time the informer wrote these words it is impossible to say. I must not, however, omit to notice the report of the 16th July (Exhibit 56) as a statement in this report is much relied on by Mr. Norton. The statement is "That the informer has learnt from Jamini that Deb Dass Karan has kept the bomb in a stone built room in a tank or excavation in the house of Parmananda Shaha." It appears that Mr. Macpherson discovered that on the land adjoining Parmanand's house there is a well or tank hewn out of the rock. Mr. Norton says that this is strong corroboration of the informer's report. I do not agree in this view. On the 16th July 1908, it is improbable that there was no water in the well or tank. It is not likely that Deb Dass Karan would keep

his bomb which was constantly being brought out in water. On the 31st July a search took place at the house of Baroda and Saroda Dutt resulting in the discovery of the bomb in a record-room at their premises. This was followed by the arrest of the second batch of prisoners including Surendra Nath Mookerjee. The record-room in which the bomb was found was used for storing the old *zemindari* papers and was very rarely opened. It was in the possession of Madhu Sudan Dutt, the common manager of their joint estate. When the Police had broken open the lock of the door it was found that the floor was strewn with old *zemindari* papers. The room was thick with dust. In fact so much so that Mr. Cornish states that although he went into the room he came out because the dust was so thick. Now what would strike any man going to search a room in this condition in the early morning of the 31st July for an article which had not been there on the night of the 29th July? I should have thought, obviously, to see if there were any marks in the dust to show if any one had been into the room recently or of any of the papers having been recently disturbed. But no such precautions were taken. Lal Mohun began to shovel the papers on the floor from one side of the room to the other with a "piece of timber." At a spot not far from a window, in which there was a broken bar, Lal Mohun came across some old books of account, one placed across the top of the others separated into two heaps, and lifting the top book off with his hand he discovered the bomb there. It certainly was fortunate for Lal Mohun that he ceased shovelling the papers just in time to find the bomb, otherwise the consequences must have been disastrous to him. One would certainly have thought when Lal Mohun came to the books, if the story of the finding of the bomb is true, that Lal Mohun would have noticed that these books had been recently disturbed and called Mr. Cornish's or some of the search witnesses' attention to the fact. I must confess for my own part that I feel a doubt whether an experienced Police officer would set about a search of a room in which he expects he may find a bomb hidden by shovelling the papers on the floor from one side to the other with a piece of timber.

Mr. Cornish in his evidence in this Court stated: "when I saw the window with the broken bar it did strike me that the bomb had been put in from outside. The bomb was found near the window." The evidence is very suspicious, but I cannot say that it is such that I can find that the bomb was placed in the record room by the Police.

In the judgment on appeal in the criminal case I find the following remarks: "The Advocate-General (that is Mr. Gregory) has stated before us that he placed no reliance on this bomb and has refrained from discussing its discovery. But if, as we hold, there is strong reason to doubt the genuineness of that discovery it must affect our attitude towards the evidence which relates to the bomb in Peary's house." Mr. Gregory now stated that he made no such statement at all. All I can say, if that be so, is that it is exceedingly unfortunate that Counsel should allow this statement to go unchallenged for years.

The persons arrested on the 31st July were produced before Mr. Nelson on the 1st August and remanded by him until the 15th August.

It might have been expected that after what had happened on the 31st July the rest of the conspirators who had not been arrested would now at any rate for some little time remain quiet.

But on the 1st August, the informer reports again that "Surendra Bose, Sarat Chandra Patra, Jnannedra Sarkar went this day to Deb Dass to bring the bomb to kill the Magistrate." Doubtless the informer says they did not get it.

In passing, I may mention that from the 1st August the original reports of the informer are not produced but only documents stated to be translations of the same. On the 2nd of August there is a report of a meeting in the drawing room of Baroda and Saroda who had been arrested on the 31st July. There was a discussion about bombs and picric acid was produced. On the 2nd August there is a long report about bombs.

On the 4th and 5th August the informer again reports. On the 6th August the informer reports about a bomb which Rash Behari Bose kept in the cash box of Rhidoy Suri, a wine merchant, and which he saw the wine merchant give to Rash Behari who having got it tied it to his

waist and rode away on his bicycle. On the 7th August there is another report. Also on the 8th August, the 9th August, the 10th August when Rash Behari Bose produces his bomb. Again, on the 11th, 13th and 16th, the informer reports. On the 17th August the informer reports that Jamini Mullick produced from his pocket a bomb saying, "see I am always keeping it with me, saying this he kept it back in his pocket and went away." On the 18th of August again there is a long report. On the 20th August there is a meeting about the establishment of a bomb factory and the preparation of bombs. On the 21st August there is another report. Also, on the 25th August, Jamini is reported to have said that he had sent to Calcutta for 40 bombs. And on the 26th August comes the last report, in some ways the most extraordinary. It says "Raja's Ammuktear Nalini Kanto Sen attended the secret meeting which was held in the lodging of Mahisadal on 11th June 1903."

Why on the 26th August should the informer make such a report of his own motion does not appear.

On the 26th August the last batch of warrants were applied for and on the 28th August the third batch were arrested.

Before proceeding further, it will be convenient to consider what are the provisions that the Legislature in its wisdom has thought fit to impose as to information to the Police and investigation by the Police of alleged offences.

These are contained in Part V, Chapter XIV of the Code of Criminal Procedure. Section 154 enacts: "Every information relating to the commission of a cognizable offence if given orally to an officer in charge of a Police Station shall be reduced to writing by him or under his direction and be read over to the informant and every such information whether given in writing or reduced to writing as aforesaid shall be signed by the person giving it and the substance thereof shall be entered in a book to be kept by such officer in such form as the Local Government may prescribe in that behalf."

The first information is the basis upon which an investigation under Chapter XIV of the Code of Criminal Procedure commences.

The careful and accurate record of the first information has always been considered as a matter of the highest importance by the Courts in India, the object of the first information being to show what was the manner in which the occurrence was related when the case was first started. It is really not necessary to quote any authority in support of this statement which is clearly deducible from the words of the section itself.

If authority, however, were required it would be sufficient for me to rely on the judgment of Prinsep and Henderson, JJ., in the case of *Emperor* v. *Kampu Kuki* (3). "Such a practice," say the learned Judges, "is altogether contrary to section 154 of the Code of Criminal Procedure. The first information if recorded as directed by section 154 at the time that it is made is of considerable value at the trial because it shows on what materials the investigation commenced and what was the story then told. Any statement recorded as in this case several days (in fact in that case it was four days) after the commencement of the investigation and after there had been some development is not only no first information but has very little or no value at all as the original story because it can be made to fit into the case as then developed. No one would accept such a statement as reliable in its details after the lapse of time even if it were admissible in evidence." What do we find in this case? No first information was recorded between the 8th of July and the 7th of September.

The Moulvi says this was not done as "we don't do that in conspiracy cases." He, however, admits that he is well aware of the provisions of the law set out in section 154. In these circumstances, the explanation that "we don't do that in Conspiracy cases" hardly seem sufficient.

Nor is there any reason to believe that the provisions of the law as to the recording of first information are set aside by the Police in a particular class of cases.

The first information filed by the Moulvi on the 7th of September came into being in the following manner. On the 3rd of September the Inspector-General of Police (Mr. Morshead) accompanied by the Deputy

(3) 11 C. W. N. 554 at p. 556; 6 Cr. L. J. 86.

Inspector-General (Mr. Plowden) visited Midnapore. They noticed that no first information had been filed. So it is arranged that a first information should be drawn up in Calcutta. Accordingly, on Mr. Plowden's instructions, Rai Ram Saday Mookerjee Bahadur of the C. I. D. who according to Mr. Plowden has had great experience in drawing up first information of this nature drew up the first information, it then passed through Mr. Plowden's hands, then Mr. Morshead's and was ultimately settled by an attorney, Mr. Withal. That a document drawn up like this is a proper first information within section 154 cannot be suggested for one moment.

What the law requires is not a first information drawn up by a Police officer (however much experience he may have had in drawing up first information of this nature) and finally settled by an attorney but the statement of the person himself giving the first information.

As the first information can be used in evidence under sections 157 and 158 of the Evidence Act to corroborate or impeach the testimony of the person lodging the first information it will be seen how valueless the document becomes if the first information is drawn up by some person other than the proper informant. One example of this from the first information filed on the 7th September must suffice though this is not the only one that might be drawn:

"The following are some of the important places where the members of the said society used to meet and conspire together for the above purposes and other unlawful objects. . . . . .

At the premises of the Raja of Mourbhunj Bakshibazar Midnapore."

There is nothing in the informer's reports giving the house of the Maharaja of Mourbhunj as a place where the conspirators used to meet and conspire although the informer does mention an intended meeting at the Maharaja's premises which was put off. Moreover, the house of the Maharaja is not in Bakshibazar.

The Moulvi says this statement in the first information is a mistake. On the other hand, Mr. Plowden says the first information having been gone through so carefully by himself, Mr. Morshead and Mr. Withal with the information which had been sent to the C. I. D. that the statement must have been taken from that information. Which of the two statements is correct it is impossible to state. If the provisions of the law had been observed, such a state of things could never have happened. The first information drawn up by the C. I. D. implicated 154 persons ranging as has been said from 'Raja to Beggar'!

I can only assume that Mr. Withal the attorney settled the first information in ignorance of the provisions of the law.

The next section of the Code of Criminal Procedure that it is necessary to refer to is section 172:

"(1) Every Police officer making an investigation under this Chapter shall day by day enter his proceeding in the investigation in a diary setting forth the time at which information reached him, the time at which he began and closed his investigation, the place or places visited by him and the statement of the circumstances ascertained through his investigation." The second sub-section of the same section authorises any Criminal Court to send for the diary and to use the same to aid it in the inquiry or trial. The object of the special diaries under section 172 (which are commonly called 'case diaries') has been well expressed by Edge, C. J., in *Queen-Empress v. Mannu* (4): "The early stages of investigation which follow on the commission of a crime must necessarily in the vast majority of cases be left to the Police and until the honesty, the capacity, the discretion and judgment of the Police can be thoroughly trusted it is necessary for the protection of the public against criminals, for the vindication of the law and for the protection of those who are charged with having committed a criminal offence that the Magistrate or Judge before whom the case is for investigation or for trial should have the means of ascertaining what was the information, true, false or misleading, which was obtained from day to day by the Police officer who was investigating the case and what were the lines of investigation upon which the Police-officer acted."

It is hardly necessary to state that the Moulvi and Lal Mohun both state that they are aware of the provisions of the law as to the keeping of "case diaries." Now what do

(4) 19 A. 390.

I find in the present case ? Between the 8th of July when Santosh was arrested and the 3rd of August, no "case diary" was opened. The defendant, Lal Mohun, who was the investigating officer states that this was a mistake but this statement I cannot accept.

Therefore, during by far the most important period of the investigation in the Bomb Conspiracy Case, the provisions of the law for enabling the Courts to check the method of the Police investigation have been deliberately disobeyed.

I shall now consider the evidence that has been given on both sides as to the truth or untruth of the statements in the informer's reports. I shall first deal with the evidence given on behalf of the defendants. From the case diary, Exhibit V, it appears that on the 22nd August 1908, Lal Mohun held a consultation with his officers as to "a plan of action."

On the 23rd August the plan of action resulted in the production of two witnesses and this was the first evidence obtained corroborating the reports.

The witnesses all speak to having overheard words or seen incidents which had been uttered or taken place long before.

They one and all say that Lal Mohun sent a constable to bring them to him. How Lal Mohun was able to discover these witnesses may be matter for comment.

The first witness is Akhoy Kumar Pal. By way of introduction it may be stated that some time ago the widow of a pleader named Mookerji brought a certain suit against him. In answer to this suit Akhoy produced a receipt which the Subordinate Judge held to be a forgery and directed Akhoy to be prosecuted for forgery and on appeal the District Judge has confirmed this order. At least two of the other witnesses for the defence in that suit, Kangali Ghorai and Amir Ali, gave evidence in the suit brought by the widow against Akhoy to prove that they saw the receipt executed. Akhoy in his evidence here stated, "the Government have now taken me under their protection." There would appear to be some foundation for this, for according to Akhoy's evidence the Government intended to settle certain lands with him but which lands after he had entered into possession he had to vacate because the lands belonged to a gentleman who defended the coolies in the train wrecking case and not unnaturally this gentleman insisted upon his right to his own land.

It would also appear from Akhoy's evidence that he has been allowed to avail himself of the services of the Government Pleader. It is, however, only fair to the authorities to say that Mr. Macpherson, the Commissioner of the Burdwan Division, stated that he was wholly unaware that Akhoy was being allowed the services of the Government Pleader until he read it in the public press during the proceedings in this case. It does not appear that Akhoy could obtain no other pleader who would work for him so that the authorities had to allow him the services of the Government Pleader. For he said in evidence before me "I don't mean to say that all the pleaders and muktears declined to work for me. I engaged two or three pleaders to file my written statement." Akhoy's statement was recorded by Lal Mohun under section 161 of the Criminal Procedure Code on the 30th August. Akhoy cannot say how Lal Mohun came to send for him.

In the statement Akhoy said that he had seen the Raja of Narajole walking through the town in *Bande Mataram* processions. Such a statement as to the conduct of the Raja of Narajole it is impossible to believe. Before me he has stated that what he meant was that when the Raja came out the people got excited and followed him and it locked like a procession.

It really is not worth while to go through the evidence of Akhoy, as I am satisfied he is a thoroughly disreputable and untruthful witness.

His statement, however, in his evidence here, "I did not say one single word to Lal Mohun of my own accord," even if it means that Akhoy only answered questions put to him by Lal Mohun tends to show that his statement was not recorded very satisfactorily. Akhoy in his evidence speaks to a meeting held five, six or seven days before the Mozufferpore outrage at the house of Deb Das Karan. Akhoy is positive that Santosh was present at that meeting. It is established without doubt that at that time Santosh was at Ranchi. There is only one other matter relating to Akhoy Pal before parting with his evidence. That is with regard to Exhibit 61 which has been produced by Akhoy as being, he alleges, a note sent by Mr. K. B.

PEARY MOHAN DAS *v.* WESTON.

Dutt offering to pay him money if he would refrain from giving evidence. Akhoy says he knows Mr. K. B. Dutt's handwriting as he has on one or two occasions leant over Mr. Dutt's chair when Mr. Datt was engaged in Court and has seen Mr. Datt writing in English in the margin of his brief with a Bengali word every here and there. He also says that some years ago he saw a letter asking for votes in connection with a Municipal election. Counsel for the defendants stated that they were going to call Mr. Hardless, the Government expert in handwriting, to prove the writing in certain documents and had these documents sent to the Survey of India for the purpose of having them photographed preparatory to Mr. Hardless's evidence. Exhibit 61 was one of these documents. Mr. Hardless, however, has not been called by the defendants, so presumably his evidence if he had been called would not have assisted the defendants. There is no doubt in my mind that Exhibit 61 is a forgery. But while saying this I am statisfied on the evidence that there is not the slightest ground for suspecting that either Mr. Weston or Mr. Hadrill had anything to do with it nor did they in any way suspect that it was not a genuine document.

The next witness on this branch of the case is Kangali Charan Ghorai. He was also sent for by Lal Mohun in Bhadra. Lal Mohun asked him about a meeting at Deb Das Karan's house and the witness answered. This witness gave evidence to prove the receipt in the suit brought against Akhoy Kumar Pal by the widow of the pleader.

Kangali also appear to be engaged in litigation of a very doubtful nature. His evidence is that "Moti Babu (*i.e.*, the officiating Government Pleader) was engaged by the Government to conduct my cases. The Government have been paying the cost of these two cases and the Police are looking after them."

Doubtless after a night's rest he resiled to a considerable degree from this statement, but I am not satisfied that the original statement is not correct.

One of these two cases referred to by the witness is a criminal prosecution against him and another witness for the defendants, Radha Nath Raut, for defamation, the defamation charged being that these two men said that a woman died from the effects of abortion whereas apparently the body which was examined by a medical man showed that the woman died from the effect of a snake bite. The prosecution in that case alleges that the witness made the defamatory statement in order to extort money. The Deputy Magistrate has framed charges against the witness and Radha Nath and there the matter for the present rests. The witness also appears to have been concerned in other criminal cases. Lal Mohun recorded the statement of the witness under section 161 on the the 13th October 1908. A constable took him to Lal Mohun. How again did Lal Mohun manage to get hold of this witness ? The substance of the statement of this witness recorded under section 161 was to speak to the meeting held at Deb Das Karan's.

The witness is, I am statisfied, a thoroughly untruthful witness.

The next witness is Radha Nath Raut. He formerly worked with the last witness Kangali. He was convicted of some offence on the 20th August 1903, but having presented an appeal he was out on bail pending the hearing of his appeal when Lal Mohun sent a constable to bring him on 21st August 1903. This witness according to his statement was discovered by Akhoy Pal.

The witness also appears to be engaged in some litigation including the defamation prosecution in which he is jointly charged with the witness Kangali. He stated, "I know the Government is paying the costs of one suit (of ours)." Again, this witness resiled from this statement.

The witness speaks to the meeting said to have been held at Deb Das Karan's. In my opinion there is no truth in his evidence.

The next witness on this branch is Lal Mahomed Khan. He is a teacher in the Lower Primary School at Midnapore. He also writes up the books of account of one Mulick, a baker.

His evidence is that two or three days after the *Utsnath* in 1903 when leaving the baker's in the evening he determined to go and see his doctor as he was not feeling very well. When he was passing by the house of Mr. Birendra Nath Dey, I. C. S., he noticed two or three carriages there and people were going into the house. Whilst he was listening to the *gulmal* he saw Babu Abinash Chandra Mitter drive up in his carriage

PEARY MOHAN DAS v. WESTON.

Abinash said, "Hallo, master, what brings you here?" The witness said he told Abinash that he was on the way to the doctor. Abinash said, "now come with me", and the witness went into the house with Abinash and there he saw a large number of persons seated. The witness says he also saw a young Babu singing songs to the accompaniment of a harmonium and that there were 30 or 40 persons present. The witness said he made an entry as to his attending this meeting in the books of the baker. This witness also says he made his statement to Lal Mohun two or three months after the date of the meeting. How did Lal Mohun manage to find out this witness?

That Abinash was likely to invite a person he met casually in the street to come to a meeting where the making of bombs was going to be discussed two days after Santosh's arrest can hardly be suggested.

The next witness is Mohesh Chandra Kundu. He states that on the day previous to the *Ultarath* he saw the Raja of Narajole at dusk leaving the house of Jamini Mullick. This witness states that Lal Mohun sent a Daroga for him in September 1908, who took him to Lal Mohun where his statement was recorded. How out of all the 80,000 inhabitants of Midnapore did Lal Mohun in September find out that this witness who does not live near Jamini Mullick's house happened to see the Raja of Narajole leaving it on the evening of the 7th July?

As a complement to the last witness we have the evidence of Rakhal Bera. He states that on the evening before the *Ultarath* in 1908 he saw the Raja of Narajole arriving at Jamini Mullick's house in his carriage. At the back of the carriage where the syces generally stand were standing two men with swords. The witness says he *salamed* the Raja.

Again this witness says that Lal Mohun sent a constable to bring him in Bhadra (September) and that Lal Mohun then recorded his statement. The witness admits that during the time that the Raja of Narajole was out on conditional bail, he wrote and signed a document that one Pitamber Roy Kaviraj had tutored him to make the statement to Lal Mohun. Pitamber is described in Lal Mohun's case diary as "an enemy of the Raja of Narajole." The plaintiff's Counsel suggests that Pitamber has what are delicately called relations with the Police.

Doubtless in his evidence here the witness has stated that he was compelled to give the statement in writing that he had been tutored by Pitamber. But I am not prepared to accept that statement of the witness.

Another witness on this branch of the case is Taju Kan.

He says that a constable came and took him to Lal Mohun and Lal Mohun asked him 'if he had seen anything in connection with the Babus.'

He said that in the month of Jaista at about 2 or 3 in the afternoon as he was going to his work and happened to be passing by the premises of the Mullick's, he saw Babus entering the *Rasmancha*. His curiosity was awakened as he thought the Babus were going to have a *jatra* or a *nautch* at 2 or 3 in the afternoon. He went and peeped into the green room and saw a large number of Babus there. Then one of them told him to quit the place and he left.

On another occasion the mother of this witness happened to be ill. She had a fever and a "pain under her ribs" so he started off to find Dr. Abhoy Kundu with two bottles in his hand—one to cure the fever and the other the pain under the ribs. He first went to the house of Dr. Abhoy but finding his shop closed he went to his residence. There a lady came out and told him the doctor had gone to the Mullicks'. The witness hastened there and went near the *Thakur-dalan* and called for Dr. Abhoy who came out to him. He saw a large number of Babus sitting there, also a young Babu playing on the harmonium and another young Babu singing.

Again, on another occasion whilst the witness was waiting for coolies to come to work, he saw Babus going into the house of Kamini prostitute. The witness says he calls the mother of Kamini sister. He asked the mother what was going on and she told him. The witness recognised several of the people mentioned by the informer. The witness was not sent for by Lal Mohun until 2, 3 or 4 months after he had seen the first meeting.

The next witness is Bankim Behary Haldar. He was sent for by Lal Mohun in September 1908. His story is that two

days before the first *Rath* he went to Troylokya Nath Pal's house to see about some litigation in which a friend of his was engaged and as he passed the windows of Troylokya's house he heard the following words, but he cannot say by whom they were spoken, "that money would have to be collected until after the disposal of the Arms Act case, and that we should have to live with care up to that time." He also says he saw certain people whose names he had mentioned there.

Troylokya, he says, told him to come next day, then he left. This witness also appears to have had three criminal cases brought against him since 1906.

The next witness is Nibaran Chunder Ghose, a Mohurir. This witness made a statement to Lal Mohun on the 25th September 1909.

The witness occupied a room in the house of Nishi Goalini where also lived Rajabala, prostitute, who was the mistress of Nikunja Maiti.

The witness states that on one night when the door of Rajabala's room was closed he heard from outside these words being spoken in her room, "The Firingees would have to be killed by means of bombs."

He states that "two" voices said this—the two voices were the voices of Nikunja Maiti and Gosto Behary Kundu.

The next witness is Saday Jana. He seems to have had some previous experience of litigation as he has on two occasions been fined for bringing vexatious complaints.

Raja Sri Narain Pal is his *zemindar* with whom he had litigation some time during the last four days of Assar. He says Sri Narain Pal sent for him. The witness said he could not go to the Raja that morning but would go in the evening. He went to the Raja's house in the evening but finding that the Raja had gone to the cutchery of the Raja of Mahisadal, he followed him there, and when after some difficulty he arrived at the Mahisadal cutchery, he heard the words "that unless the Police were beaten, assaulted or killed, nothing could be done," but could not say who said these words. He saw 30 or 40 people some of whose names he gave.

Gosto Behary Kundu was playing on the harmonium and Nikunja Maiti was singing a *Swadeshi* song. I am satisfied that there is not a word of truth in the evidence of any of these witnesses.

I shall interpose here the evidence of a witness Gajendra Nath Bhunia. The witness is the Mohurir of Mohendra Nath Das pleader.

His evidence is that late in the night of the 13th September, 1908, when he had gone to sleep at his master's premises, two constables—one of whom was Allabux—came and arrested him on the ground that he had a sword-stick with him.

Gajendra was taken to the *thanah* where he says he saw the defendant Lal Mohun and some Sub Inspectors. Previously he says he had been approached by the Police to give false evidence in the Bomb case against Upendra Nath Maiti but he had refused. Gajendra further says that Lal Mohun asked him at the *thanah* why he had not come and seen him although he repeatedly sent for him through Allabux. Gajendra also says that he suffered certain ill-treatment and the charge was altered to one of being drunk and disorderly. Shortly before 2 o'clock in the morning Gajendra was bailed out by one of his friends Haripada Bhunia, a Mohurir in the Collectorate, who has been called as a witness for the defence in this suit. Upon his release Gajendra went immediately to the house of Bepin Behary Ghosh, a pleader, who advised him to go and find some Magistrate who would be able to speak to his being sober.

Gajendra hastened to the house of Babu Sarat Chandra Roy, one of the Deputy Magistrates at Midnapore.

The Deputy Magistrate (who has given evidence in this case for the defendants) having been aroused from sleep came out, when Gajendra fell at his feet and told him of his arrest on a false charge. The Deputy Magistrate agrees in the story so far and says that Gajendra was perfectly sober and that he did not smell of liquor at all. But Sarat Babu says Gajendra did not make any complaint against the Police except that they had arrested him on a false charge. Haripada Bhunia, the Collectorate Mohurir, gave evidence to the same effect. Next morning when the case

appeared on the file of the witness Sarat Babu (the Deputy Magistrate), Gajendra at once filed a statement Exhibit A10 stating that he had been falsely arrested for refusing to give false evidence against Upendra Nath Maiti in the Bomb case.

The case only remained on the file of Sarat Babu for a few minutes before he transferred it to Mr. Mirza another Magistrate for disposal, but it appears from the order of transfer that Sarat Babu had read Gajendra's statement. Gajendra said he could not get any pleader to file his statement. This can be well imagined for the other witness for the defence Haripada Bhunia says that at that time not only was he himself in fear of being arrested but some of his neighbours were in such a state of fear that they were flying from their homes. Mr. Norton quite frankly admits that having regard to the statement of his own witnesses and the statement filed before the Deputy Magistrate by Gajendra there can be little doubt that Gajendra was arrested on a false charge and that probably some of the inferior Police had been trying to get him to give false evidence against Upendra Nath Maiti, but he says that there is no reason to suppose that Lal Mohun was concerned in this.

But why should I accept every portion of Gajendra's statement except as to the presence of Lal Mohun at the *thanah* when he was arrested and taken there ? Besides Lal Mohun was the investigating officer and he was procuring either by himself or through his subordinates the evidence in support of the case. It seems to me highly improbable that two Police constables would have approached Gajendra to give false evidence against Upendra Nath Maiti unless it was with the sanction of Lal Mohun.

I accept Gajendra's evidence.

The plaintiff, on the other hand, calls some thirty witnesses who state they did not do the things which Rakhal's alleged reports mention them as having done.

In my opinion the most important of these witnesses—not by reason of his wealth but on the ground of his respectability and position—is Babu Upendra Nath Maiti, the leader of the local Bar at Midnapore. He is one of the plaintiffs in the other suits. He has given evidence before me and I am satisfied that his evidence is true. He states that no meeting ever took place at his house on the 3rd July 1908 or on any other date. The reports of Rakhal give a meeting as being held that day in his house at which there was singing and speech-making and the bomb found on the 8th of July at the plaintiff's house was produced.

The learned Sessions Judge in the course of his judgment said with regard to Babu Upendra Nath Maiti: "I may say at once that some of the presons incriminated in Exhibit 56 have not in my belief done and said what is alleged against them. Babu Upendra Nath Maiti is an instance."

This view of Upendra Nath Maiti was also taken by the Appellate Bench on the hearing of the Criminal Appeal. In this view of Babu Upendra Nath Maiti I entirely concur. Now if one finds such an essential link in the story as the meeting of the 3rd July held at Upendra Babu's house to be untrue, I must confess it makes one look with some suspicion on the remainder of the report. For if the report of the meeting at Upendra Nath Maiti's on the 3rd of July be untrue why should one readily assume that the reports of the other meetings are true? Upendra Nath Maiti was arrested on the bare statement in Exhibit 56 as to the meeting being held in his house on the 3rd July 1908.

The next witness on whose evidence I place much reliance is Babu Radha Nath Pati. He is a pleader practising at Midnapore.

Radha Nath Pati says he never attended any secret meeting or paid any subscription towards the manufacture of bombs. The reports give Babu Radha Nath Pati as having attended the meeting at Kamini prostitute's on the 23rd June. He says he was never in the house of a prostitute in his life. I have no doubt that the evidence of Radha Nath Pati is true. Another witness on this point is Abinash Chandra Mitter who is one of the plaintiffs in one of the other suits. He is a man of considerable wealth. He says he took part in the *Swadeshi* movement and started a *Swadeshi* shop. He, however, denies that he did any of the things that are reported against him in Exhibit 56. I accept his evidence on this point. Abinash was also one of the persons arrested. Then there is the evidence of Khagendra Banerjee, also another plaintiff in one of the other suits. He denies attending any of the meetings which he is said to have attended.

PEARY MOHAN DAS v. WESTON.

In the report (Exhibit 53) of the 18th June 1908 there purports to be a description of the attempt to wreck the train of the Lieutenant-Governor at Naraingarh with which I have already dealt.

There is no reason to think that Khagendra's brother was employed in the office of the Lieutenant-Governor.

Gopal Chandra Bannerjee is another plaintiff in one of the other suits. He was also arrested. He denies attending the meetings which he was alleged to have attended. His evidence, I think, is true.

Space forbids me to go through the other witnesses on behalf of the plaintiff on this point. It is sufficient for me to say generally that I am statisfied from their evidence that they did not do and say the things mentioned as done and said by them in Exhibit 56 and Exhibit G.

But while I say this it must not be taken that I agree with Mr. Dutt in saying that all these witnesses were loyal and law-abiding subjects. I think some of them probably were not. There appears from the evidence circumstances of suspicion against some of them that they were neither loyal nor law-abiding. But the question is whether they were in the conspiracy related by Rakhal and I am satisfied they were not. Take for instance the witness Piyari Lal Ghose. He seems to have been deeply in the *Swadeshi* and boycott movement. The house where the *tantsala* opened by Satyendra was carried on belonged to him. He was also a relative of Satyendra's. But I have heard nothing in this case to make me think that Piyari Lal Ghose was in the conspiracy said to have been reported by Rakhal.

Much has been said against the Raja of Narajole. I agree that there are circumstances which tend to show that some of the Raja's subscriptions were not above suspicion. But, again, there is nothing to connect those subscriptions with the alleged reports of the informer. I am statisfied that the Raja never went to Jamini Mullick's on the evening of the 7th July to see a bomb. This is the only meeting the Raja is alleged to have attended. The other reports against the Raja in the reports are also, I think, untrue.

The Raja says that he had to pay the Police the sum of Rs. 40,000 to extricate himself from the criminal case. The evidence shows clearly that the Raja did come to Calcutta and change Government Promissory-notes for Rs. 30,000 into ten-rupee notes. That the Raja intended to make a payment with those ten-rupee notes that could not be traced is, I think, clear. He says that the Rs. 30,0 0 was handed over to his maternal uncle Ashutosh Roy for payment to the Police. Ashutosh Roy is said to be on terms of friendship with the Police. That the Raja intended to make a present of Rs. 30,000 to his maternal uncle in ten-rupee notes is not, I think, likely. The plaintiff has, however, failed to call Ashutosh Roy and without Ashutosh Roy's evidence no Court could assume that the money reached the Police. Then the Raja spoke as to Lal Mohan and Noresh coming to him after he was released and asking for this Rs. 30,000 to be paid, as they said there was going to be an inquiry, and they might lose their posts. Whilst I am not prepared to say that the Raja's story as to this visit is untrue, it is obviously insufficient to prove the receipt by the Police of the Raja's money. Indeed, the case of the defendants is that Ashutosh Roy has "pocketed," as Lal Mohun said, the bulk of the money himself, and there certainly appears to be some ground for this suggestion. Before parting with the Raja I must express my strongest disapproval of the language used by the Advocate-General with regard to him. Unfortunately, owing to the acoustic properties of the Court being so bad I did not myself catch the remarks of the Advocate-General at the time. The Assistant Registrar has, however, supplied me with a copy of a *verbatim* note of the words as taken by Dr. Suhrawardy, one of the Counsel for the plaintiff in the case.

The words are as follows :—"There he (the Raja) sat, a disgusting sight, drink-sodden, more beast than man." No words more insulting to a witness could be imagined. That Dr. Suhrawardy's note is substantially correct there can be no doubt, for Mr. Norton informed me that he was instructed that the Advocate-General stated that the Raja was "more beast than man." If I had heard at the time the words used by the Advocate-General I should instantly have checked him. The Raja, it must be remembered, is a nobleman amongst his own people, and, however dissipated or disloyal the Advocate-General may think him to be, it does not entitle him to use such language.

PEARY MOHAN DAS v. WESTON.

The evidence of two of the plaintiff's witnesses has been relied on by the defence.

The first is Rash Behari Bose. Doubtless there appears to be strong suspicion to connect him with that very improper portrait sent to Mr. Weston and which has been referred to as the stabbing portrait. But how does this connect him with the conspiracy said to have been related by Rakhal which makes no mention of this portrait? The other witness is Moti Lal Mookerjee. The defendants rely on his case because he did not surrender until the 17th October although a warrant had been issued against him on the 26th August. His evidence is that he was lying ill in Calcutta and was attended by Dr. Pushong and, therefore, did not surrender earlier. Then, the fact that his father-in-law's residence was No. 2, St. James' Lane, Calcutta, has been relied on because this address is given on one of the exhibits in this case. These facts are obviously wholly insufficient in any way to establish the truth of the story said to have been given by the informer.

The evidence, therefore, as to the truth of the informer's reports stands as follows:—

On the side of the defendants there is the evidence of the witnesses to whose evidence I have already referred. There is also the deliberate attempt to get the witness Gajendra Bhunia to give false evidence. On the side of the plaintiff there is a body of some 30 witnesses, some of them men of irreproachable character, all of whom have stated that they did not do what was alleged against them in the alleged reports of the informer. These, coupled with the improbabilities of the reports said to have been given by the informer, lead me to the clear conclusion that the informations are not true.

Whether the informer actually gave these reports or not it is impossible to say. That they were evolved by a drunkard like Rakhal, the informer, does not appear probable. Nor is the account of the way in which the reports are said to have been written as given by Moulvi and Asadulla satisfactory. In the absence of Rakhal it is impossible to say who wrote the reports.

Mr. Norton has stated that the plaintiff ought to have called Rakhal as a witness. This obviously the plaintiff could not do. Moreover, it appears from some of the documents used at Mr. Macpherson's inquiry that the Police had Rakhal out of jail and examined him at that inquiry.

I must now go back and deal with the evidence relating to the period between the 8th July (when Santosh was arrested) and the 23rd July (when the plaintiff was arrested).

The reason set out in the written statements of the defendants Weston and the Moulvi for the arrest of the plaintiff is "of there being reasonable grounds for the belief that the plaintiff has been accessory to the commission of an offence under the Explosive Substances Act in connection with the said bomb which was found in his house." This is the case in the pleadings which the defendants set up in reply to the plaintiff's case and upon this they came to trial.

The application for the warrant to arrest Peari on the 23rd July 1908 (Exhibit R in No. 1) states that "the surrouding circumstances of the conspiracy give rise to a reasonable suspicion that the accused Santosh Dass's father Babu Peari Mohan Das who... lives in the same house and mess with the accused is fully aware of the operations and the possession of the bomb for an unlawful object."

Now the case set up in the pleadings of the defendants Weston and the Moulvi that the plaintiff was arrested as there were reasonable grounds for the belief that the plaintiff had been accessory to the commission of an offence under the Explosive Substances Act in connection with the bomb found in his house has been wholly abandoned at the hearing and an attempt made to set up a wholly different defence to that raised in the pleadings.

The defendants are obviously not entitled to pursue such a course. The case the defendants are now endeavouring to set up is not that they arrested the plaintiff or caused him to be arrested on the ground that they reasonably believed him to be accessory under section 6 of the Explosive Substances Act, 1908, but that they arrested or caused him to be arrested under section 5 of the same Act.

Section 5 of the Act is in the following terms:—"Any person who knowingly has in his possession or under his control any explosive substance under such circumstances as to give rise to a reasonable suspicion that he does not have it in his possession or

under his control for a lawful object shall, unless he can show that he had it in his possession or under his control for a lawful object, be punishable with transportation for a term which may extend to 14 years."

The learned Advocate-General stated that under this section whenever a bomb is found in a house every member of the family is liable to be arrested. That, in my opinion, is far too broad a statement. In this country the joint family system prevails and the family frequently consists of a very large number of persons. That every person in such family should, merely on the ground that a bomb is found in the joint family residence, be liable to be imprisoned and tried for an offence under the Explosive Substances Act is not, in my opinion, the law. Section 5 of the Explosive Substances Act only applies when a person has in his possession or under his control an explosive substance. Though doubtless when once it is established that a person has in his possession or under his control an explosive substance the Statute casts the onus of proving that he had it in his possession or control for an innocent purpose on such person, but still one has to come back to the question, when an article is found in the residence of a joint Hindu family, in whose possession or under whose control it is. If the article is found in a portion of the house of which one member of the family has the exclusive use, then no difficulty arises, for such member must *prima facie* be held to be liable for anything that is found there. But if an article is found in a portion of the house of which all the members of the family have the use then *prima facie* the *Karta* (the managing head) of the family is responsible.

But in either case it is only a presumption which may be rebutted and if the Police act on information, which they believe, showing that an article found in a house is in the exclusive possession of one member of the family and the article is found in a portion of the joint family residence of which all the members of the family have the use, then I apprehend that the head of the family is not liable to arrest merely on the ground that the article is found in a portion of the house to which all the family can resort.

These seem to be the principles which are reasonably deducible from the decision of *Queen-Empress* v. *Sangam Lal* (5). In the present case there is not a word in the reports of the informer on which the defendants say they acted to suggest that the plaintiff was in possession of the bomb.

The story told by the defendants here is as follows:—That Mr. Weston did not know of the application for the search warrant on the night of the 7th July and that when he came to hear of the search on the 8th July and saw the other two defendants, he asked them why they had not arrested the plaintiff. They said it had not occurred to them to arrest the plaintiff as the information regarding the bomb implicated Santosh only. The Moulvi and Lal Mohun then offered to return and arrest Piyari, but Mr. Weston said that was not necessary as the plaintiff would not run away and he would wait until he knew whether the article was really a bomb or only a hoax. That until the evening of the 20th July, when the Moulvi says he got the demi-official of the Chemical Examiner's report, which he says he gave to Mr. Weston that same night or on the next morning, Mr. Weston was not certain whether the bomb was a dangerous article or not. But that upon receiving the demi-official report of the Chemical Examiner Mr. Weston directed that the plaintiff should be arrested as the owner of the house. Then inquiring the date for which Santosh's case was fixed and being told it was fixed for the 23rd July Mr. Weston said it would be sufficient if the plaintiff were arrested on the 23rd July and accordingly the plaintiff was so arrested. The whole of this story rests upon one fact, namely that Mr. Weston did not know the nature of the article found at the plaintiff's house on the the 8th of July earlier than the evening of the 20th July or the morning of the 21st July.

This time has to be fixed, as Mr. Weston admits that he had an interview with the plaintiff on the 19th July and also because the plaintiff has preserved a note (Exhibit *h*) which Mr. Weston wrote to him on the 20th July. If it is established that after the date when Mr. Weston was fully aware of the character of the article found in the plaintiff's house on the 8th July, Mr. Weston not

(5) 15 A. 129.

only had an interview with the plaintiff but also wrote to him appointing another interview, then the story told by the defendants that as soon as the character of the article was ascertained Mr. Weston decided that the plaintiff should be arrested and after that date had no communications with the plaintiff, falls to the ground.

Now on the 9th July Major Weinman gave a certificate (Exhibit 36) as to the bomb found at the plaintiff's house on the 8th July.

The certificate states that "the core consisted of a yellowish brownish powder mixed with shot."

With regard to this Mr. Cornish states: "after I had seen Major Weinman's certificate I had no doubt as to the dangerous character of the article found in Santosh's house," and again, "on the 11th July the Moulvi and Lal Mohun had no doubt as to what the bomb contained nor do I know that Mr. Weston had any doubt.

Mr. Nelson states that "I had no doubt after Major Weinman had examined the bomb as to its dangerous character."

But we have a much more extraordinary piece of evidence than the statements of Cornish and Mr. Nelson. On the 12th of July the Moulvi addressed to Mr. Weston a letter (Exhibit 70) asking for permission for himself and Lal Mohun to have an interview with Santosh in jail to question him about the bomb. This letter ends with the very significant sentence: 'In his statement before the Joint Magistrate in charge of the Sadar Sub-division he (*i. e*, Santosh) said it was a ball made of rags and intended for *benati* whereas on examination it has been found to contain certain explosives and shots." Mr. Weston states that he does not remember seeing this document. But that he saw it is clear from the endorsement by Mr. Weston in the margin: "Jailor please allow this, D. Weston. 11th July 1908." And why should Mr. Weston allow the two Police officers to question Santosh in jail as to an article he thought might be a hoax?

Then, again, the evidence shows that Mr. Weston was in possession of the demi-official of the Chemical Examiner's report earlier than the night of the 20th July or the morning of the 21st July.

The copy of the demi-official report sent to Midnapore has written beneath it "Calcutta July 1908. Copy forwarded to W. H. Cornish, Esq., Superintendent of Police, Midnapore. (Signed) G. C. Denham, Special Assistant S. B. Bengal 17-7." The evidence shows that a letter posted in Calcutta in the evening reaches Midnapore early next morning and that a letter posted in Calcutta in morning reaches Midnapore the same evening.

Mr. Cornish's evidence is that he showed the demi-official report of the Chemical Examiner to Mr. Weston immediately after he received it by post and then made it over to the Moulvi. The defendants's case is that Mr. Cornish gave the document to the Moulvi and that the Moulvi showed it to Mr. Weston

I accept Mr. Cornish's evidence on this point. Then, again, Mr. Cornish says: 'I must have received it (*i. e.*, the demi-official report) on the 18th July.' The defendants' case is that the document was not received in Midnapore until the 20th July.

In my opinion the demi-official report was in Midnapore without doubt on the 18th July. It is not likely that the document would be three days in the post between Colcutta and Midnapore nor that Mr. Denham having signed the copy of the demi-official report on the 17th July would not have it posted in the ordinary course. I, therefore, find as a fact that the demi-official report of the Chemical Examiner was received by Mr. Cornish on the 18th July and immediately shown by him to Mr. Weston.

I do not accept the date written by the Moulvi on Exhibit 79 as a genuine date.

On the evidence I come to the conclusion that defendants, after Major Weinman's report of the 9th July, had no doubt as to the dangerous character of the bomb although probably they did not know the nature of the explosive used. On this view of the evidence the defendants' story as to why the plaintiff was not arrested falls to the ground. I am satisfied that this story put foward by the defendants has no foundation in fact. It was suggested by Lal Mohun that Mr. Plowden had given orders for Peari's arrest. But this Mr. Plowden says is not so. Mr. Plowden did say that when he saw Lal Mohun he did make a remark, "just a casual remark," as to whether the owner of the house had been arrested. I think Mr. Plowden's memory is at fault with regard to this. He spoke to this remark long after it had taken place and it is possible that

PEARY MOHAN DAS v. WESTON.

Mr. Plowden may have been asked about this incident and quite honestly after discussion have thought he remembered it.

The evidence shows clearly that Mr. Plowden in fact had nothing to do with the arrest of the plaintiff.

I now turn to the plaintiff's story as to the reason why he was arrested.

On the 9th or 10th July Peari presented a petitition to the Joint Magistrate (Mr. Nelson) praying that he might be allowed to supply Santosh with some clothes in jail. Under the provisions of the Prisons Act and the Jail Code the plaintiff was entitled as of right to be granted this. Under-trial prisoners are not required to wear jail clothing. This application was rejected by Mr. Nelson.

Moti Lal Mukerjee, the Pleader, states he saw this petition being taken with a red slip on it towards Mr. Weston's house. Mr. Nelson states that 'on the 9th July I distinctly remember an application being made to me by Peari for leave to send clothes to Santosh in jail. I cannot remember what I did with it. I did not send it to Mr. Weston for orders.' Mr. Weston says he does not remember this petition.

That Mr. Nelson rejected this petition is clear. But why? Mr. Nelson could hardly be desirous of preventing Santosh from having proper clothing in jail. Mr. K. B. Dutt suggests that Mr. Nelson rejected this petition at the instance of Mr. Weston so that the plaintiff might go and present a petition to the higher authority, Mr. Weston. There is nothing on the evidence to show that that was so. The result, however, of the rejection by Mr. Nelson of that petition was that Peari went to see Mr. Weston on the 11th July.

It is unfortunate that the petition presented by Peari to Mr. Nelson, like many other documents in this case, is missing. It ought to have been with the record in the Joint Magistrate's Court.

On the 11th July the plaintiff went to Mr. Weston's house. It is admitted by Mr. Weston that the plaintiff had an interview with him on that day. The plaintiff's evidence is that at that interview Mr. Weston did not say anything about the desirability of making Santosh confess. Mr. Weston says that the plaintiff asked his advice and that he advised that the best thing for Santosh to do would be to confess, or rather make a clean breast of it, if he were guilty and penitent and perhaps the Court would take a lenient view of Santosh's offence. Mr. Weston is not an inexperienced officer. He acted for some years as Chief Presidency Magistrate in Calcutta, and he must have known that if Santosh followed his advice he could not hope to get a light sentence. Moreover, Mr. Weston's evidence is that at this time he was only waiting for the Chemical Examiner's report to see if the plaintiff should be arrested. On the other hand, it cannot have escaped Mr. Weston's notice that with regard to the conspiracy said to have been reported by Rakhal he had no evidence on which he could hope to convict the conspirators—nay more, on the evidence then in his possession it might even be difficult to convict Santosh. This statement of Mr. Weston's as to the advice he then gave the plaintiff does not seem to fit in with his statement that he did not know the character of the article found at the plaintiff's house on the 8th July. For, if Mr. Weston then felt any doubt as to the dangerous character of the article or thought it might be a hoax, one would have expected him to advise the plaintiff to wait and see what the article proved to be. On the 11th July the plaintiff under an order obtained from Mr. Weston went to the jail to see Santosh, but he was not allowed to do so as the jail authorities said Santosh was not well.

After seeing the plaintiff on the 11th July Mr. Weston saw the Moulvi and Lal Mohun and gave them an order to visit Santosh. On the same day, the Moulvi and Lal Mohun went to the jail and had an interview with Santosh in his cell. They say they were with Santosh for about 15 minutes but Santosh said he was not well and told them that they should come the next morning. Santosh, on the other hand, says he was perfectly well and that the Police were with him for over an hour. The jail gate register shows that the Police officers or rather the Moulvi was in the jail from 4-10 P. M. to 6 P. M: Santosh's statement as to the time the Police were with him is far more probable than that of the defendants. Nor could Santosh's illness be of such a serious character as to prevent him holding a conversation with the Police officers, for the Police officers

say they saw him at 8·45 next morning, that is only about 15 hours later, when Santosh appears to have been perfectly well.

Santosh's account of what took place at that meeting on the 11th July was that the Moulvi and Lal Mohun told him that he ought to confess and that all that he would have to say was that the Raja had gone to Jamini Mullick's the night before his (Santosh's) arrest and also he would have to speak to the meeting at Kamini's and at Saroda and Baroda Dutt's and to some other meetings. Santosh says that the Police officers also told him if he did not consent to make a confession his father would be arrested and that they would come again to-morrow by which time he had better make up his mind.

On the following morning, the 12th July, the Moulvi and Lal Mohun again saw Santosh in his cell. The interview took place about 8·45 A.M. The Moulvi and Lal Mohun say that the Moulvi questioned Santosh about secret meetings, but he made no reply and all that he said was that he would make a statement to the Magistrate after consulting his father.

Santosh, on the other hand, says that the Police officers asked him to admit being present at the meetings held at Baroda and Saroda Dutt's, at Kamini's and at Upendra Nath Maiti's and also as to the Raja of Narajole going to Jamini Mullick's on the evening of the 7th July. Santosh also says that the Police officers showed him a warrant for the arrest of his father the plaintiff and that by threat and persuasion they made him write a letter to the Magistrate (Exhibit 69). The Moulvi and Lal Mohun say they never saw Exhibit 69 until they saw it in the Sessions Court.

The truth of Santosh's account of this interview must, therefore, largely depend on whether Santosh's story as to the writing of the letter, Exhibit 69, to Mr. Weston is true. Santosh says that the Moulvi produced from his pocket a piece of paper, and pen and ink having been sent for, he wrote the letter at the dication of the Moulvi.

This letter Exhibit 69 is written on a piece of country made paper commonly called "Bally" paper.

The Jail Code provides that in case of convicted prisoners their correspondence shall be written upon Jail Miscellaneous Form No. 87. True it is that the Jail Code does not in words provide that the correspondence of under-trial prisoners shall be written on the same form, but Capt. Salisbury's and other evidence shows that when an under-trial prisoner expresses his desire to write a letter, he is given a Jail Miscellaneous Form No. 87.

The Jail Code, moreover, provides that all correspondence of both convicted and under-trial prisoners shall pass through the Jailor who shall certify that the contents of the letter are admissible under the rules and the Jailor shall then take the orders of the Superintendent of the Jail who may direct that the letter may be posted.

Now what do we find with regard to this letter of the 12th July (Exhibit 69)? First, it is not written on Jail Miscellaneous Form No. 87, nor does it bear the usual endorsement of the Jailor that the contents are admissible under the rules, nor the order of the Superintendent that the letter may be posted. There is also the absence of the usual official covering letter from the Superintendent to the District Magistrate, "Jail Miscellaneous Form No. 79."

In place of these we find a memorandum endorsed, without any date: "Forwarded to Magistrate of Midnapore for favour of disposal, S. C. Chakravarti, for Superintendent of Central Jail, Midnapore." The practice is, as Exhibit 68 shows, for the Superintendent to forward such letters to the District Magistrate with a covering letter. Mr. Weston says he cannot say how Santosh's letter of the 12th July came into his possession. The Moulvi and Lal Mohan say that they had nothing to do with this letter. I accept Santosh's story supported as it is by all the probabilities that this letter was written by him in his cell on paper supplied by, and at the dictation of, the Moulvi and that the Moulvi took the letter away with him. That being so, I in substance accept Santosh's account as to what took place at the interview in his cell on the morning of the 12th of July. Early on the same morning, the 12th July, the plaintiff had presented to Mr. Weston a petition (Exhibit 67) asking that he might be allowed to visit Santosh in jail on that day and on every alternate day. Mr. Weston sent this petition to the Superintendent of

the Jail for disposal and on the same day Major Weinman ordered that the plaintiff should be allowed interviews with Santosh, twice a week, on Wednesdays and Sundays.

The plaintiff's story is that he and his son Ashutosh drove together to the jail on the morning of the 12th July, that the plaintiff on going to the jail office found the Moulvi and Lal Mohun there. The plaintiff also says that, on seeing Santosh, he told the plaintiff that the Moulvi and Lal Mohun had been trying to get him to implicate respectable people, and had made him write to the Magistrate. Ashutosh says that he did not go into the jail office but remained outside, and that when Santosh was being brought from the jail, their eyes met, and he shouted out to Santosh that he was convinced of his innocence and would see that it was established. That thereupon the Moulvi and Lal Mohun having Police canes in their hands rushed at Ashutosh, but the plaintiff intervened and told Ashutosh to go and sit in the carriage. The Moulvi denies this story altogether but says that as he and Lal Mohun were driving away from the jail, they passed the plaintiff's carriage going to the jail.

Immediately they had passed the plaintiff's carriage the Moulvi suddenly recollected that he had forgotten to give a private message to the Assistant Jailor. The Moulvi thereupon stopped the carrige and got down and walked back to the jail. There he saw Ashutosh making signs to Santosh.

The Moulvi says he gently reproved Ashutosh, telling him it was very wrong of him to make signs to Santosh. Having given his message to the Assistant Jailor the Moulvi left the jail. He says he did not see the plaintiff. Lal Mohun says he did not see the plaintiff's carraige pass them on the way to the jail.

The story about the Moulvi, immediately he passed the plaintiff's carriage, suddenly remembering that he had a message to give to the Assistant Jailor and his return to the jail and the gentle reproof to Ashutosh appears to me to be highly improbable. I accept the plaintiff's account of what happened at the jail office on the 12th of July. To return now to Exhibit 69, the letter of Santosh of the 12th of July to Mr. Weston.

Mr. Weston now says that he has no recollection whatever as to how he recived Exhibit 69. Before the Sessions Judge Mr. Weston said: "I received this (Exhibit 69). On it I must have allowed Santosh's father to see him. I sent the petition on to Mr. Cornish."

Mr. Cornish's evidence here is: "An interview must have been arranged between the father and the son. The application was made to the Magistrate. The interview took place. The Magistrate arranged it."

Now if this be true, as I think it is, then the probabilities are that Mr. Weston sent for the plaintiff after receiving Exhibit 69. The plaintiff's story is that he received a chit from Mr. Weston on the 13th or 14th July asking him to come and see him. With regard to chits received by the plaintiff from Weston, the plaintiff's evidence is that "Mr. Weston sent me chits asking me to come and see him." "I received three. I lost two. Lal Mohun and Moulvi brought them all. I got two chits between the 12th and 19th July." Having regard to Exhibit 69 and Mr. Cornish's evidence the probabilities are strongly in favour of the plaintiff having received a chit from Mr. Weston on the 13th or 14th July. The plaintiff says that the next interview he had with Mr. Weston was on the 14th July. All the probabilities are that this interview took place following on the receipt by Mr. Weston of Exhibit 69 (Santosh's letter of 12th July).

The plaintiff's account of what took place at that meeting is as follows:—He says he swore before God that his son was innocent. Mr. Weston said he should not be so nervous as the Police had made no reports against him (the plaintiff). But if he sought his son's safety, he should get his son to be an approver. The plaintiff fixes another interview with Mr. Weston on the 15th or 16th July, but as to this there is nothing to confirm him. I hold this interview not to be proved.

The next interview that took place is common ground between the parties—that is the interview on the 19th July.

Now, why should the plaintiff go and see Mr. Weston on the 19th July 1908 which was a Sunday? It could not be that he wanted to see Mr. Weston in order to get an order for an interview with Santosh in jail

on that day, for the plaintiff had already under Exhibit 67 got an order to see Santosh on all Wednesdays and Sundays.

I can hardly think, in these circumstances, that the plaintiff went to Mr. Weston of his own accord. If he did not, then the probabilities are that Mr. Weston sent a chit for him to come and see him. If that be so then this would account for the third chit which the plaintiff said he received from Mr. Weston. Mr. Weston says he does not remember what took place at that interview except that the plaintiff wanted to see his son.

That does not seem satisfactory in view of the documentary evidence that we have, Exhibit H., which is a note sent by Mr. Weston to the plaintiff on the 20th July in the following terms:—"I cannot see you as arranged at 7 P M. on Tuesday. Come at 9 A. M. on Wednesday."

Now why did Mr. Weston arrange an interview with the plaintiff at 7 P. M. on Tuesday which was the 21st July, 1908 ?

The hour, Mr. Weston agrees, is unusual as he usually sees people on these matters in the early morning. He says that he thinks 7 P.M. in the evening was probably fixed so that the plaintiff might see him after he had seen Santosh.

There can be no doubt that this note (Exhibit H) shows that this proposed interview on the 21st July with Piyari was arranged by Mr. Weston so that he might see the plaintiff after he had had an interview with his son Santosh. But what did Mr. Weston want to see the plaintiff for after he had seen his son in jail ?

Mr. Weston says he remembers nothing further that passed at the interview on the 19th July except that the plaintiff wanted to see his son.

The plaintiff's evidence is that Mr. Weston told him the only way to save his son was to make him an approver and that if he could not manage to get his son to make a statement he himself would be arrested.

Then we have the fact from Santosh's history ticket that the plaintiff did see Santosh in jail on the 21st July which was a Tuesday. Mr. Weston must have authorised this visit. I have no doubt but that the plaintiff's account of this interview is correct.

The next interview that the plaintiff alleges he had with Mr. Weston is on the 22nd of July.

By this note of the 20th July (Exhibit H) Mr. Weston had appointed 9 A M. on the 22nd of July as the time of meeting.

The plaintiff, however, says that he did not keep the appointment as he had failed to induce Santosh to agree to make a confession on the 21st. In the afternoon of the 22nd July, the plaintiff says, he mustered up courage to go and see Mr. Weston. The plaintiff says that Mr. Weston told him he would give him one more chance and that he gave him an order so that he might be allowed to see Santosh in jail. The plaintiff says that when he arrived at the jail, he saw the Superintendent who told him that he had come late and it was just about closing time. But as the plaintiff had brought an order from the Magistrate, he allowed the plaintiff to see Santosh. Santosh, however, the plaintiff says, did not agree to make a confession. The plaintiff says he returned to Mr. Weston and told him the result of his interview with Santosh and Mr. Weston said he would think over what should be done.

Next morning, Santosh was produced before Mr. Nelson and the plaintiff, either in the Court room or just outside it, was arrested. Between the 12th July and 23rd July interviews in jail took place between the plaintiff and Santosh, as appears from the history ticket, on the 15th, 19th, 21st, and 22nd July. There was also, according to the evidence of the plaintiff and Santosh, the second meeting in jail on the 22nd July, late in the afternoon.

In his retraction, dated the 7th September 1908, Santosh states: "My father while visiting me in jail in the afternoon previous to the day of his arrest (that is the 22nd July) told me, if I did not turn an approver, then the Magistrate would cause him to be arrested. He also showed me a slip that the Magistrate had given him."

The evidence also satisfies me that during the period between the 9th and 22nd of July, there were frequent visits by the Moulvi and Lal Mohun to the plaintiff's house and that pressure was brought to bear on the plaintiff to induce him to get Santosh to confess and as time went on, this pressure passed from inducement and persuasion into threats.

PEARY MOHAN DAS v. WESTON.

The evidence on the part of the plaintiff is that some of these visits took place when Romesh Bose, the plan-maker, a Government servant, was present making a plan of the plaintiff's house for the purpose of being used in the criminal case. The plan-maker has not been called by the defendants as a witness.

The story as to the Moulvi explaining the Explosive Substances Act to the plaintiff and his wife is, I think, true.

There is also substantial corroboration of the story told by the plaintiff and his witnesses in the statement of Ashutosh of the 16th August 1908 sent to the Government on the 27th August. Counsel for the defendants has suggested that this statement is the invention of the Bar at Midnapore. This suggestion seems to me to be quite impossible having regard to the date and other circumstances relating to the document. The document was, I think, clearly a genuine statement of Ashutosh's. As against this evidence given on behalf of the plaintiff, there is the case set up by the written statements that the plaintiff was arrested as an accessory which has been wholly abandoned and the case attempted to be made at the trial that Mr. Weston determined to arrest the plaintiff as soon as he knew the dangerous character of the article found at the plaintiff's house, which has wholly failed.

I must now take, shortly, the events subsequent to the plaintiff's arrest on the 23rd July.

The history ticket of the plaintiff states that on his entry to the jail "health bad old age"; across the corner of the history ticket I find written "to be strictly segregated." The evidence shows that the plaintiff was kept in solitary confinement during the whole time he was in jail. The plaintiff who was suffering from diabetes with accompanying ailments might surely have been let out on bail. His applications for bail, however, were opposed, but each of the defendants has denied that he had anything to do with the opposition to them.

The treatment of the plaintiff in jail was in clear breach of the provisions of the law. The rules contained in what is known as the Jail Code are rules framed by the Local Government under the powers contained in the Prisons Act and subsequently sanctioned by the Governor-General in Council. Rules when so framed and approved have the same force as the Statute and it is not open to any person to set aside the provisions of such rules.

Then who was responsible for the order on the plaintiff's history ticket "to be strictly segregated?"

It must be either Mr. Weston, Mr. Nelson, or Major Weirman. All three of them deny any knowledge of this order. Accordingly, I am unable to decide by whose authority the plaintiff was kept in solitary confinement, a result which cannot be considered satisfactory. On the 29th of July, the Moulvi and Lal Mohun again visited Santosh in his cell.

Now what were the Police doing in the cell of Santosh again on the morning of the 29th of July?

There can be little doubt, to my mind, that they had come to see the effect of the father's arrest on the son. The plaintiff was sent for and taken to Santosh's cell. There the Police appealed to the higher feelings of Santosh to save his father in his old age and to make a confession. But the plaintiff said that they must have some time to think the matter over.

Later in the day, the Police returned to Santosh's cell representing that his father had consented to his making a statement and took him to Mr. Weston's house.

Mr. Weston says he examined Santosh and finding that he was willing to make a confession he sent for Mr. Nelson to record the confession. Mr. Weston admits that he was present at the recording of the confession and that he did put some questions to Santosh from papers he had in his possession and suggested other questions to Mr. Nelson.

This course cannot be justified at all. Mr. Weston obviously had no right to be present at the recording of the confession. Then much has been made of the preliminary questions put by Mr. Nelson to Santosh which are as follows:—

"Do you know who I am?"

"Yes."

"Any statement you make will be of your own free will. You are under no compulsion I understand." It has been much argued as to whether the words, "I understand", are an answer to the questions that go before or form part of the previous sentence. I think ob-

viously they are not an answer. First, "I understand" is not an answer to the question "You are under no compulsion." Then in the whole of the confession I cannot find that Mr. Nelson has omitted to write a full stop in any other place where one ought to appear. It seems to me clear that Mr. Nelson did not properly comply with the provisions of section 164 of the Code of Criminal Procedure. Mr. Nelson says that he never heard the Police officers had been visiting Santosh in jail. Probably, if he had known this he would have been more careful to comply with provisions of section 164. Now Santosh had come to confess how he had come into possession of a bomb. Instead of doing this, he commences to relate his history as from October or November, 1907.

Then we have the extraordinary coincidence that in Exhibit 56 the name of a man said to be present at some of the meetings alleged to have been held is given as Gosto Behary De, his real name is in fact Gosto Behary Chandra. The name of this man as given in Santosh's confession in two places was originally Gosto Behary De, the word "De" being subsequently struck out and the word "Chandra" written in place thereof.

Moreover, in Exhibit G. this man's name is written "Gosto Behary Chandra (Dey ?)"

Then, again, in the confession Santosh states that he attended a meeting on the 30th June. This is also the date given of this meeting in Exhibit 56. According to the defendants, subsequent inquiries show that this meeting was held on the 29th of June.

Then, again the first four names mentioned in the report of the 30th June in Exhibit 56 are given in exactly the same order as in the confession. These may be coincidences only, but they are, to say the least of it, peculiar.

Then the following expressions, "The Raja of Narajole gave Rs. 2 per month," "Satyendra Nath Bose gave nothing," "No bomb was produced," "I think I could identify him," "I can't remember the date," show clearly that portions of the confession which purport to have been given by Santosh in a narrative form must in fact have been given by him in answers to questions put to him.

There can be no doubt to my mind that this confession was not recorded in the manner required by section 364 of the Code of Criminal Procedure which requires every question put and every answer given to be recorded. But whilst I say this I altogether disbelieve the suggestion that Mr. Weston and Mr. Nelson or either of them put to Santosh questions which they knew to be untrue. The truth of the matter is, I think, that Mr. Weston thought that with a little judicious examination Santosh might make a full disclosure with regard to a considerable portion of the conspiracy. Mr. Weston did not, however, bear in mind the visits of the Police to Santosh and the arrest of the plaintiff.

Although I think Mr. Weston's conduct as to the confession of Santosh was improper and irregular, I can see no ground for suggesting that Mr. Weston put to Santosh questions and received answers which he knew to be untrue.

The 7th of August was the day fixed for the production of the plaintiff and Santosh before Mr. Nelson. It is admitted that niether of them were so produced. This was in manifest breach of the provisions of section 344 of the Code of Criminal Procedure. Mr. Norton admitted that if Mr. Weston knew of this it would be his duty as District Magistrate to call Mr. Nelson's attention to the fact. I find from a letter dated the 9th August (Exhibit 33), which Santosh wrote to Mr. Weston, the following:—"The date of appearance of the petitioner and his father was fixed on the 7th instant, but they were not brought to Court on that day. If the petitioner's old father be detained here any longer period, he may be deprived of his life."

It would appear, therefore, that Mr. Weston did know that the plaintiff and his son were not being produced before Mr. Nelson in the manner provided by law.

On the 5th of August Mr. Nelson passed an order remanding Surendra Nath Mukerjee to Police custody for seven days, but Surendra owing to ill-health could not be handed over to the Police until the 7th August when he was handed over by the jail authorities to Lal Mohun.

From the 7th August to the 12th August Surendra was kept at the Midnapur *thanah* and during such period he says he was tortured by the Police.

PEARY MOHAN DAS v. WESTON.

Under section 167 of the Criminal Procedure Code before a Magistrate remands an accused person to Police custody the accused must be produced before him, for the section says: "The Magistrate to whom an accused person is forwarded."

The section also requires that a Magistrate remanding an accused person to Police custody shall record his reasons for doing so. Mr. Nelson did not observe any of these provisions.

Moreover, it is provided by the Bengal Police Code, Chap. XVI, pp. 374-388, that an application for remand to Police custody under section 167 of the Code of Criminal Procedure must be made personally by the Chief Police Officer present to the Chief Magisterial Officer present, that is to say, at the head-quarters of a district (as Midnapore is), by the Superintendent of Police to the District Magistrate, unless this is impossible owing to the absence of one of the officers concerned or through some other exceptional cause.

Surendra's story is that between the 7th and 12th August he spent most of his time at the Sub-Inspector's quarters where he was ill-treated by Lal Mohun and other Police officers.

Further, that on the 11th August the ill-treatment was so severe that after it he was in a state of collapse and that Dr. Bankim Chunder Ghose was sent for by the Police to attend him.

It is common ground between the parties that on one occasion while Surendra was in Police custody he was in urgent need of medical aid. The Moulvi and Lal Mohun fixed this date as the 31st July, the day of Surendra's arrest, when they saw Surendra was suffering from an attack of simple fever and they sent a constable to find the Assistant Surgeon, but not finding him at home he brought Dr. Bankim Chunder Ghose. Dr. Bankim's fees are stated by Lal Mohun to have been paid out of the Secret Service Fund and that a receipt which he gave for his fees was handed to Mr. Cornish. Mr. Cornish was not asked anything about this receipt.

Mr. Norton stated it was probable that Surendra did suffer ill-treatment of some sort from subordinate Police officers during this lengthened detention at the *thanah* in Police custody, but he denies that Surendra was ill-treated by Lal Mohun or the Moulvi. Surendra's statement that he was tortured whilst in Police custody must, of course, be taken with some reserve and can only be accepted if it is either corroborated or fits in with the probabilities of the case.

The first point to decide is, when did Dr. Bankim Chunder Ghose attend Surendra?

Now Dr. Bankim Chunder Ghose has produced two of his books in support of his statement, namely, a Prescription Book and a Dispensary Book. He had two other sets of books which he has not produced. In the Prescription Book which he has produced I find an entry of the 31st of July of a prescription for Surendra Nath Mukerjee. Counsel for the plaintiff suggested that as the 31st of July was the last day of the month there was a blank space where a prescription might be written in. This standing alone would obviously not be sufficient. But when one takes the entries of the next day the manner in which the book has been altered is apparent. In fact, Mr. Norton admits that the entry is a suspicious one. This entry on the 1st of August is for quinine pills which it is suggested were for Surendra on the morning of the 1st of August.

But the merest glance at the name at the heading of the prescription shows that it was originally "For Upendro," then that a capital "S" has been squeezed in between the "for" and "Upendro." Then to the "p" in Upendro has been added a slanting stroke converting it into a capital "R", but with half of the "R" below the line. Dr. Bankim Chunder Ghose admits that the stroke which converts the "p" into an "r" in Upendro is written in different ink to the rest of the letter. The net result of the alterations to the word "Upendro" is that it is altered into "Surendro," the first three letters "Sur" being all capitals, half of the "r" being below the line.

Then the word Upendro so altered is penned through and Dr. Bankim writes above it Surendro Nath Mukerjee A. M. B. case (accused Midnapore Bomb Case).

Then I come to the Dispensary Book.

Now if you take the entries in the Dispensary Book for the 30th and 31st July and 1st August as orignally written, that is omitting the entry of the alleged prescription for Surendra on 31st July and subject to

the alteration of the name of the person for whom the quinine pills were prescribed on the 1st of August, the Book before the alterations were made was in correct order. On the pages which contain the entries for 31st July I find the number of every prescription has been altered, the alleged prescription for Surendro being written last on the page.

If one turns back to the page on which the prescriptions for the 30th of July are entered one finds that the last prescription entered on the 30th of July bears the same number as the altered number of the first prescription of the 31st July.

Then on the page which contains the entries for the prescriptions of the 1st of August, I find the name of the person for whom the quinine pills were prescribed is altered.

But a portion of the first letter of the name that was originally written is visible and the Court Interpreter informs me that the portion visible appears to be the tail of a capital Bengali "U" and there can be little doubt that the word written originally was "Upendro."

Why should these entries be altered in this manner unless it is to support the case that Dr. Bankim attended Surendra on the 31st July ? It seems to me quite clear that Dr. Bankim's books have been altered for this purpose.

When once one comes to the conclusion that Dr. Bankim attended Surendra on some day other than the 31st July, one gets rid of the story set up by the Moulvi and Lal Mohun.

Then it has been suggested that even if Dr. Bankim did not attend Surendra on the 31st of July yet he may have attended him on some other date for fever. That suggestion it is not possible to accept, the defendants having put forward a definite case that Surendra was treated by Dr. Bankim for fever on the 31st July. Accordingly I am of opinion that Surendra was attended by Dr. Bankim on the 11th August.

Now, why should Dr. Bankim be sent to treat Surendra on the 11th August ? Surendra's story is that since he had been in Police custody from the 7th August, he had been subjected to ill-treatment to try and induce him to confess, and on that day Lal Mohun had so ill-used him that he lost control over himself and having been compelled to evacuate on the floor he lay in a state of collapse, that Dr. Bankim was hurriedly sent for to come and attend him and that a *mehter* was sent for from the Municipal Office to clean the place and a blanket that had got soiled.

I have looked at certain works on Medical Jurisprudence in order to see if a kick in the stomach would produce the effect that Surendra has stated it produced on him. Apparently the shock to the nerve centre might produce the effect which Surendra has stated. But what has weighed with me more than this is that the defendants called two medical men, Major Weinman and Dr. Bankim Chunder Ghose, as witnesses. No questions were put to them that assuming that Surendra was kicked in the manner he has stated the kick could not have had the effects Surendra has related.

Why then are the Moulvi and Lal Mohun so anxious to fix the date of Dr. Bankim's attendance on Surendra as the 31st July which is clearly not the true date?

It seems to me there can be no other reason for this except that on the date that Dr. Bankim did attend Surendra, something had happened to Surendra which they are anxious to conceal. This being so, I think, one can reasonably accept the evidence of Surendra corroborated by Bholanath, Ramtullah and Sanyasi as to the main incidents as to what happened on that day.

It is only fair to Mr. Weston, however, to state that I am satisfied that he knew nothing about the treatment of Surendra at the *thanah*.

On the 12th August, Lal Mohun started for Salboni taking Surendra with him. He returned to Midnapore on the 13th August, the train arriving at Midnapore Railway Station at 1-30.

According to Ashutosh's evidence, from the 24th July he was having frequent interviews with the Moulvi. He also from time to time saw Mr. Weston. It is not, however, necessary to go into this portion of the evidence, although some interviews are admitted, or as to whether during this period attempts were being made to get Ashutosh to be a witness in the Conspiracy case. It will be sufficient to start with the incidents of the 13th of August. But before con-

sidering the incidents of the 13th August I ought to state that Mr. Weston saw the plaintiff in jail on the 5th August. Mr. Weston says the only complaint the plaintiff made to him was that the jail officials had taken away his bed-stead. Mr. Weston says that upon inquiring of the jail officials, why this had been done, he was told that they were afraid that the plaintiff would commit suicide by standing the bed-stead on its end and then hanging himself to it. It does not seem to have occurred to Mr. Weston to question the jail officials as to what sort of treatment the plaintiff had been subjected to that they should be afraid he would commit suicide. Mr. Weston ordered the plaintiff's bed-stead to be restored.

Then, again, on the 11th August, it is agreed on both sides that Santosh in answer to his letter of the 9th August (Exhibit 68) had a further interview with Mr. Weston. Mr. Weston says that Santosh at that interview wished to add two further names to his confession. Santosh says he sought the interview in order to ask Mr. Weston to release his father. Exhibit 68 shows clearly that this was the thought uppermost in Santosh's mind. Then we come to the incidents on the 13th August. It is agreed that on the afternoon of that day both Santosh and Ashutosh saw Mr. Weston. The story of the defendants is as follows:—

That in the afternoon—the Moulvi fixes the time about 8 o'clock—whilst the Moulvi and Lal Mohun were driving with Santosh from the jail to the *thanah*, having taken him into Police custody for thres days, Ashutosh ran up to the carriage when they were near to Mr. Weston's compound and asked to be allowed to speak to his brother Santosh. The Police officers said they could not allow this without the consent of the Magistrate. Thereupon they drove into Mr. Weston's compound and they all saw Mr Weston who said Ashutosh might have an interviw with Santosh at the *thanah*. Mr. Weston further said that if Ashutosh wished to make a statement the Police officers might record it, but he warned Ashutosh that he could not expect a pardon if he made a statement.

The improbability of the Police officers disturbing Mr. Weston in the afternoon to ask if Santosh and Ashutosh might have an interview may be left out of account for this story is conclusively proved to be untrue. Lal Mohun returned to Midnapore with Surendra on the 13th August by the train reaching Midnapore at 1-30. The jail gate-register shows that Santosh on the 13th August left the jail at 1-25. At Midnapore the evidence shows that they keep standard time. It was, therefore, impossible for Lal Mohun to be driving with Santosh to Mr Weston's house as stated.

Ashutosh's evidence, on the other hand, is as follows:—

That he had been ordered to be at Mr. Weston's house on the morning of the 13th August and that he went there as directed, but was told that Mr. Weston was sleeping and that he was to come back later. That he in accordance with this order went back later to Mr. Weston's and after a time the Moulvi arrived in a carriage bringing Santosh with him but that Lal Mohun was not there. That they went in and saw Mr. Weston and that Lal Mohun arrived subsequently. That it was then decided to take Santosh into Police custody for three days and to confront Santosh, Ashutosh and Surendra together.

Santosh's jail history ticket supports this view. There are two entries on the history ticket for the 13th August, the first: "Went to see the Magistrate," the second: "Made over to Police custody for three days."

Surendra, in the meantime, who had been left by Lal Mohun at the Police office had been sent back to jail. He was brought back from jail to the *thanah*. On the 13th and 14th August, Santosh, Ashutosh and Surendra and Jotindra Sen (Ashutosh's nephew) were tutored at the *thanah* and Surenda persuaded to make a confession.

On the morning of the 15th August Ashutosh and Surendra were taken to Mr. Weston's house. There is a conflict on the evidence as to whether Mr. Weston saw Ashutosh on the morning of the 15th August. Mr. Weston says he did not. All that happened he says was that he was shown a statement of Ashutosh's which he thought concealed more than it stated and, therefore, he told Lal Mohun to tell Ashutosh to go away. Lal Mohun says that Ashutosh was standing near a Mahomedan shrine in Mr. Weston's compound about 80 or 100 yards from the house and he went and gave Mr.

Weston's message. Then Ashutosh left the premises. Ashutosh's story, on the other hand, is that he saw Mr. Weston and he asked Mr. Weston if his father would be released if he made the statement. Mr. Weston stated, that did not rest with him, thereupon Ashutosh said he declined to make the statement until he had seen his father. Mr. Weston gave him an order to see his father and he left Mr. Weston's house. The original of Ashutosh's statement that he made to Lal Mohun is missing. The document purporting to be a copy, Ashutosh says, is not in fact a copy. Whether that be so or not it is impossible to say. It is certainly a most extraordinary fact that so many original documents are not forthcoming.

Ashutosh's evidence as to what happened at Mr. Weston's house on the morning of the 15th August is, I think, correct and is substantially corroborated by documentary evidence.

First, there is Lal Mohun's case-diary of the 15th August: "Asu Das, brother of Santosh, at first wanted to make a statement before the Magistrate regarding his knowledge in the affairs and then took time to consider over the matter." This certainly suggests that Ashutosh saw Mr. Weston on that morning.

Secondly, there is Exhibit 45 which is an application by Ashutosh of the 15th August to be allowed to see his father which was allowed by Mr. Weston on the same date.

Ashutosh's evidence is that he wrote this on the verandah of Mr. Weston's house on the morning of the 15th August.

Now, this application of Ashutosh's differs from all the other applications that he presented to Mr. Weston as it is written in the vernacular. All his other petitions to Mr. Weston were written for him in English by a dismissed Post-master.

This document shows that the story about Ashutosh's not getting within 80 or 100 yards from Mr. Weston's house is not true. Ashutosh's evidence as to what happened on the morning of the 15th August is, I am satisfied, true and is confirmed by his statement of the 16th August (sent to the Government on the 27th August), Exhibit F.

Then Mr. Weston proceeded to deal with Surendra. He sent for Babu Surendra Nath Chakrabatti, Deputy Magistrate, to record Surendra's confession.

Surendra's confession was recorded in Mr. Nelson's house by the Deputy Magistrate, Mr. Nelson being present most of the time. If Santosh's confession suggests that portions of it were not given in a narrative form but in answer to questions, Surendra's confession does so with far greater force. In fact, the Deputy Magistrate who recorded it stated in his evidence before me that any one reading the confession would probably think that it had been recorded in answer to questions put to Surendra. The Deputy Magistrate also states that he was not aware that Surendra was coming out of a long period of Police custody which was obviously a material fact for the recording officer to know.

Now, the first matter that strikes one, on looking at the confession and the statement of Surendra recorded by Lal Mohun which was with the Deputy Magistrate and Mr. Nelson at the time when the confession was recorded, is a most extraordinary coincidence. Lal Mohun in writing the word "Das" in English writes the letter "a" open and the letter "S" he forms in a peculiar manner with a tail so that any person unacquainted with his writing would think the word written was "Dey." Then there is a very extraordinary fact that in two places in the confession of Surendra which was recorded in Bengalee the word originally recorded was "Dey" instead of "Das." This was subsequently altered into "Das." Surendra says this was done at Mr. Weston's house later. Space forbids more than a few instances being given of Surendra's confession which must have been recorded in answer to questions put to him.

First, near the beginning where Surendra is purporting to speak of the *Basanta Malati Akra*: "The Raja of Narajole used to pay a monthly subscription of Rs. 2 for that *Akra*. I don't exactly remember the name of the Raja of Narajole."

Considerably later in the confession we find the following statement:—

"Before the last *Ulta Rath* in the month of *Asar* (I do not remember the date and the day) the Raja of Narajole whose name is Raja Narendra Lal Khan came to Jamini Mullick's house."

PEARY MOHAN DAS v. WESTON.

Can any one doubt that in the first part of the confession a question was put to Surendra as to what was the name of the Raja of Narajole and that he answered, "I don't exactly remember," and on the second occasion Surendra was asked if the name of the Raja of Narajole was Raja Narendra Lal Khan? Then we come to the part of the confession as to the meeting said to have been held at the *Basanta Malati Akra*.

The confession as to this is as follows:—

"That meeting was held at about 8 P.M. There was no special arrangement for sitting. There was only one bench. There was no bed."

I cannot doubt that questions were put to Surendra as to the seating arrangements at that meeting. Moreover, we have a very significant fact that in Exhibit G which was drawn up by Asadulla to be used by the informer Rakhal for the purpose of getting up his evidence there is this statement with regard to the meeting at the *Basanta Malati Akra*, "There was a bench for sitting."

Next, one other statement as to the meeting at the *Basanta Malati Akra*:

"I do not remember what other things were said in that meeting by what other persons." Then as to the meeting said to have been held at the *Rasmancha* of the Mullicks':

"I don't exactly remember who were present at that meeting. Jyoti Das, Jamini Mullick and Moti Babu were there. Hem Chandra, Abhoy Chandra Kundu too were present. It might be 25 or 30 persons in all. I can say if names are mentioned to me.

Q.—(Suggested by Mr. Nelson, struck out) Was Jogendra Mullick there?

A.—Yes. Jogendra, Gobinda Pal, Hari Kristo Patal, Rakhal Chandra Pal, Ashutosh Kundu, Ashutosh Das (originally written Dey) all these persons were there. . . . I don't remember what other speeches were made."

Then at the meeting at the house of Kamini prostitute:

"I don't remember who else made speeches."

Then take the meeting at the Raja of Mahisadal's house:

"The date I cannot exactly remember . . . . I cannot say who live at the Mahisadal Raja's house and whether those who live there were present at the meeting." Then, lastly, one further example. The confession originally recorded gave the name of "Honorary Magistrate Abinash Chandra Dutt." Later in the confession we find "whether Abinash's title is Mitter or anything else I do not know." Whereupon the former part of the confession "Honorary Magistrate Abinash Chandra Dutt" is altered to "Abinash Babu."

In my opinion there can be no doubt but that by far the greater portion of this confession was obtained from Surendra by means of questions put to him and that the confession was recorded in a form in manifest breach of the plain provisions of the law which, according to the Deputy Magistrate's own statement, were well known to him. I do not, however, believe that Mr. Nelson and the Deputy Magistrate knew that the confession that Surendra was making was untrue.

The Deputy Magistrate admits that if he knew Surendra was coming out of Police custody he would be much more careful. It is unfortunate that the Deputy Magistrate was not so told.

On the 15th August, under the permission given by Exhibit 75, Ashutosh saw his father in jail. Ashutosh informed his father what had taken place and his father advised him to go to the Bar Library and see the pleaders. The same afternoon Ashutosh went to the Bar Library and related his story, how his father had come to be arrested and the attempts made to get him to be a witness.

A deputation accompanied by Ashutosh waited on Mr. Bradley Birt, the Additional District Magistrate, but Mr. Bradley Birt told him that he could not interfere and that they must go to Mr. Weston. The deputation said that Mr. Weston was absolutely in the hands of the Police. On the 16th August a number of gentlemen of Midnapore wrote to Mr. K. B. Dutt, who was then the Chairman of the Midnapore Municipality, requesting him to acquaint the Lieutenant-Governor with the existing state of affairs. Pursuant to this requisition, Mr. Dutt telegraphed to the Chief Secretary on the 16th August, the telegram (Exhibit N.) in which it is stated: "We are satisfied on materials which we desire to place before the Government that evidence implicating respectable and absolutely innocent persons is being fabricated."

On the 27th August Mr. Dutt forwarded to the Government two statements of Ashutosh dated respectively the 16th and 18th August, a statement of Jotindra Nath Sen (the plaintiff's grandson) and also a statement of Upendra Nath Mukerjee (the brother of Surendra Nath Mukerjee).

Counsel for the defendants suggest that these statements were invented by the Bar at Midnapore. That seems to be quite an impossible theory. I think the statements are genuine and, on the whole, they contain a substantially accurate account of what had happened.

The 15th August had been fixed as the date on which the persons arrested on the 31st July should be produced before Mr. Nelson. None of them were so produced. On the 21st August Santosh was produced before Mr. Nelson but not in open Court, but in some other room at the Court premises. This again was in direct contravention of the provisions of the law.

Section 352 of the Code of Criminal Procedure enacts: "the place in which any Criminal Court is held for the purposes of inquiring into or trying any offence shall be deemed an open Court to which the public generally may have access so far as the same can conveniently contain them."

The plaintiff says that on the 21st August he was not taken out of jail at all. I think he is right in this but it matters little whether he was or was not.

The production of Santosh but not in open Court on the 21st August seems to suggest that his non-production on the 7th August was done of a deliberate and set purpose.

On the 21st August two petitions for bail were filed on behalf of Santosh and the plaintiff (Exhibit LXXXVI in No. 1 and Exhibit K. K K. in No 1). The petition of Santosh stated that he was innocent. The plaintiff's petition stated in paragraph 2: "The petitioner's said son was pressed from the very beginning to make a confession but he denied all knowledge of the bomb. Para 3. That after the arrest of Santosh Chandra Das your petitioner was pressed by 'various authorities' to induce his son to make a confession which not being done your petitioner was arrested on the 23rd July, 1908, and was remanded to *hajat* on the very day where he is rotting since then."

This petition sets out clearly the cause of the plaintiff's arrest, *viz.*, his failure to induce Santosh to make a confession. The only thing that is not stated specifically is who were the "various authorities" that caused the plaintiff to be arrested.

By the 21st August it had been found out that the confessions of Santosh and Surendra contained mistakes which did not fit in with the reports of the informer. According to Lal Mohun, on the 21st August he went to the Police office at the Court and questioned Santosh as to his confession. Santosh according to Lal Mohun immediately cleared up all difficulties, corrected the dates and brought the incident of the 7th July into line with the alleged reports of the informer. Lal Mohun says that he recorded this additional statement of Santosh. Santosh says he gave no such statement. I accept Santosh's statement. The additional statement, if true, was one of considerable value. No statement of Santosh recorded by Lal Mohun could be used in evidence. There was a Magistrate in the building, and it is inconceivable, if Santosh did make this statement, that Lal Mohun would not at once have taken him before a Magistrate and had his statement recorded.

Surendra in his confession had come to grief more, because he had given, as being present at the meeting at the *Basanta Malati Akra*, Santosh who was then in Ranchi and Satyendra Nath Bose who was then in jail.

Lal Mohun says he went to the jail on the 21st August and saw Surendra who immediately corrected the errors in his confession. Surendra says he did nothing of the sort. I accept Surendra's statement. I am satisfied if he had made this important correction he would have been taken before a Magistrate and the alteration would have been recorded.

On the 28th of August, as I have already stated, the third batch was arrested. It is said that it was intended to arrest Ashutosh on that day but this could not be done as he was absconding.

I am satisfied that Ashutosh was not absconding. He was present in Court on the 31st of August. It is now said that the plaintiff's house was again searched on the 28th of August by Asadulla.

Not a single question as to this search was put to the plaintiff or any of his witnesses.

PEARY MOHAN DAS v. WESTON.

This search I am satisfied never took place and the return to the warrant by Asadulla is not genuine.

The warrant (Exhibit CCXXV in No. 1) purports to show from the return on the back of it that the search took place in the presence of one witness, Abdulla, only. Section 103 of the Code of Criminal Procedure requires that there shall be at least two witnesses to a search.

Asadulla now says that there were two other witnesses—a doctor with leprosy on his hands and a blacksmith, neither of whose names does he recollect.

I reject Asadulla's evidence. The search, I am satisfied, never took place. Then, on the 31st of August the plaintiff, Santosh, Surendra and others were produced before Mr. Nelson in Court.

Mr. P. K. Bose, a Barrister, who is described in the list of Moderates and Extremists (Exhibit LXXX) as an Extremist and supporter of all the *Akras*, appeared for the Crown. The first thing that occurred in Court on that day was that Mr. Keays applied for bail on behalf of the Raja of Narajole.

Then Mr. Dutt applied for leave of the Court to hand over to the plaintiff, Santosh and Surendra three petitions to sign if they desired. It appears that Mr. Dutt said they were important petitions. (See evidence of P. K. Bose on behalf of the defendants)

The petition handed to the plaintiff was, according to Lal Mohun, "a long petition" and when he had read a page or two of it he got his son Santosh to read the rest of it to him. The three petitions were then signed and handed back to Mr. Dutt. So far there is not much controversy on the evidence on this point.

The Court then adjourned for lunch. Lal Mohun's evidence is that he spent the luncheon interval in conversation with a connection of his wife who had come down to the Court to see him. This I do not believe. The evidence on behalf of the plaintiff is that the Police asked Santosh and Surendra during the adjournment of the Court what the petitions they had signed were and they said they were petitions for bail.

The evidence also is that the Police officers told the plaintiff that he was going to be released but as he had signed a petition he could not be released unless he withdrew it. On the Court resuming after the adjournment the plaintiff asked for his petition back and struck his name out.

A petition (Exhibit B) which is said to have been the petition signed by the plaintiff is produced here. At first it was challenged by Counsel that this was not the petition, on the ground that the petition signed by the plaintiff on the 31st of August was a short petition. Lal Mohun's evidence put an end to this suggestion for he says the plaintiff's petition was a long petition. Exhibit B consists of a petition written on five and a half sheets of foolscap the writing being on one side of the paper only, anything much shorter than this could hardly be described as a "long petition."

The evidence satisfies me that Exhibit B was the petition signed by the plaintiff on the 31st August.

To return to what happened in Court on the 31st August after the midday adjournment. Lal Mohun first gave some formal evidence and the case was withdrawn against the plaintiff and two others.

Then Mr. K. B. Dutt made an application for bail for Santosh and Surendra and some other of the accused. Mr. Nelson's evidence is that it is the usual practice for applications for bail to be founded on petitions.

So in the usual course the application for bail on behalf of Santosh and Surendra would be supported by petitions.

Santosh's petition (Exhibit 43) withdrew his confession and asked for an opportunity to make a statement which would disclose the circumstances under which he was by threat, inducement and persuasion compelled to make his confession. Surendra's petition (Exhibit 44) did not formally withdraw his confessions, but he asked that an opportunity should be given him of making a statement in Court.

Apparently, while Mr. Dutt was making his application, Mr. Nelson was not paying great attention to it for the evidence shows that he was writing orders on other petitions. Mr. Nelson rejected the application for bail and immediately afterwards the case was adjourned, the record being immediately carried away by the Court Inspector, Rash Behary Sen, who is a Police officer who conducts prosecutions in the Court.

The Court Inspector at that time had charge of the record in the case. He was

as I have already said, cited as a witness by the defendants in this case but was not called. Presumably, therefore, his evidence on this point, if he had been called, would not have supported the defendants' case.

The question is, were these two petitions put in on the 31st August or were they, as Counsel for the defendants says, "smuggled into the record?"

According to Mr. Norton, Mr. Dutt deliberately "cheated and defrauded the Court" on that day.

Mr. Cornish's evidence on this matter is as follows:—

"On the 31st August I heard of applications being signed by Santosh, Surendra and Peari. I think the Moulvi told me this before I went to the Club. He told me some petitions had been signed and put in. I think he said, but I can't remember, that they had been surreptitiously filed .... He must have told me what the petitions were. He told me I think that they were petitions of retractation of Santosh and Surendra. To the best of my belief I went and reported the matter to Mr. Weston. Mr. Weston wrote to Mr. Nelson and asked him if these petitions had been filed. Mr. Nelson, so far as I remember, knew nothing of them. When Mr. Nelson looked he found that they were with the record. This was on the 31st August. The Moulvi told Mr. Weston that the petitions were retractations."

If Mr. Cornish's evidence be accepted there can be no doubt that the defendants knew about these petitions being filed and that they were petitions of retractations on the 31st August.

The Moulvi's evidence now is that he was in Court for only a few minutes on the 31st of August. But before the Committing Magistrate, on the 8th September 1908, he said: "I was in Court on the 31st (*i.e.*, the 31st August). I did not hear of any applications to retract confessions. I do not know up to now if any such petitions were filed. I had not heard that two such petitions were filed and disappeared from the record. I have not heard of the existence of such petitions and their disappearance."

To Court. "I have heard of some petitions being smuggled into the record."

No reliance can be placed upon the evidence of the Moulvi.

Then the evidence of Lal Mohun is that he saw Santosh and Surendra sign the two petitions in Court on the 31st August but they were not filed in Court on that day. At the rising of the Court he says he glanced through the record but could find no petitions filed on behalf of Santosh and Surendra. He then says he went and informed Mr. Weston that Santosh and Surendra had signed but had not filed two petitions.

This, however, does not agree with Lal Mohun's evidence at Sessions where he said: "Bail petitions were made for all the accused on the 31st August. They were presented in my presence.

"Q.—The petition for bail and the petition for retractation of confession is the same identical petition.

"A.—I know now. I did not know at that time."

Lal Mohun at the Sessions evidently meant the Court to believe that petitions were filed on behalf of Santosh and Surendra on the 31st August but he thought they were petitions for bail.

Then again, the account given by Mr. Weston here is substantially different from the account he gave at the Sessions.

At Sessions, Mr. Weston said: "I had the petitions of retractation in my house because I wanted to see them. I am in the habit of seeing records; it is part of my duty. I sent for them from Court. These were then in a flat file with the record, not part of the record. They came from the custody of the Court. I know there is a dispute as to what had become of them. They were underneath the record forming no part of the record. I heard of their existence because applications were put in for copies of them before the trying Magistrate."

This is a different story to that which Mr. Weston has told here. On the 1st September, an application was made to the Court for copies of the confessions and "also for copies of the petitions filed by Santosh and Surendra filed on the 31st August."

Mr. Nelson rejected the application for copies. In his order of the 2nd September he states: "These petitions were certainly not brought to my notice during the hearing. A perusal of them shows that both Surendra and Santosh demanded to be examined that day." Mr. Nelson had been concerned in recording both Santosh and Surendra's con-

fessions and one would have thought as soon as he became aware of the petitions of Santosh and Surendra asking for an opportunity to make a statement to him, he would at once either have gone to the jail or have had Santosh and Surendra produced before him and given them the opportunity of making a statement to him.

On the 2nd September Lal Mohun and the Moulvi went to the jail and saw Santosh.

The Moulvi says he did not go into the jail and see Santosh but he waited outside and that Lal Mohun only went in.

The entry in the case-diary of Lal Mohun for the 2nd September is as follows:—

"With Moulvi Mazharul Huq went to the jail and questioned Santosh Das about the petition alleged to have been signed by him on the 31st in Court of Joint Magistrate, and he said that he signed it without reading its contents considering it to be a bail application." Why "alleged to have been signed," when Lal Mohun saw Santosh sign the petition in Court? Santosh's evidence is that the Moulvi and Lal Mohun came to him in jail and tried to get him to disclaim the petition of the 31st August. Santosh's story is, I think, far more probable.

Fist of all, the Police-officers on the 2nd of September did not go to question Surendra in jail, the reason apparently being that Santosh's petition formally withdrew his confession whilst Surendra's did not do so but only stated that he wanted to make a statement to the Court.

Secondly, when Mr. Reid—Mr. Nelson having been transferred on the 2nd September—went to jail on the 3rd September and asked Santosh and Surendra about the two petitions, "they admit their signatures and that the petitions are theirs" (See Mr. Reid's order of the 3rd September). Santosh made no reservation on 3rd September that he thought he had signed the petition as a bail petition.

Mr. Reid's order on the 3rd September was, "Orders will be passed thereon later." No orders were in fact ever passed on these two petitions. I cannot help thinking it would have been wiser that Mr. Reid on the 3rd of September had given Santosh and Surendra an opportunity of making a statement.

The conclusion I come to with regard to the two petitions of the 31st August is as follows:—First, that the two petitions were without doubt filed in Court on that day, that Mr. Nelson was not attending to what was being said in Court but was writing orders on other petitions. That when Mr. Nelson was questioned about these petitions subsequently he did not know of their existence and, therefore, it was assumed that the two petitions had been improperly put into the record. I think that it was owing to this that the subsequent unpleasant events arose. The evidence doubtless is in some parts suspicious as to there being an attempt to suppress these two petitions, and if Mr. Cornish's evidence is accepted doubtless it goes far to establish the plaintiff's contention. But on the whole after very careful consideration of the evidence I am of opinion that the whole incident arose out of a misunderstanding.

Then the plaintiff's evidence is that on the night of the 31st August and again on the 1st September Lal Mohun came to his house to induce him to try and get Santosh to stick to his confession and that Ashutosh did write a letter to Santosh to this effect. But whether that be so or not, it is common ground that on the 2nd of Septemer Lal Mohun and, as I hold, the Moulvi also interviewed Santosh in his cell with reference to his petition. Whatever instructions Mr. Weston may have given the Police officers, I am satisfied that on the 2nd September they tried to persuade Santosh to disclaim his petition of the 31st August. On the 4th September, Ashutosh was arrested and put up before Mr. Reid when he filed a petition for bail (Exhibit L. L. L.). In this petition he stated that "the Police and the superior officer (*Urdhatam Karmachari*) have been for a long time trying to make your petitioner a witness in the bomb case." That the "superior officer" refers to Mr. Weston is not open to doubt. I have little doubt but that the arrest of Ashutosh was a move to try and get Santosh to stick to the confession which had required so much trouble to obtain and without which the defendants knew the criminal case would probably go to pieces.

On the 3rd September Piyari Lall Ghosh, Vakil, wrote to the Superintendent of the jail asking for an interview with Santosh and Surendra and other prisoners. This interview was granted as regards the prisoners other than Santosh and Surendra. With

regard to Santosh and Surendra Mr. Weston himself came to the jail with Lal Mohan on the 5th September and says he asked Santosh and Surendra if they wished to see a Vakil.

Mr. Weston then says he entered an order in the visitors' book as follows:—"I visited the confessing prisoners with whom a Vakil had asked for an interview. As the prisoners expressed no wish to see him the Superintendent may inform the Vakil accordingly." Other attempts by legal advisers to see Santosh and Surendra proved also unsuccessful. There seems to have been a very heated interview between the Superintendent of the jail and Mr. Keays and Mr. A. N. Chaudhuri.

Major Weinman in his evidence before the Committing Magistrate said: "when the Councel asked me to see Santosh and Surendra, I asked why should I put it into his head that he could see them when he had already said he did not want to see a legal adviser." Major Weinman says, however, that he went and asked Santosh and Surendra, "Do you want to see a Vakil" Major Weinman knows perfectly well that an European or any other Barrister is not described in the vernacular as a "Vakil."

The evidence satisfies me that every possible difficulty was being put in the way of Santosh and Surendra seeing their legal advisers.

The net result was that before being taken to Court on the 7th of Septemper, Santosh had seen his Pleader for three minutes that morning, and Surendra had not seen a legal adviser at all. It is suggested by Counsel for the plaintiff that the Pleader was allowed to see Santosh for three minutes on that morning, because Santosh had formally withdrawn his confession, and that special rules framed by Mr. Weston and Major Weinman as to interviews with confessing prisoners did not apply to Santosh.

On the 7th September the accused were taken to Court. Immediately Counsel applied for an interview with Santosh and Surendra. Mr. Reid allowed it "with certain precautions." Mr. Cornish was stationed outside the room in which the interview took place.

The interview appears to have lasted about two hours. Santosh and Surendra both signed petitions setting out the facts. They also—Santosh on the 7th September and Surendra on the 7th and 8th September—in the Court of Mr. Reid wrote out more detailed statements. These statements, if true, are of great importance. Now until the morning of the 7th September Santosh and Surendra had seen no one who could have tutored them to make these statements.

Counsel for the defendants say, however, that the legal gentlemen at the interview allowed by Mr. Reid on the morning of the 7th Septemder tutored Santosh and Surendra. This is pure suggestion and there is not a word of evidence to support it.

The legal gentlemen who saw Santosh and Surendra on the morning of the 7th September were Mr. Godfrey, now Assistant Government Advocate in Burmah, Mr. K. B. Dutt, Mr. A. N. Chaudhuri, Mr. A. C. Dutt, and probably also Mr. Keays, now second Presidency Magistrate, and Mr. H. Mallick. There was also the Pleader Piyari Lall Ghose present.

The defendants try and get rid of the European Barristers as tutoring Counsel by saying they were present only a few minutes. There is not the slightest reason to suppose that these statements were not written by Santosh and Surendra without any outside assistance. I have already stated what happened in the bomb case resulting finally in the acquittal of Santosh, Surendra and Jogjiban in this Court. A great deal of evidence has been given on behalf of the plaintiff in this case as to the treatment of the under-trial prisoners in the bomb case in jail.

There can be little doubt that the treatment of many of the prisoners was contrary to the provisions of the Jail Code.

Major Weinman was a most unsatisfactory witness. He came here and gave evidence that the evidence he gave before the Committing Magistrate was incorrect or as he said it contained "many, many mistakes." I think his evidence before me contained many mistakes also and I am not satisfied that his evidence before the Committing Magistrate was incorrect.

I refrain from going into the treatment of the prisoners in jail, not because I accept Major Weinman's or Mr. Brett's evidence but because I think that the evidence that has been given here is insufficient to establish that any of the defendants are responsible for such treatment.

To sum up. From a careful ap-

preciation of the evidence and having had an opportunity of seeing the witnesses on both sides in the witnesses-box I find the following facts:—

First, that the story given in the reports alleged to have been given by Rakhal Chandra Laha was not in fact a true story.

Secondly, that the plaintiff has not proved that the bomb found in his house on the 8th July, 1908, was placed there at the instigation of the defendant, the Moulvi.

Thirdly, that the defendant Weston believed that the story contained in the reports alleged to have been given by Rakhal Chandra Laha was true.

For this purpose it might be sufficient for me to say that the defendant Weston's belief in the story would be sufficiently evidenced by the manner in which he had his house guarded by armed constables. But as in the course of this judgment I have had occasion to severely criticise the defendant Weston's conduct, it is only fair to him that I should state that I am satisfied that not only did he believe in the story set out in the alleged reports of the informer but also that if he had suspected that the reports were untrue he would not have acted on them.

I apprehend that it is no part of a District Magistrate's duty to be an expert in criminal investigation. The defendant Weston, however, does appear to have endeavoured to have taken some steps to try and satisfy himself that the story was true. But he had neither the time, for his charge at Midnapore seems to have been an extraordinarily heavy one, nor the experience to do this in a satisfactory manner.

In this respect there seems to have been an extraordinary blunder somewhere. Mr. Cornish's evidence is that he was really ousted from any control over the Police officers engaged in the investigation of this case. His control, he says, was altogether nominal and that he understood that the Police officers were working under the control of the Criminal Investigation Department. Mr. Plowden, the Deputy Inspector-General, having control of the Criminal Investigation Department, says that his Department had nothing to do with the investigation into the Bomb Conspiracy case at all except that occasionally he was asked for and gave advice The result was that the defendants, the Moulvi and Lal Mohun, were under the control of no superior Police officer. Whether Mr. Cornish's view is correct or not, it is not necessary for me to state. There can be little doubt that Mr. Cornish had not a strong belief in the story related in the reports—nay more, he stated in his evidence that when the bomb was found in the record room of the Dutts on the 31st July, he suspected that the Police had put it there. It does not appear that he communicated this suspicion to the defendant Weston.

I think that the defendant Weston was misled as to the truth of the reports by the other two defendants.

Fourthly, I find that the defendants, the Moulvi and Lal Mohun, did not believe in the story set out in the alleged reports of the informer.

This I infer from the procuring and attempting to procure false evidence, the tutoring of confessing prisoners and others by these two defendants.

Doubtless it does not follow as a matter of necessity that because these two defendants did these things that they know that the story was not true. But when evidence has been given establishing these facts it raises a strong presumptive case against these two defendants which if they fail to displace is, in my opinion, sufficient, proof of their not believing in the story.

Fifthly, I find that the reason of the plaintiff's arrest was to put pressure on his son Santosh to confess and not in the belief nor with a reasonable or other suspicion that the plaintiff had anything to do with the bomb found in his house, nor on the ground that the plaintiff was the owner of the house in which the bomb was found. I also find that prior to the arrest of the plaintiff, each of the defendants, at first by advice and persuasion and then by threats, tried to induce the plaintiff to get his son Santosh to make a confession and on his failure to induce Santosh to confess the defendants caused the plaintiff to be arrested.

The evidence to my mind establishes conclusively that the three defendants were working together in concert for a common object. The motive of the defendant, Mr. Weston, for joining the conspiracy may be very different from that of the two other defendants. But the law does not permit of a man being arrested in order to put

pressure on his son to confess, even if the person causing the arrest believes that by so doing he will get evidence that will lead to the conviction of persons engaged in a huge conspiracy.

I disbelieve altogether the suggestions of a corrupt motive that have been made against the defendant Weston.

The story of the sale of his motor car to Mahisadal Raj has been satisfactorily explained by him, although it may not have been very discreet of him to sell it to the Raj at the time the Dewan was cited as a witness for the defence.

I must now deal shortly with the points of law that have been raised by Counsel. *First*, it is said that the standard of proof in a case like the present is the same as if the defendants were being tried for a criminal offence. Doubtless, the English text-book writers are not agreed on this point. Such eminent writers as Taylor and Stephen support the view that the standard of proof is in a case like the present such as would be required in a criminal case The tendency, however, of the authorities in England appears to me to be the other way.

However, in India the law of evidence is modified. The Act defines when a fact is said to be proved although, of course, in a case like the present due regard must be had to the presumption of innocence. This matter is, however, not open to argument in this Court. The point has recently been decided by Jenkins, C. J., and Woodroffe, J., in *In the goods of Gopessur Dutt* (6), in a judgment delivered so recently as the 18th July 1911 in which they decided that whatever may be the rule in England there is no rule under the Indian Evidence Act that the standard of proof in a case like the present must be the same as if the defendants were being tried on a criminal charge.

The next point argued is, that a suit to recover damages resulting from a conspiracy is not maintainable in British India The argument is put in this way. That as the only conspiracy which constitutes a criminal offence under the Indian Penal Code is that of a conspiracy to wage war against the King, therefore no suit can be maintained for damages resulting from a conspiracy. To that argument I am unable to assent. This being a case instituted in a Court in the mofussil the Court has to apply the principles of justice, equity and good conscience to the case; that is to say, the principles of the law of England so far as suited to India and the state of society here.

That the Indian Penal Code took away by express words any civil remedy cannot be suggested nor can I see that it did so by necessary implication. I have, therefore, to consider the case apart from the provisions of the Indian Penal Code. On what principle of justice, equity or good conscience ought a plaintiff in a suit in a Court in India not to be entitled to recover damages which have resulted from a conspiracy to injure him? In my opinion in such a case the plaintiff has a right of suit in India.

To hold otherwise would, I think, be a blot upon our system of jurisprudence.

The learned Advocate-General has referred as part of his argument to a memorandum by Lord Dunedin and Sir Arthur Cohen annexed to a report of the Commission on Trade Disputes expressing the view that it was only such conspiracy as amounts to a criminal offence that can give rise to civil liability. But the report obviously refers to conspiracies which are indictable according to the Common Law of England. Lord Macnaghten in his judgment in *Quinn v. Leathem* (7) expressly lays down that because a Statute has exempted certain conspiracies from the purview of the Criminal law, this does not in any way affect civil liability. Nor are Judges of the highest eminence all agreed that it is only such conspiracies as are indictable that can give rise to civil liability.

The next point raised by the Advocate-General is that the plaintiff has brought his suit on a conspiracy and he must be kept strictly to the cause of action that he has set out in his plaint. To that view I assent.

But then argues the learned Advocate-General that this suit is in substance only one for malicious prosecution against joint tortfeasors and, therefore, the plaintiff's suit must fail. To that view I cannot agree.

I take the following from Lord Coke's Commentary on Littleton, Hargrave and Butler's Edition, published in 1794, a book

(6) 16 C. W. N. 265; 13 Ind. Cas. 577.

(7) (1901) A. C. 495; 70 L. J. P. C. 76; 65 J. P. 708; 50 W. R. 139; 85 L. T. 289; 17 T. L. R. 749.

of the highest authority amongst English lawyers.

Note on 161 A.

"II. Where two or more conspire to harass any person by false and malicious suit whether criminally or civilly it is a crime punishable by indictment or the parties injured may sue for damages by writ of conspiracy; and both of these remedies lie at common law, that part of the Statute or *Ordinance Articuli super charta* which gives remedy against conspirators by writ out of Chancery being according to both Staunford and Lord Coke only an affirmance of the common law, Staunford P. C., 172, 2 Inst. 561, 562."

"IV. There is also a remedy for a false and malicious prosecution though the aggravation of a conspiracy or confederacy is wanting and the injury comes from one only: for in such a case the party prosecuted may have an action upon the case for damages."

A conspiracy to maliciously prosecute a man is obviously indictable according to the common law of England.

As Lord Brampton pointed out in the case of *Quinn* v. *Leathem* (7): "A conspiracy consists of an unlawful combination of two or more persons to do that which is contrary to law or to do that which is wrongful and harmful towards another person, it may be punished criminally by indictment or civilly by an action on the case in the nature of conspiracy if damage has been occasioned to the person against whom it is directed. It may also consist of an unlawful combination to carry out an object not in itself unlawful by unlawful means. The essential elements whether of a criminal or of an actionable conspiracy are, in my opinion, the same though to sustain an action special damage must be proved. This is the substance of the decision in *Barber* v. *Lesiter* (8)."

Applying the test given by Lord Brampton, it is clear that if the conspiracy is a criminal one it gives rise to civil liability if special damage has been suffered by the plaintiff. The conspiracy in the present case would obviously be indictable at common law in England and, therefore, if damage resulted the plaintiff would have a good cause of action in England. In my opinion, he has a similar right in India.

The truth of the matter is that in a case like the present the plaintiff has two causes of action, one to recover the damage that has been occasioned to him as the result of the conspiracy, and the other to recover damages for malicious prosecution against the defendants as joint tortfeasors. This is well illustrated by the case of *Quinn* v. *Leathem* (7). There the plaintiff in his pleading charged in the first four Courts as separate causes of action four separate acts each of which was alleged to have been done wrongfully and maliciously and with intent to injure the plaintiff and to have occasioned him actual loss, injury and damage. The fifth count charged as a separate cause of action that the defendants unlawfully and maliciously conspired together and with others to do the various acts complained of in the previous counts with intent to injure the plaintiff and his trade and business and that by reason of the conspiracy he was injured and damaged in his trade. The jury returned a verdict in favour of the plaintiff on all five counts and the verdict and judgment were upheld on appeal in the House of Lords.

In my opinion the present suit to recover damages resulting from the conspiracy is maintainable by the plaintiff. These points of law as to whether a suit to recover damages resulting from a conspiracy and as to the nature of the present suit do not in any way affect the merits of the suit. Their importance lies in the fact that if the suit is only one for malicious prosecution then the suit is barred under the provisions of the Indian Limitation Act as being brought after the statutory period has expired. I, therefore, decide the first issue in favour of the plaintiff and also the second issue so far as relates to the overt acts mentioned in clauses (*c*), (*d*) and (*e*) of that issue.

The third issue is whether the defendants were entitled to notice of this suit under section 80 of the Code of Civil Procedure. In my opinion they were not. A public officer sued in respect of an act done in bad faith is not entitled to notice under section 80. The decisions in this Court of *Shahunshah Begum* v. *Fergusson* (9) and *Raghubans* v. *Phool Kumari* (10) establish this proposition without doubt [See also *Muhammad Saddiq Ahmed* v. *Panna Lal* (11)].

(8) (1859) 7 C. B. (N. S.) 175; 29 L. J. C. P. 161; 6 Jur. (N. S.) 654.

(9) 7 C. 499.

(10) 32 C. 1130; 1 C. L. J. 542.

(11) 26 A. 220.

In these circumstances, it is not necessary for me to determine the fourth issue.

The fifth issue is whether this suit is barred by limitation

The Article of the Indian Limitation Act, 1908, which applies to the present suit is, I think, Artlcle 36. This suit is, I think, a suit "for compensation for any malfeasance, misfeasance or non-feasance independent of contract and not herein specially provided for," the period of limitation for such a suit is two years from the time when the malfeasance, mis-feasance, or non-feasance takes place. In this view the plaintiff's suit is brought within time. I do not agree with the argument that this suit is governed by Article 23 as being a suit "for compensation for a malicious prosecution," the period of limitation for which is one year from the time when the plainitff is acquitted or the prosecution is otherwise terminated.

If this suit is not governed by article 36 I should hold that Article 120 applies. That Article fixes six years as the period of limitation with regard to suits for which no period of limitation is provided elsewhere in the Second Schedule to the Act.

I am, therefore, of opinion that the present suit is not barred by limitation.

The sixth and last issue is, what damages is the plaintiff entitled to. In order to sustain an action of this nature the plaintiff must prove special damage. The conspiracy must be the proximate cause of the damage or the damage must be such as to have been in the contemplation of the parties.

In the present case the plaintiff has given evidence that he was compelled to spend a considerable, though not a heavy sum, owing to his arrest.

The question is whether these damages legally resulted from the conspiracy. The case principally relied upon by the defendants is the decision in *Barber* v. *Lesiter* (8).

But all that decision laid down was that on the facts alleged in the declaration the conspiracy was not the proximate cause of the damage nor was the damage to the plaintiff in the contemplation of the parties.

The damages in the present case are not, in my opinion, too remote. I adopt Lord Justice Fitzgibbon's statement in his charge to the jury in *Quinn* v. *Leathem* (7).

"I told the jury that pecuniary loss directly caused by the conduct of the defendants must be proved in order to establish a cause of action and I advised them to require to be satisfied that such loss to a substantial amount had been proved by the plaintiff. I decline to tell them that if actual and substantial pecuniary loss was proved to have been directly caused to the plaintiff by the wrongful acts of the defendants that they were bound to limit the amount of damage to the precise sum so proved."

I accordingly award to the plaintiff the sum of Rs. 1,000 as damages. The defendants must pay to the plaintiff his costs of this suit on scale No. 2.

Before parting with this case I wish to make a brief reference to a matter which, though not bearing directly on the result, is intimately connected with the conduct of this case and involves a serious imputation of unprofessional conduct, which two senior members of the Bar, one of them being the Advocate-General, have seen fit to make on the conduct of Counsel opposed to them.

It was made a matter of deliberate and unrestrained attack on Mr. Dutt that he had not gone into the witness box. Mr. Dutt has himself explained the reason of his abstention and that reason appears to me to be satisfactory. His client, in whose favour his testimony would have been given, with full knowledge of this saw fit to retain him as his Counsel and it cannot be suggested that there was anything improper in Mr. Dutt's accepting this retainer. Having done this, it was in strict accordance with the rule of professional ethics of almost universal application that having taken up the position of an Advocate he should refrain from testifying on a trial which was being conducted by him. I may observe that this rule of professional conduct was not, I regret to say, observed by Mr. Dutt's opponents. I may further add that I viewed at the time and still view with complete disapproval Mr. Norton's unfounded and abusive attack on Mr. Dutt's junior, Mr. H. D, Bose.

Suit decreed with costs

AMODINI DASEE *v.* DARSON GHOSE.

(s. c. 38 C. 828.)

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 440 OF 1911.

June 23, 1911.

Present:—Mr. Justice Casperez and Mr. Justice Sharf-ud-din.

AMODINI DASEE—COMPLAINANT—PETITIONER

versus

DARSON GHOSE—ACCUSED—OPPOSITE PARTY.

High Court—Criminal case—Rule discharged under misapprehension of facts—Judgment not signed—Rehearing of case—Discharge of accused by Magistrate—Revival of case by same Magistrate, if legal—Magistrate hearing case partly—Discharge of accused by another Magistrate for non-attendance of remaining prosecution witnesses—Criminal Procedure Code (Act V of 1898), ss 253, 369.

A judgment or order of the High Court is not complete until it is sealed, and until this is done, it may be altered by the Court without any application for review.

Gibbons, In re 14 C. 42 and *Queen-Empress* v. *Lalit Tiwari*, 21 A. 177, relied upon.

Queen Empress v *Fox*, 10 B. 176, not followed.

A Magistrate who discharges an accused person may on application made to him revive the case.

Mir Ahwad Hussain v. *Mohomed Askari*, 29 C. 726 (F. B.), followed.

A Bench of Magistrates examined three witnesses for the prosecution. On the next day fixed for hearing, the Sub Divsional Magistrate withdrew the case to his own file and discharged the accused under section 253 of the Criminal Procedure Code as "no evidence is produced:"

Held, that the case must be sent back so that it may be heard with reference to the evidence already on the record.

Criminal rule against the order of the Sub Divisional Magistrate of Baraset, dated January 10th, 1911.

FACTS.—The petitoner brought a complaint against the accused under section 417 of the Penal Code of cheating and criminal breach of trust. The case having been settled, the accused was discharged. Subsequently, the petitioner applied to the same Magistrate who had discharged the accused (the Sub-Divisional Officer) that the compromise was fraudulent. The Magistrate after an inquiry, revived the case and transferred it to a Bench of Magistrates. Three witnesses for the prosecution were examined and the case was adjourned till January 7, 1911, in order that the accused may have an opportunity of moving the High Court for a transfer. On January 9, the Sub Divisional Magistrate withdrew the case to his own file and took it up the next day when the complainant represented that as there was a likelihood of the case being transferred, she had not her other witnesses present, and she applied for a postponement but the Magistrate discharged the accused by the following order:—"Complainant present. No evidence is produced. Accused discharged under section 253, Criminal Procedure Code. True—Section 417, Indian Penal Code."

The petitioner then obtained this Rule on the ground that the learned Magistrate should have considered the evidence taken down by the Bench, which established a *prima facie* case.

The rule came on for hearing before the learned Judges of the High Court composing this Bench on June 16, 1911. The Court was under a misapprehension of the facts. It thought that the Sub Divisional Magistrate had revived an order of discharge passed by another Magistrate and, therefore, it discharged the Rule. Immediately afterwards the petitioner's Vakil pointed out the mistake and stated that the Magistrate had revived an order of discharge passed by himself which he had every jurisdiction to do having regard to the Full Bench case of *Mir Ahwad Hossein* v. *Mohomed Askari* (1). Their Lordships then heard the case again.

Babu *Bhudeb Chandra Roy*, for the Petitioner.

Babu *Probodh Kumar Das*, for the Opposite Party.

JUDGMENT.—When this Rule was heard on the 16th June last, we delivered judgment discharging the same, but on the same day, the case of *Mir Ahwad Hossein* v. *Mahommad Askari* (1) was brought to our notice, and it subsequently appeared that we were under a misapprehension on the facts of the case. As we had not signed our judgment, we thought it proper to hear both the learned Vakils again to-day.

It has been contended by the learned Vakil for the opposite party that we cannot, having once delivered our judgment, review the same. We entertain no doubt that it is competent to us to do so. The terms of section 369 of the Criminal Procedure Code are general, and we have not signed our judgment. The same view may reasonably be inferred from the case of *In the matter of the*

(1) 29 C. 726 (F. B.)

petition of Gibbons (2) and a very extreme case is that of *Queen-Empress* v. *Lalit Tiwari* (3), where it was held that a judgment or order of the High Court is not complete until it is sealed in accordance with the rules of the Court, and up to that time may be altered by the Judge or Judges concerned therewith without any formal procedure by way of review of judgment being taken.

Our attention was called to a case of the Bombay High Court, *Queen-Empress* v. *Fox* (4). If that case is an authority for the proposition advanced, we must respectfully decline to follow it. We, therefore, proceed to consider this Rule on the merits.

We are invited in this Rule to set aside an order of the Deputy Magistrate discharging the accused, under section 253 of the Criminal Procedure Code, on the 10th January, 1911. The petitioner charged the accused with an offence under section 417 of the Indian Penal Code, but the accused was discharged on the 22nd August, 1910, by the Deputy Magistrate. The petitioner, however, obtained an order reviving her case from that Magistrate, and it was sent for disposal by the Bench of Honorary Magistrates at Baraset. The Magistrates thereupon examined three witnesses. On the 9th January, 1911, the Deputy Magistrate withdrew the case to his own file, and, next day, passed the following order:—"The complainant present. No evidence is produced. Accused discharged under section 253 of the Criminal Procedure Code. True—Section 417 of the Indian Penal Code."

It is this second order of discharge that we are asked to set aside on the ground that the Deputy Magistrate ought to have considered the evidence already on the record and to have held that the same established a *prima facie* case against the accused.

It is clear, on the authority of the Full Bench in *Nir Ahmad Hossein* v. *Mahomed Akasri* (1), that it was competent to the Deputy Magistrate to revive the case on application made to him. The case was regularly inquired into by the Baraset Bench. The only defect in the procedure is that the Deputy Magistrate has not said a single word in his order of the 10th January last to show that he had considered the evidence in any way. What the petitioner now seeks is that the evidence should be considered.

We do not desire to fetter the discretion of the Deputy Magistrate in any way, but we suggest that he do fix a date and call upon both parties to appear on that day. Then, arguments should be heard with reference to the evidence already on the record. If, in the opinion of the Deputy Magistrate, the case should not be gone into any further, it will be competent to him to pass an order of discharge under section 253 of the Criminal Procedure Code, which, in that event, will be a perfectly legal order to pass. The Rule is made absolute.

Rule made absolute.

(2) 14 C. 42
(3) 21 A. 177.
(4) 10 B. 176.

[S.C. (1912) 1 M. W. N. 50.]

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 729 OF 1911.

CASE REFERRED No. 143 OF 1911.

December 29, 1911.

Present:—Sir Ralph Benson, Judge.

AIYA CHALAMAYA—ACCUSED

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898)—Reference after a long time—Enhancement of sentence.

Although the sentence on an accused is inadequate, it ought not to be enhanced after the elapse of nine months.

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the District Magistrate of Ganjam in his letter, dated the 7th July 1911.

ORDER.—The sentence in this case was passed on the 16th March, 1911, and the District Magistrate's letter of reference was written only on the 8th July. Again, a reference was made by this Court to the District Magistrate in regard to the case on the 18th July, but it was not answered until the 30th November, *i. e.*, after more than four months had elapsed.

The sentence is certainly inadequate, but it is not now, after the elapse of nine months, expedient to enhance the sentence by ordering the accused to undergo 2 or 3 months' imprisonment as proposed by the District Magistrate.

(s. c. 4 Bur. L. T. 270.)

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 31 OF 1911.

May 2, 1911.

Present:—Mr. Shaw, J. C.

NGA PU—APPLICANT

versus

EMPEROR—RESPONDENT

Opium Act (I of 1878), s. 9 (c)—Possession—Opium found in accused's house.

Possession to be punishable must be possession with knowledge and assent.

Pin Ye v. *Queen-Empress*, U. B. R. 1892-96, I, 139; *Venkata Ram Chetty* v. *Emperor*, U. B. 1907-09, 3rd Qr., Excise 1; 4 Ind. Cas. 898; 11 Cr. L. J. 77, followed.

Where opium is found in an accused person's house, it must be shown that he was in possession of it, before he can be called upon to account for it under section 10 of the Opium Act, in other words, that it was in his house with his knowledge and assent.

Criminal revision of the finding of the Headquarters Magistrate, Yamethin, in Civil Regular No. 426 of 1910 convicting the applicant under section 9 (*c*) of Opium Act and sentencing him to pay a fine of Rs. 15 or in default 14 days' rigorous imprisonment.

Mr. *Chatterjee*, for the Applicant.

JUDGMENT.—Some opium and articles connected with the consumption of opium were found in the applicant's house in places which the Excise Sub-Inspector said were not accessible to the public.

The Magistrate laid upon applicant the burden of proving that the opium, etc., had, as applicant said, been planted in his house by two men Po Tha and Min Gyaw who had stayed there the night before the search. In doing this, I am of opinion that the learned Magistrate was in error. Possession to be punishable must be possession with knowledge and assent. This was explained long ago in *Pin Ye* v. *Queen Empress* (1) and attention was recently drawn to the point in *Venkata Ram Chetty* v. *King Emperor* (2).

Before applicant could be called upon to account for the opium in question under section 10, Opium Act, it had to be shown that he was in possession of it; in other words, that it was in his house with his knowledge and assent. There was nothing whatever to indicate that applicant was aware of the presence of the opium and other exhibits in his house. And it was obviously possible that Po Tha and Min Gyaw planted them. Having been admitted to the house and spending the night there, they were in a position to do so.

The evidence adduced on behalf of the applicant, moreover, raised at least a strong suspicion that the case had been fabricated against applicant. The witnesses Mi Nyein and Mi Mon were both apparently independent and credible. And the Magistrate seems hardly to have allowed due weight to their statements. To say that these witnesses were entirely uncorroborated because the witnesses who corroborated them were the wife and brother of applicant seems to me to be almost a perverse way of regarding the evidence.

The conviction and sentence are set aside. The fine is to be refunded.

Conviction set aside.

(1) U. B. R. 1892-1896, I 139.

(2) U. B. R. 1907-1909, 3rd Qr., Excise 1; 4 Ind. Cas. 898; 11 Cr. L. J. 77.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 338 OF 1911.

December 19, 1911.

Present:—Sir Henry Richards, KT., K.C., Chief Justice, and Mr. Justice Banerji.

BALMAKUND—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Stamp Act (II of 1899), ss. 30, 65—Receipt of money by money order—Refusal by payee to give a duly stamped receipt of payment to the remitter, whether an offence.

G. remitted a sum of Rs. 34 to *B.* by a postal money order. *B.* on receipt of the money signed a receipt in duplicate and delivered the same to the postal peon but *G.* demanded a duly stamped receipt from *B.* which *B.* refused to give:

Held, that *B.* ought not to be convicted under section 65 of the Stamp Act for having refused to give the second stamped receipt to *G.*

Section 30 does not require a person receiving money to specify the particular purpose for which the money is paid.

Order on the application of Balmakund.

Mr. *Gulzari Lal*, for the Applicant.

Mr. *Ryves*, for the Crown.

ORDER.—This is an application in revision. The facts are undisputed and very simple. One Mr. Gotting sent a money order for Rs. 34 to the applicant Balmakund. Gotting intended that the Rs. 34 should go in part-payment of a certain debt due on a bond. The money was received on the 14th of September 1910, by Balmakund,

who in the usual way signed a receipt in duplicate and delivered the same to the Post Office official. One receipt is in the following form:—

"ACKNOWLEDGMENT"

"This is a duplicate receipt which will be returned by the Post Office to the remitter).

"I acknowledge to have received payment of money order No. 3438 for the sum specified on the reverse.

"Date 1910.

Signature (in ink) of payee, or thumb impression of payee if illiterate."

The reverse side is in the following form:—

"On Postal Service,
Amount of order (in figures) Rs. 34,
Name of remitter M. A W. Gotting,
Address, Locomotive Department,
Stamp of the office of issue. } Mekamoh, Patna."

The other receipt is in the following form:—

"Received payment of the sum specified on the reverse.

Dated 1910.

Signature (in ink) of payee or thumb impression if payee is illiterate.

Paid by me Rs. As.

Signature and designation of official who paid the amount."

On the reverse are the particulars of the amount of the order in words, the name and address of the payee in full. This latter receipt is kept by the Post Office officials. Mr. Gotting, for reasons of his own (probably because he was anxious to have a receipt which would show on the face of it an acknowledgment from Balmakund of part-payment of the particular debt which he intended in part to discharge), demanded from Balmakund a duly s amped receipt. Balmakund refused contending that the receipt which he had given when he received the money order was sufficient. Later on, on the 30th of October 1910, however, Balmakund did sent a stamped receipt but more or less under protest still contending that the receipts which he had signed were sufficient compliance with the law. Subsequently, sanction was obtained for the prosecution of Balmakund under section 65 of the Stamp Act. It was probably due to apprehension of such prosecution that Balmakund signed the stamped receipt to which we have just now referred. The result of the prosecution was that Balmakund was fined Rs. 50. An application was made to the Sessions Judge in revision which application, however, was refused, hence the present application to this Court.

It is contended on behalf of the applicant that under the circumstances the conviction is illegal. Mr. Ryves on behalf of the prosecution admits that the punishment is somewhat severe but contends that the conviction was quite legal, and that an offence was committed under the Stamp Act. The question for us to decide is whether or not the conviction is legal. Section 65 of the Stamp Act provides that any person, who being required under section 30 to give a receipt refuses or neglects to give the same, shall be liable to a fine which may extend to Rs. 100. Section 30 is as follows:—"Any person receiving any money exceeding Rs. 20 in amount, or any bill of exchange, cheque or promissory note, for an amount exceeding Rs. 20 or receiving in satisfaction or part satisfaction of a debt any moveable property exceeding Rs. 20 in value, shall, on demand by the person paying or delivering such money, bill, cheque, note or property, give a duly stamped receipt for the same." It is clear that had Mr. Gotting made the payment himself, or through an agent, he would have been entitled to get a receipt for the amount of money which he paid and that such receipt should be duly stamped. It is also clear that under such circumstances Balmakund would have been liable to a conviction if he refused to give such duly stamped receipt. The money, however, was remitted through the Post Office in the manner to which we have already referred. Section 9 of the Stamp Act provides that "the Governor-General in Council may by rule or order published in the Gazette of India reduce or remit certain duties, including the duty payable upon certain instruments." By Notification No. 785 S.R. dated the 17th of February 1899, the Governor-General in Council in exercise of the powers conferred by the aforesaid section remitted the duties chargeable on certain instruments which are specified at the foot of the order. No. 30 is "Receipt endorsed

by the payee on a postal money-order." It would thus appear that Balmakund gave a receipt in duplicate to the Post Office authorities acknowledging the receipt of the money which Mr. Gotting had sent, and that that receipt is expressly exempted from duty by an order of the Governor-General in Council duly made in exercise of the powers conferred by the Stamp Act itself. The actual person who made the payment was not Mr. Gotting. It was the Post Office official. This official got, as he was entitled to get, a receipt in duplicate, and the Post Office Regulations provided that the duplicate was to be given by the Post Office authorities to Mr. Gotting. If it can be said that the money was paid by Gotting at all, it can only be upon the ground that the Post Office official was the agent of Gotting. It seems to us most unreasonable that a person who receives money from an agent and gives a valid receipt to such agent should be required to give another receipt to the principal. Had the money been sent by the hand of an ordinary agent instead of through the Post Office, it could not, we think, be argued for one moment that that the agent would be entitled to receive a duly stamped receipt and that his principal would be entitled to receive a second duly stamped receipt: what reasonable object could be gained by the giving of a second receipt in the present case? Section 30 does not require a person receiving money to specify the particular purpose for which the money was paid. He is only required to give a receipt for the sum paid. Under these circumstances, we think that Balmakund ought not to have been convicted under section 65 for having refused to give a second receipt to Gotting. We accordingly allow the application, set aside the conviction and sentence and direct that the fine, if paid, be refunded.

Application allowed.

[S. C. (1912) 1 M. W. N. 69.]

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 540 OF 1911.

CASE REFERRED No. 99 OF 1911.

December 4, 1911.

Present:—Mr. Justice Ayling.

EMPEROR—PROSECUTOR

versus

ARUMUKHAM PILLAI—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 233 and 234—Joinder of charges—Act II of 1890, s. 19—Ferry contractor's servant—Excessive toll—Former's guilty connivance—Presumption.

The fact that the servant of a ferry contractor levied toll without the knowledge of his master, does not give rise to a presumption as to the latter's guilty connivance.

Each individual levy of excess toll constitutes a separate offence, and sections 233 and 234, Criminal Procedure Code, would apply.

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the Sessions Judge of Tinnevelly, in his letter dated 26th August 1911.

ORDER.—In this case the accused, a ferry contractor, has been convicted of an offence under section 19 of Act (II of 1890, for levying excess tolls.

Apart from Prosecution witness No. 1, whose evidence was rightly discredited in the original Court, there is no evidence to support the conviction. The money in each case is said to have been demanded by, and paid to, a Paraya servant of the accused and in each of the several instances deposed to, the accused was either not present at the ferry at all, or on the opposite side of the river to that on which the toll was demanded and paid. Whatever suspicion may be entertained, no legal presumption can be drawn from this that the accused (in the language of the Sub-Magistrate) "connived at the exaction made by his servant." Apart from this, it must be pointed out that each individual levy of excess toll constitutes a distinct offence: and that the principles embodied in sections 233 and 234, Criminal Procedure Code, which apply not only to warrant-cases, but to summons cases also, appear to have been violated. The view expressed by the Deputy Magistrate in his explanation that the accused could be prosecuted "not for levy of excessive toll on the 17th November 1910 or any particular date, but for his

unauthorised collection of tolls generally" is manifestly wrong.

The conviction is set aside. The fine, if paid, will be refunded.

Conviction set aside.

(s. c. 16 C. W. N. 143.)

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 766 OF 1911.

August 3, 1911.

Present:—Mr. Justice Holmwood and Mr. Justice N. Chatterjea.

DR. H. P. SANDYAL—COMPLAINANT—PETITIONER

versus

KUNJESWAR MISRA—ACCUSED—OPPOSITE PARTY.

Complaint—Dismissal—No opportunity given to complainant to prove case—Criminal Procedure Code (Act V of 1898), ss. 202, 203.

After the examination of a complainant on oath, the Magistrate is bound to dismiss the complaint at once, or to elect to hold inquiry under section 202, Criminal Procedure Code, before issuing process. If he elect to do the latter, it is his duty to impress upon the complainant that he should produce his witnesses on a particular day fixed for hearing; and if on that date no witnesses are produced, the Magistrate should dismiss the complaint.

A Magistrate made some inquiry from the Solicitor of the accused and looked into the papers filed by the accused before the Police, and thereupon dismissed the complaint.

Held, that the action of the Magistrate was irregular and that he should have given the complainant an opportunity to prove his case.

Rule against the order of the Chief Presidency Magistrate of Calcutta, dated May 26th, 1911.

Babu *Athulg Charan Bose*, for the Petitioner.

Mr. *K. N. Chauduri* and Babu *Mommatha Nath Mukherjee*, for the Opposite Party.

JUDGMENT.— It is clear that there have been great irregularities in the conduct of this case. The complaint was made on the 28th February, 1911, by one Dr. Sandyal against one Kunjeswar Misra for having fraudulently used a forged cheque in his name. The case was adjourned from time to time, for what reason we know not, but the complainant was not examined until the 28th April 1911, and according to law after the examination of the complainant on oath the Magistrate was bound to dismiss the complaint at once, or to elect to hold inquiry under section 202, Criminal Porcedure Code, before issuing process.

It appears from the facts that he adjourned the case till the 26th May 1911, that he elected to do the latter and it was, therefore, his duty to impress upon the complainant that he was bound to produce his witnesses on the 26th May and he should then, if no witnesses were produced, have dismissed the complaint upon his disbelief of the complainant's statement. But he does nothing of this kind. He proceeds to make a detailed investigation and to hear the accused who entirely without process and apparently without any reason had appeared in Court by a Solicitor, he mads inquiry from his Solicitor and looked into the papers which had been filed by the defence before the Police; and as the result of this *exparte* inquiry he dismissed the complaint not on the ground that the complainant was unable to produce any witness.

We, therefore, think that the case must go back to the Chief Presidency Magistrate to give Dr. Sandyal an opportunity to prove his case and produce his witnesses, and if he does not produce any witnesses then this case may be dismissed upon that ground.

The Rule is accordingly made absolute. The records will be returned to the lower Court.

Rule made absolute.

[s. c. (1912) I M. W. N. 49.]

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 490 OF 1911.

January 2, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

MANDI GHASI—PRISONER—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898)—Charge of dacoity—No details of offence—More than three dacoities, charge for—Evidence of three other dacoities—Inadmissible—Evidence Act (I of 1872), ss. 14, 15.

Where accused persons charged with dacoity are not identified as being present at the scene of the dacoity, the charge must fail.

If the charge for dacoity omits to set out or indicate the particular dacoity in respect of which the accused are being tried, the conviction must be set aside.

An accused cannot be charged with more than three dacoities in all.

DEWAT SINGH *v.* EMPEROR.

Evidence of other dacoities by accused is inadmissible either under section 14 or 15 of the Evidence Act.

Appeal against the order of the Court of Session of the Vizagapatam (Agency) Division in Case No. 18 of the Calendar for 1911.

JUDGMENT.—The conviction in this case connot be sustained with respect to the first count. Two witnesses were examined. The first witness does not identify the accused as one of the persons who took part in the dacoity. The 2nd witness does not prove any dacoity at all.

With regard to the second and third counts, the charge does not set out the particular dacoity which was intended to form the subject-matter of the trial. At the trial three different dacoities were spoken to with reference to the second count and several dacoities with respect to the third count. There was nothing to indicate to the accused which particular dacoity he was being tried for with respect to each count. There was no attempt on the part of the prosecution to show that the different dacoities spoken to with reference to the second and third counts respectively were parts of the same transaction. On this ground the conviction must be set aside. The accused cannot be charged with more than three dacoities in all. We may also point out that the learned Sessions Judge was wrong in supposing that evidence of other dacoities may be given to prove the conduct of the gang. Such evidence would not come within the purview of either section 14 or section 15 of the Evidence Act.

We set aside the conviction of the accused and direct that he be re-tried on such charges as the Sessions Judge may select with reference to the above observations.

Re-trial ordered.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 1421 OF 1911.

January 6, 1912.

Present:—Mr. Justice Johnstone.

DEWAT SINGH AND OTHERS—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act of 1898), s. 107—

KAMINI MOHAN DAS *v.* HARENDRA KUMAR.

Security for keeping peace—Person not likely to commit breach himself but indueing others to do so.

Security for keeping the peace under section 107, Criminal Procedure Code, should not be taken from a person, who is not likely to commit any breach of the peace himself, but is likely to induce another person to do so.

Empress v. *Badhawa*, 54 P. R. 1887 Cr; *Ram Coomar* v. *Rajah Gopal Singh*, 17 W. R. 54 Cr., followed.

Petition for revision, under section 439 of the Criminal Procedure Code, of the order of the Magistrate, 1st class, Ambala, dated 20th April 1911, convicting the petitioners.

Lala *Sundar Das*, for the Petitioners.

JUDGMENT.—In this case 18 persons have been bound over to keep the peace. There are factions in the place, and as regards the first 16 in the list there was, no doubt, reason to suspect them of an intention to break the peace. Accused Nos. 17 and 18 are *banias* and the finding is that they are not likely themselves to commit any breach of the peace, but may very likely egg on their partisans among the other 16 so to do. In my opinion, such a finding does not warrant the taking of peace security under section 107, Criminal Procedure Code. *Empress* v. *Badhawa* (1) is in point, and *Ram Coomar* v. *Rajah Gopal Singh* (2) is even more directly so. In the latter case, it was laid down that security should not be taken from a person under section 107, Criminal Procedure Code, in order to prevent him from inducing another person to break the peace.

For these reasons I cancel the order for security as regards petitioners Dewat Singh and Basant Singh, accused Nos. 17 and 18.

Order cancelled.

(1) 64 P. R. 1887 Cr.
(2) 17 W. R. 54 Cr.

(s. c. 38 C. 876)

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 497 OF 1911.

May 26, 1911.

Present:—Mr. Justice Caspersz and Mr. Justice Sharfuddin.

KAMINI MOHAN DAS GUPTA—PETITIONER

versus

HARENDRA KUMAR SARKAR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 144—

PAIMULLAH *v.* EMPEROR.

Breach of peace, no likelihood of—Personal apprehension that breach of peace would take place—Jurisdiction to make prohibitory order—Urgency—Scope of s. 144.

Section 144 of the Criminal Procedure Code is ordinarily to be used in cases of urgency, and should not be allowed to take the place of any other provision of the law which might more appropriately apply.

An order under section 144 should not be made without recording any urgency in the matter and from the Magistrate's personal apprehension that the parties would break the public peace, when there was no report from the Police that there was a likelihood of any such breach.

Rule against the order of the Sub-Divisional Magistrate of Magura, dated April 19th 1911.

Mr. *H. N. Sen* and Babu *Trailokya Nath Ghose*, for the Petitioner.

JUDGMENT.—We are asked in this rule to set aside an order of the Sub-Divisional Magistrate of Magura, purporting to be under section 144 of the Criminal Procedure Code, on two grounds, namely, *first*, that the terms of section 144 of the Criminal Procedure Code were not duly complied with, and *secondly*, that there is no probability of a breach of the peace.

The facts of the case are sufficiently trivial. They appear to be these. The parties are Pleaders at Magura. The petitioner began to excavate a tank near his house, and the Police, apprehending that, if he continued to do so, the house of the opposite party would sooner or later go down into the bed of the tank, approached the Magistrate to take action under section 133. The Magistrate appears to have had an interview with the Pleaders, and to have advised them to compromise. Then, on the 19th April 1911, and without further inquiry and without recording any urgency in the matter, the Magistrate made his rule absolute, not on the ground reported by the Police but, as appears from his present explanation, from his personal apprehension that the parties would break the public peace.

It appears to us that the order is entirely misconceived, and it cannot possibly be sustained. No cause is shown, but we have examined the papers and read the explantion of the Sub-Divisional Magistrate. It is obvious from a bare recital of the facts that section 144 of the Criminal Procedure Code was not applicable, and that the order was not passed on any real apprehension properly arrived at. Orders under section 144 are not intended for the purpose to which the Magistrate has applied his powers under that section. The section is ordinarily to be used in cases of urgency, and should not be allowed to take the place of any other provision of the law which might more appropriately apply. If the opposite party had been so advised, he might have obtained against the petitioner an injunction to prevent him from continuing the excavation of the tank. In this view, we make the rule absolute, and set aside the order complained of.

Rule made absolute.

(s. c. 16 C. W. N. 238)

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 432 OF 1911.

July 25, 1911.

Present:—Mr. Justice Holmwood and Mr. Justice N. Chatterjee.

PAIMULLAH AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 227—Charge—Alteration without assigning reason—Penal Code (Act XLV of 1860), ss. 392, 395, 411—Dacoity—Robbery—Pointing out place where stolen articles were concealed—Confession of guilt before Police—Not to be allowed to go in as evidence.

A Sessions Judge should not alter a charge under section 395, Indian Penal Code, of being concerned in dacoity, to one of robbery, without assigning any reason and before hearing the evidence.

Where the sole evidence against an accused is that he pointed out the place where some of the stolen properties were concealed it was held that this in itself was not sufficient evidence to support a conviction under section 411, Indian Penal Code, far less was it any evidence that the accused took any part in any robbery or dacoity.

Queen-Empress v. *Gobinda*, 17 A. 576, followed.

A Police officer in giving evidence should not be allowed to state that an admission of guilt was made by the accused.

Appeal against the conviction and sentence passed upon the appellants by the Sessions Judge of Dinajpur, under section 392, Indian Penal Code, on April 22nd, 1911.

Babu *Probodh Chandra Chatterjee*, for the Appellants.

Mr. *Sultan Ahmed*, Officiating Deputy Legal Remembrancer, for the Crown.

PAIMULLAH v. EMPEROR.

JUDGMENT.—This is an appeal from the judgment and sentence of the learned officiating Sessions Judge of Dinajpur, who agreeing with both the assessors convicted the accused persons under section 392, Indian Penal Code, and sentenced them to five years' rigorous imprisonment each.

It appears that certain persons entered the house of the complainant at night and having used great violence carried away his money, documents and jewelleries. The complainant told the Police that he only saw three persons. The Police after making investigation held that there had been dacoity in which at least six persons were concerned and they sent those six persons, among whom were the three present appellants, up to the Magistrate for trial preliminary to commitment under section 395, Indian Penal Code. The learned Magistrate discharged three of these accused for want of evidence and committed the three appellants to the Sessions under section 395, that is, for being concerned in dacoity. The learned Sessions Judge, without assigning any reason, amended the charge to one of robbery, thereby, before hearing the evidence, changing the character of the charge altogether; and now that we know that the presumption that the appellants were dacoits or robbers rests solely on the finding of stolen property in places pointed out by them, it is very apparent how the appellants must have been prejudiced by this unauthorized amendment; for, granted that there were six persons engaged in this affair and that only three of them entered the house, the fact that these appellants knew where the property stolen was hidden is obviously not sufficient to convict them of being concerned in robbery. Indeed, it could not be sufficient to convict them under section 411, for, as was held by the Allahabad Court in the case of *Queen-Empress* v. *Gobinda* (1), where the sole evidence against the persons charged with an offence under section 411 consisted of the fact that the accused had pointed out the place where some of the stolen properties were concealed in the field of another person, this was not in itself sufficient evidence to support a conviction under section 411, Indian Penal Code. With that ruling we are in entire agreement and particularly in the circumstances revealed in this case; for it appears that the junior Sub-Inspector, a very energetic young man anxious to distinguish himself, had been told on the night of the 30th January by a man named Gopi, who was himself one of the persons sent up for dacoity, that the property would be found at the places apparently where the three accused pointed it out on the 30th January, and it was he who named these three accused as persons who could point out the place where the property was. That is all these persons did on the next day. The Sub-Inspector of Police has been very improperly allowed to state in his evidence that one of these persons admitted his guilt, and he makes a further statement that "from the statement of this accused Paimulla I could understand the exact nature of the offence committed by the accused." This ought never to have been allowed to go before the assessors and must have prejudiced their minds considerably.

Be that as it may, there is no reason to doubt that these three appellants did know where Gopi and his accomplices, persons probably who committed the robbery, had hidden these articles. But that is not in itself sufficient to convict them even under section 411, far less is it any evidence that they took any part in any robbery or dacoity. There being no other evidence to connect them with the crime, unless it be the statement of Umardi who made some inquiry about the jewellery of the complainant's deceased wife shortly before the occurrence—and we do not think that this in itself would carry the case any further—it would be wholly unsafe to uphold the conviction in this case, and certainly it would not be our duty to order a re-trial to be held under section 395, where the circumstances show that there is really no evidence that these persons committed dacoity at all.

As we have already pointed out they cannot be convicted under section 411 on the evidence on the record, and the conviction and sentence passed upon them under section 392 being set aside they must be acquitted and released.

Appeal allowed:

Accused acquitted.

(1) 17 A. 575.

BANBIHARI KAPUR *v.* KHETRA PAL SINGH ROY.

(s. c. 38 C. 923; 16 C. W. N. 250.)

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL No. 133 OF 1909.

July 13, 1911.

Present:—Mr. Justice Holmwood and Mr Justice D. Chatterjee.

BANBIHARI KAPUR—DEFENDANT No. 1—APPELLANT

versus

KHETRA PAL SINGH ROY—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), ss. 164, 167—Rent suit against real though not recorded tenant—Effect of decree--Whether decree, rent decree or money decree—Provision of sale to be strictly followed—Purchase of tenure by mortgagee in execution—Subsequent purchase by landlord in execution of rent decree—Non-annulment of incumbrance of mortgage, effect of—Priority of title.

A suit for rent was brought against the real tenant, who was not recognised as tenant, but was sued merely as he was in possession, and a decree was made:

Held, that the decree was not a money decree for compensation for use and occupation, but a good decree for rent.

Ranee Lalun Monee v. *Sona Monee Dabee*, 22 W. R. 334 and *Surnomoyee* v. *Dinonath Gir*, 9 C. 908; 13 C. L. R. 69, relied upon.

The provisions of the Bengal Tenancy Act regarding sales are very stringent and the results are generally destructive of various derivative rights belonging to third parties not before the Court. Those provisions are a part of public policy intended for the benefit of all parties concerned. If the landlord wants the special results provided for by the Act, he must proceed strictly in accordance with its provisions.

If the bidding for a tenure put up to auction under section 164 of the Bengal Tenancy Act does not reach the level of the decretal amount, the sale cannot be held under that section. If the sale takes place on the first day of sale without the issue of a second proclamation, the sale is not one under the Bengal Tenancy Act and only the right, title and interest of the judgment-debtor will pass to the purchaser.

The mortgagee of a tenure purchased the mortgaged property in execution of his own mortgage decree. The same property was subsequently purchased by the landlord in execution of a rent decree but the mortgage incumbrance was not annulled:

Held, that the landlord could not oust the mortgagee without annulling the incumbrance under section 167 of the Bengal Tenancy Act, and that the mortgagee purchaser was entitled to fall back upon his mortgage lien to defend himself from ths attack of the landlord.

Appeal from the decree of the Subordinate Judge of Hooghly, dated March 29th, 1909.

Babu *Basanta Kumar Bose* and *Shorashi Charan Mitra*, for the Appellant.

Mr. *S. P. Sinha*, Babu *Dwarkanath Chakravarti* and *Saratkumar Mitra*, for the Respondent.

JUDGMENT.—One Ballav Lal Barman was the holder of a permanent tenure under defendant No. 1 and his predecessor-in-interest. In 1857 Ballav Lal executed a *kabala* in respect of this tenure in favour of his wife Radhamani. Ballav Lal, however, continued as the registered tenant until his death in 1891 or thereabout. He was succeeded by his grandson Shyama Prosad who was a minor at the time living under the guardianship of his grand-mother Radhamani and mother Kali Moti. The collections in the *Mofussil* were made in the name of Radhamani and she mortgaged the tenure to the plaintiff on the 7th December, 1894, for Rs. 1,499. About three weeks after this on the 28th December, 1894, defendant No. 1 took from Radhamani a *kistbandy* bond for the arrears due on the tenure. In this document Radhamani described her title under the purchase of 1857, and it can hardly be argued that the effect of the acceptance of that document was not to recognise Radhamani as the tenant of the *mehal*. On the 27th May, 1896, Radhamani executed another mortgage of the tenure in favour of the plaintiffs who brought a suit upon the two mortgages against Shyama Prosad as heir and grandson of Radhamani and in possession of her estate and obtained an *ex parte* decree on the 26th February, 1902. Defendant No 1 in April, 1902, brought a suit for arrears of rent against Shyama Prosad stating that Ballav Lal was the recorded tenant and Shyama Prosad was in possession of the tenure, and obtained an *ex parte* decree on the 21st June, 1902. The plaintiffs executed their mortgage decree and purchased the mortgaged property on the 15th September, 1903, for Rs. 3,600. Defendant No. 1 executed his rent-decree and himself purchased the property in arrear on the 9th February, 1904, for Rs. 800. The plaintiffs applied for setting aside the sale on the ground of fraud and irregularities, but were not successful. They bring the present suit on the ground that the decree itself was fraudulent as well as the sale, and pray for recovery of *khas* possession on the declaration that their rights were not affected by the sale.

BANSIHARI KAPUR v. KSHETRA PAL SINGH ROY.

The lower Court has given the plaintiffs a decree holding that the decree for rent was fraudulent and collusive. Defendant No. 1 has appealed, and on his behalf it has been contended that the finding is not supported by the evidence in the case. It is quite clear that the findings of fact arrived at by the learned Judge do not make out any case of fraud against defendant No. 1. It is not alleged or shown that there was no arrear due on the tenure and there is no evidence that defendant No. 1 did anything in respect of the suit that he was not entitled to do under the law. It does not also appear that he had any duty to perform towards the plaintiffs the breach of which would throw any discredit upon him. We think the finding of fraud is wrong and must be set aside.

The decree of the lower Court, however, has been supported on the ground that the decree obtained by defendant No. 1 was not a rent decree under the Bengal Tenancy Act, and in any case the sale brought about by him was not in respect of the tenure but only the right, title and interest of Shyama Prosad, so that their rights as purchasers under the mortgage decree were not affected. It has been further contended that the mortgage lien exists notwithstanding the sale, and as no notice under section 167 of the Bengal Tenancy Act has been served, the Raja, defendant No. 1, was not entitled to *khas* possession.

With regard to the first point we have seen that defendant No. 1 recognised Radhamani as his tenant by accepting from her the instalment bond for rent. She was, therefore, his recognised tenant from 1301. Upon her death no one took any steps to register himself or herself as her representative. If her purchase was a *bona fide* one, her daughter Lakhimoni, who was alive at the time of the rent suit, was her legal representative, if she was a *benamdar* for her husband then Shyama Prosad was the rightful heir. In any case Lakhimoni was not in possession and Shyama Prosad was sued as the party in possession and there is no dispute that he was really in possession. In fact, no claim has ever been made on behalf of Lakhimoni and both the contending parties have treated Shyama Prosad as the tenant in possession and the question of *benami* has not been pressed by either party. The suit for rent was, therefore, rightly brought against Shyama Prosad who must be taken as the real tenant. It has been contended that as Shyama Prosad was not recognised as the tenant but was sued merely as he was in possession, the decree obtained is a money decree for compensation for use and occupation. That would have been a legitimate view to take if, as a matter of fact, Shyama Prosad had not been the real tenant: See *Ranee Lalun Monee* v. *Sona Man e Dabee* (1); *Sarnomoyee* v. *Denonath Gir Sunnyasee* (2). As it is, however, the decree was a good decree for rent.

As regards the second point, it appears from the order sheet in the execution case in which defendant No. 1 made his purchase that processes of attachment and sale were issued simultaneously, evidently under section 163, clause 1 of the Bengal Tenancy Act. It may be presumed that clause 2 (*a*) of that section was also complied with. As the sale took place on the first day of sale, the sale could be held under section 164 only, subject to registered and modified incumbrances if the bidding were sufficient to liquidate the whole amount of the decree and the costs. The bidding, however, did not reach the level of the decretal amount and was in fact several hundred rupees less; so that the sale could not be held under section 164, and as there was no second proclamation and sale as contemplated by section 165, the sale cannot be taken as one held under the Bengal Tenancy Act. The provisions of the Bengal Tenancy Act regarding sales are very stringent and the results are generally destructive of various derivative rights belonging to third parties not before the Court. The State enforces its claims for revenue under the stringent provisions of the sunset law from the *zemindars* and has enacted the stringent provisions of the tenancy laws for enabling the *zemindars* and other landlords to realise rents from their tenants, providing safeguards for the protection of the tenants and those that deal with them. The special provisions for the sale of tenures are a part of a public policy intended for the benefit of all parties concerned. If the landlord wants the special results provided for by the Act, he must proceed strictly in accordance with its provisions. We think he has not done this

(1) 22 W. R. 334.
(2) 9 C. 908; 13 C. L. R. 60.

in this case and he cannot, therefore, claim rights superior to those of an ordinary purchaser at a Civil Court sale. His sale certificate also supports this view as he is certified to have purchased the right, title and interest of the judgment-debtor. The learned Vakil for the appellant has referred us to two cases in this connection: *Nazir Mahomed Sirkar* v. *Girish Chunder Chowdhuri* (3) and *Akoy Kumar Soor* v. *Beoy Chand Mohatop* (4).

These cases are clearly distinguishable; in the first case the property sold was described as the tenure and the proclamation was for the sale of the tenure under section 59 of Act VII of 1859, B. C. The learned Judges say: "the property advertised was the tenure and the property sold was the tenure, according to the sale certificate, and the mere insertion of a statement that the sale was of the rights and interests of the judgment-debtors would not, we think, have the effect, under the circumstances stated, of limiting the sale to such rights and interests and not extending it to the tenure itself."

In the second case the description of the property ended with the words, "the said lot in arrears," so that the facts are not similar. It was argued in that case that the property should have been put up first subject to registered and notified incumbrances and afterwards with power to avoid all incumbrances, but this argument was met by the remark that the mortgage in question in that case was not a registered and notified incumbrance. The report does not show under what section the sale took place or whether the amount of the bidding was sufficient to meet the decree with costs. Under the circumstances we do not feel in any way hampered by that decision.

As regards the third point, the argument of the learned Vakil for the respondent is, that notwithstanding the decree and sale, he is still entitled to fall back upon his mortgage lien to defend himself from the attack of defendant No. 1 who claims to oust him. In the case of *Akoy Kumar Soor* v. *Beoy Chand Mohatop* (4) hereinabove quoted, the mortgagee obtained his decree absolute in May 1892. The Maharaja brought his suit for arrears in 1893 and purchased the "lot in arrear" in 1893. The mortgagee then applied for executing his mortgage decree against the Maharaja as purchaser in 1901. The Maharaja then applied for the service of notice under section 167 and the learned Judges held that as this application was not made within the time limited by section 167 it was barred and the mortgagee was entitled to execute his decree against the mortgaged portion of the tenure. The result of this ruling is, that the incumbrance of the mortgage was in existence notwithstanding the decree absolute on the mortgage. There is, however, an *obiter dictum* in the case that after the mortgage had culminated in a decree there would be no incumbrance to annul under section 167; in the first place, the learned Judges say, it is not necessary to decide that question and, in the second place, that opinion is quite inconsistent with the decision on the point of limitation under section 167; for, if there was no incumbrance, there was nothing to annul and no application for annulment could be barred. In the case of *Bhawani Koer* v. *Mathura Prasad* (5) a revenue sale of an estate under section 54 of Act XI of 1859 took place after a mortgagee had purchased in execution of a mortgage decree of his own and after the sale had been confirmed. The revenue sale was subject to all incumbrances. The Court held that the mortgagee-purchaser was entitled to fall back on his mortgage as a shield against the purchaser at the revenue sale. In the present case, if the plaintiff had not proceeded to sale before the purchase of defendant No. 1, the latter would have been at best entitled to annul the plaintiff's incumbrance under section 167; there is no reason why he should be in a worse position by reason of his diligence in proceeding to sale first. It is true he could have paid up the decree of the defendant and saved himself from this tortuous litigation, but he was not bound to do that. He was not liable for the rent before his purchase and his remedy over, if any, against his mortgagor by way of contribution might be an illusory remedy after all. In any case he is entitled to rely on all defences legitimate to his jucidical position, and we think that the Raja defendant was, even if he had taken all proceedings according to law, not entitled to oust him without annulling his incumbrance under section 167 of the Bengal Tenancy Act, and this has not been done in this case.

(3) 2 C. W. N. 251.
(4) 29 C. 813.
(5) 7 C. L. J. 1.

Under these circumstances although we set aside the judgement of the Court below, we confirm the decree of the said Court but without costs in either Court.

Decree confirmed.

[s. c. 11 M. L. T. 25; (1912) 1 M. W. N. 50.]

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No 1025 OF 1910.

November 28, 1911.

Present:—Mr. Justice Spencer and Mr. Justice Sundara Aiyar.

TEJ MAL SOWCAR—DEFENDANT—APPELLANT

versus

JAGAPPILLA PAPAYAMMA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Misjoinder of causes of action—Suit before new Civil Procedure Code—Second appeal after new Code—Powers of Appellate Court—Civil Procedure Code (Act XIV of 1882), s 578—Civil Procedure Code (Act V of 1908), s. 99—Second appeal—Interference on the ground of misjoinder—Power of Appellate Court—Practice—Plaintiff to get relief on his own right.

The High Court will not interfere with the judgment of a lower Court on the ground that there has been a misjoinder of causes of action.

Section 99 of the Civil Procedure Code (Act V of 1908) regulates the procedure of an Appellate Court and applies to all appeals heard after the Act came into force, although at the time of the institution of the original suit the old Civil Procedure Code was in force which contained no provision corresponding to section 99.

Aiyaru Mooppan v. *Vellayya Nadan*, 34 M. 55; 6 Ind, Cas. 15; 7 A. L. J. 567; 8 M. L. T. 6; (1910) M. W. N. 229; and *Achutan Unni* v. *Vasunni*, 20 M. L. J. 344, 7 M. L. T. 102; 5 Ind Cas. 774, followed.

Venkata Narasinha Appa Rao v. *Lakshmi Venkayamma Rao*, 7 M. L. T. 296, 5 Ind. Cas. 102, distinguished.

Krishnier v. *Sarvothama Royar*, (1910) M.W.N. 640, 8 Ind Cas. 366; *Nagalla Kottaya* v. *Nagalla Mallayya*, (1910 M. W. N. 719, 8 Ind. Cas. 337; 9 M. L. T. 39, referred to.

Where an Appellate Court overruled a plea of misjoinder of causes of action and passed a decree on the merits of the case: it was *held* that the Court of second appeal should not reverse that decision on the ground of misjoinder. An Appellate Court has to try the suit and has the same functions and the same powers as the Court of first instance subject to any limitation expressly imposed by the Legislature.

No relief ought to be granted to a plaintiff except as to his own rights.

Second appeal against the decree of the Temporary Subordinate Judge's Court of Vizagapatam, in Appeal Suit No. 214 of 1909, presented against that of the Court of the District Munsif of Vizagapatam, in Original Suit No. 223 of 1908.

Mr. *V. Ramesam*, for the Appellant.

Mr. *S. Srinivasa Aiyangar*, for the Respondents.

JUDGMENT.—In this case the 1st and 2nd defendant each obtained a decree for money against the third defendant, and certain property was attached as belonging to the judgment-debtor in execution of each of the decrees. When the attachment was made at the instance of the 1st defendant, plaintiffs Nos. 1 to 3 and the 4th defendant, who are sisters, put in a claim-petition urging that the property attached belonged orginally to their mother, the 3rd defendant's wife, that they had succeeded as heirs and that, therefore, 1st defendant had no right to attach it as belonging to the 3rd defendant. No claim-petition was put in when the second defendant made the attachment. This suit is instituted by the plaintiffs, three out of four sisters, for a declaration "that the attachments made by 1st and 2nd defendants are not valid" on the ground that the property does not belong to the 3rd defendant.

An issue was raised as to whether the suit was not bad for misjoinder of the causes of action on the ground that there was really no cause of action against the 2nd defendant as no claim-petition had been put in against his attachments and that at any rate the plaintiffs had not the same cause of action against the first and second defendants. The District Munsif upheld the objection of misjoinder and decided on the merits also against the plaintiffs holding that the property belonged to the 3rd defendant and not to his wife.

On the appeal preferred by the plaintiffs, the Subordinate Judge held that there was no misjoinder of causes of action and, disagreeing with the District Munsif on the merits, held that the property belonged to the mother of the plaintiffs and the 4th defendant and passed to them by inheritance and he passed a decree as prayed for in the plaint. Mr. Ramesam in second appeal argues that the Subordinate Judge was wrong in holding that there was no misjoinder. We have not heard his arguments on this question fully as we have come to the conclusion that even if there was misjoinder, we should not interfere with the judgment of the lower Appellate Court on that ground. Section 99 of the Civil Pro-

cedure Code (Act V of 1908) enacts that "no decree shall be reversed or substantially varied.....on account of any misjoinder of parties or causes of action." The learned Vakil for the appellant contends that this section is not applicable to this case as the suit was instituted while the Repealed Procedure Code (Act XIV of 1882) was in force and the corresponding section in that Code, namely, section 578 did not make any provision similar to that in section 99 of the new Code in cases of misjoinder of causes of an action. But we are of opinion that the section is one regulating the procedure of the Appellate Court, and that, therefore, it is applicable to appeals heard after the Act came into force. The section was held to apply in a similar case, *Aiyavu Mooppan* v. *Vellayya Nadan* (1). Mr. Ramesan relied on *Venkata Narasimha Appa Row* v. *Lakhshmi Venkayamma Row* (2), where he contends that Order XII, rule 33, dealing with the powers of an Appellate Court in pronouncing judgment was held not to apply to appeals presented before the new Act came into operation. That was an appeal under section 15 of the Letters Patent against the judgment of this Court, the two Judges who originally heard the appeal differing in opinion. It is not clear whether the learned Judges may not have meant that the procedure in Letters Patent Appeals is not governed by Order XII, rule 33. However that may be, in several subsequent cases it was held that Order XII, rule 33, would be applicable to all cases where an appeal is heard after Act V of 1908 came into force.

In *Krishnier* v. *Sarothama Royar* (3) and in *Nagalla Kottayya* v. *Nagalla Mallayya* (4), Abdur Rahim and Krishnasawami Iyer, JJ., held so; as also did Wallis and Krishnaswami, JJ., in *Candramathi Ammal* v. *Narayanasawmi Iyer* (5). It may be noted that Wallis, J., was one of the learned Judges who decided *Venkata Narasimha Appa Row* v. *Lakshmi Venkayamma Row* (2). Section 99 of the new Code was held applicable in cases of misjoinder, though the suit or appeal might be instituted before Act V of 1908. In *Achutan Unni* v. *Vasunni* (6) it was suggested that section 99 of the new Code would not apply where the first Court dismisses the suit on the ground of misjoinder, but the Appellate Court overruling the decision holds in appeal that there is no misjoinder and pronounces a decision on the merits of the case. But in the case already referred to, *Aiyavu Mooppan* v. *Vellayya Nadan* (1), section 99 of the new Code was applied to such a case Besides, when the Appellate Court overruling the plea of misjoinder passes a decree on the merits of the case, we think it would be right to say that the Court of second appeal should not reverse that decision on the ground of misjoinder of causes of action. The Appellate Court has to try the suit and has got the same function and the same powers as the Court of first instance, subject to any limitations expressly imposed by the Legislature. The principle has been held to be applicable to all cases where the Appellate Court has plenary jurisdiction and not a mere limited jurisdiction as in the case of such appeals. Section 107 of the Civil Procedure Code (Act V of 1908) recognises it and we believe it has always been recognised both in England and in this country in determining the powers of a Court of appeal. We are, therefore, of opinion that we should not interfere with the judgment of the Subordinate Judge on the ground of misjoinder.

Mr. Ramesam in the course of his argument has raised another point; namely, that as the plaintiffs are at present entitled only to a three-quarter share in the property and as the 4th defendant is entitled to the other one quarter share and the suit has been instituted by the plaintiffs only, the lower Appellate Court should not have declared that the attachment by defendants Nos. 1 and 2 of the property in question was altogether invalid. We are of opinion that he is right in contending that no relief ought to have been granted to the plaintiffs except as to their rights. The order on the claim petition became conclusive against the 4th defendant on the expiration of one year from the date that it was passed. We, therefore, modify the decree of the lower Appellate Court by directing

(1) 34 M. 55; 7 A. L. J. 567; 6 Ind. Cas. 15; 8 M. L. T. 6; (1910) M. W. N. 229.

(2) 7 M. L. T. 296; 5 Ind. Cas. 102.

(3) (1910) M. W. N. 640; 8 Ind. Cas 366.

(4) (1900) M. W. N. 719; 8 Ind. Cas 337; 9 M. L. T. 39.

(5) 33 M. 241; 5 Ind Cas. 23; 19 M. L. J. 760; 7 M. L. T. 369.

(6) 20 M. L. J. 344; 7 M. L. T. 102; 5 Ind. Cas. 774.

that the declaration as against the appellant, the 2nd defendant, shall be that the attachment of the property is invalid as against the rights of the plaintiffs in the suit. As the last point was not raised in the grounds of second appeal, we think that the appellant should pay the whole of the respondents' costs in this Court.

(S. C. 81 P. R. 1911.)

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1056 OF 1910.

June 5, 1911.

Present:—Mr. Justice Johnstone.

FATEH DIN AND OTHERS—DEFENDANTS—APPELLANTS

versus

NIKKA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Limitation—Adverse possession—Partition—Possession subsequent to partition—Remedy of the person to whom land is allotted—Limitation Act (IX of 1908), Sch. I, Art. 144—Punjab Land Revenue Act (XVII of 1887), s. 122.

Where upon partition of land a particular field is allotted to *B* but it remains in possession of *A*, *A*. begins to hold adversely against *B* from the date of partition and if *B*. wishes to preserve his rights, he must take action within the time allowed by law.

B can, during the first three years, apply, under section 122 of the Land Revenue Act, to the Revenue Court to be put in possession of the field allotted to him or can, during the following nine years, bring a suit in the Civil Court for possession.

A suit brought more than 12 years after the confirmation of the partition is barred by time.

Second appeal from the order of the Divisional Judge, Sialkot Division, dated the 27th June, 1910.

Mr. *Zia ud Din*, for the Appellants.

Mr. *Duni Chand*, for the Respondents.

JUDGMENT.—In this case it appears that a partition of the *shamilat* took place on 10th September, 1896. The two fields Nos. 280 and 293 fell to the share of the plaintiffs upon that partition, but they never succeeded in getting possession and they filed their present suit on 5th October, 1909, *i. e.*, more than twelve years after the partition was confirmed. The first Court discriminated between the two *khasra* numbers. It held that in regard to field No. 280 the relation of landlord and tenant subsisted between the parties and that, therefore, no suit with regard to that number was cognizable by a Civil Court, and then it went on to dismiss the claim as regards *khasra* No. 293 on the ground of limitation. The plaintiffs appealed as regards both numbers to the Divisional Judge, who accepted the appeal, reversed the lower Court's decree and gave plaintiffs a decree for possession of both numbers. The Divisional Judge's idea seems to have been that the defendants, though they remained in possession of the land after partition, must be taken to be tenants-at-will as recorded in the revenue paper and that the plaintiffs, because they have been paying the land revenue, have asserted their ownership and have been constructively in possession. Now, in my opinion, if the Divisional Judge's view was correct that the relation of landlord and tenant existed between the parties, then the suit would not have been cognizable by a Civil Court at all. But it is unnecessary to pursue this matter, for in reality plaintiffs have not shown in any way that they have had possession, constructive or otherwise. When a partition of land takes place and a particular field is allotted to B. which remains in possession of *A*., in my opinion from the date of partition *A*. begins to hold adversely against B., and B. must, if he wishes to preserve his rights, take action within the time allowed by law. In the case of land coming under the Land Revenue Act of 1887 the remedy for the plaintiffs in such a case is at any time during the first three years to apply under section 122 of the Land Revenue Act to the Revenue Court to be put in possession of the field which has been allotted to him, or thereafter, some time during the following nine years, to bring a suit in the Civil Court for possession. In the present case the plaintiffs have done neither of these things and, therefore, in my opinion, the suit is barred by time.

The appeal is accordingly accepted and the plaintiffs' suit dismissed with costs throughout.

Appeal accepted.

CHERIA IMBICHI BIBEE *v.* SYED ALI.

[S. C. (1912) 1 M. W. N. 45.]

MADRAS HIGH COURT.

SECOND CIVIL APPEALS Nos. 1553 AND 1554 OF 1901.

November 17, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

PEEDIANGADI CHERIYAPURAYIL CHERIA IMBICHI BEEBI AND OTHERS—PLAINTIFFS—APPELLANTS IN BOTH

versus

PUTHIYANGADI CHERIYAPURAYIL SYED ALI AND OTHERS—RESPONDENTS IN SECOND APPEAL No. 1553 OF 1910—DEFENDANTS.

PUTHIYANGADI CHERIYAPURAYIL SYED ALI HAMIDA *alias* KOHYANEI KOYA TANGAL—1ST DEFENDANT—RESPONDENT IN SECOND APPEAL No. 1554 OF 1910.

Construction of karar—*Allotment for maintenance of* Tavazhi—*Partibility*—wakf *properties*—*Rent*—*Arrears of profits*—*Limitation Act (XV of 1877), Sch. II, Arts.* 109, 127.

Where by a *karar* executed between the members of a Muhammadan family in Malabar, following the Muhammadan Law of Inheritance, certain properties, which had been constituted *wakf* properties, were, after making provision for the expenses of the *wakf*, set apart for the maintenance of various members of the family, each branch of which was described as *tavazhi* and the property was stated to be inalienable: *Held*, in a suit for partition by the children of one of such three donees, that the plaintiffs were entitled to division.

The object of the stipulation against alienation was to prevent an infringement of the rules of Muhammadan Law applicable to *wakfs*. The description in the *karar* of the donees as a *tavazhi* did not by itself attach the custom of indivisibility to the properties allotted to them

The general rule of law is that holders of limited estate in property are entitled to enforce partition of the same.

Article 127 of the Limitation Act is inapplicable to Muhammadans Consequently, a plaintiff can only recover profits for three years under Article 109 of the Act.

Patcha v. *Mohidin*, 15 M. 57, followed.

Second appeals against the decree of the Subordinate Judge's Court of South Malabar at Calicut, in Appeal Suits Nos. 671 and 633 of 1909, presented against that of the Court of the Principal District Munsif of Calicut in Original Suit No. 473 of 1908.

Mr. *R. R. Subramania Sastri*, for the Appellants.

Mr. *C. V. Ananthakrishna Iyer*, for the Respondents.

JUDGMENT.—The parties to this suit are Muhammadans of Calicut. The plaintiffs' claim is to recover a half share of certain properties together with past profits for a period of 10 years prior to the suit and future profit till delivery. By a *karar* between the members of the family, Exhibit I, dated the 3rd September, 1893, it was declared that all the properties comprised in it were dedicated as *wakf* by a deceased ancestor and managed as *wakf* property by the senior male member for the time being, the surplus income after defraying the expenses of the *wakf* being utilised for the support of the members of the *wakf's* family. The manner in which the administration of the property was carried on and the surplus profits utilised apparently led to disputes and dissensions in the family and the object of the *karar* is stated to be to frame a scheme which would put an end to quarrels among the members in the future. The *karar* recites that the properties were indivisible, which they, of course, were as *wakf*. It then sets out the mode agreed on for the future management of the properties. Briefly, what was done was this Nine items were set apart for the probable expenses of the *wakf*, and it was declared that the senior male member for the time being should manage them and carry out the trust. The remaining properties were allotted to the members of the different branches of the family, which they were to hold and enjoy without alienating them, the object of the stipulation against alienation being, no doubt, to prevent infringement of the rules of Muhammadan Law applicable to *wakfs*. Each branch was given the right to lease out the properties allotted to it and to enjoy it in any manner it pleased. There can be no doubt, and indeed it is not denied, that the *karar* creates a limited estate in favour of the donees to whom the allotments were made. The properties of which the plaintiffs claim a share were allotted to three persons consisting of the plaintiffs' mother and two of her brothers. The allotment was made for the benefit of the donees and their issue.

One of the brothers and the plaintiffs' mother are dead. The question raised for decision in the suit is whether the plaintiffs are entitled to ask for a division of the properties allotted to their mother and her

SHAH MUHAMAD v. PIARA MAL.

brothers. The parties are admittedly governed by the Muhammadan Law of inheritance; but the first defendant contends that, though that is so, there is a custom in the family of the parties according to which the original family property as distinguished from the acquisition of individual members is to be held as indivisible property. It is not easy to understand this allegation. It does not appear that there are any so-called family properties apart from the *wakf* estate. There is no definite statement by the first defendant to what property the custom of indivisibility attaches. It is contended that the recital in Exhibit I supports this vague allegation; but the recital of indivisibility in the *karar* relates only to the *wakf* property. Exhibit I does not refer to any other property as being indivisible. We must, therefore, overrule the contention that there is any family custom by which the plaintiffs' claim for division can be resisted.

It is then urged that the plaintiffs' mother and her brothers are treated by the *karar* as a *tavazhi*, and that it was intended that the custom of indivisibility, which applies under the Marumakkatayam Law, should apply to the property allotted to the donees. But there can be no doubt that the word was loosely used to denote a branch of the family, as is often the case in Malabar in documents executed between parties who are not governed by the Marumakkatayam law. It is not suggested that the Marumakkatayam rules are applicable to this property. The *karar* does not vest the management in a single member of the donees of the branch as one would expect if it was intended to declare the allotted properties indivisible amongst the donees. We can find absolutely nothing in the *karar* to support respondent's contention that the property in question was intended to be indivisible. The general rule of law, it is admitted, is that the holders of limited estates in property are entitled to enforce partition of the property as in the case of those owning women's estates under the Hindu Law. We must, therefore, hold that the plaintiffs are entitled to division. On the death of one of the brothers, the other two donees or their heirs must be held to have become entitled to his share as the gift was a joint one to the three donees for maintenance. The plaintiffs are also entitled to recover profits but only for three years under Article 109 of the Limitation Act. Article 127 is inapplicable to Muhammadans: see *Patcha v. Mohidin* (1). The lower Appellate Court has not recorded a finding on the question of the amount of the profits for the three years preceding the suit. We reverse the decrees of both Courts, and declare the plaintiffs entitled to a half share of the properties as claimed and the profits of the properties for three years prior to the suit and future profits till delivery of possesion. The appeals are remanded to the lower Appellate Court, which will appoint a commissioner for making a proper division and then pass a final decree for partition. It will also pass a decree for the profits to which the plaintiffs are entitled. In the circumstances the parties will bear their respective costs up-to-date.

Case remanded.

(1) 15 M. 57.

(S. C. 84 P. R. 1911.)

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 90 OF 1903.

July 29, 1911.

Present:—Mr. Justice Johnstone and Mr. Justice Chevis.

SHAH MUHAMMAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

PIARA MAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Limitation—Vendee transferring property to another person before institution of suit—Second vendee impleaded after expiration of period of limitation—Appeal—Power of Appellate Court to refuse to entertain plea of limitation—Belated pleas of limitation, how to be dealt with.

Where, before a suit for pre-emption has been instituted, the vendee has re-sold the property to another person, the suit for pre-emption is barred against the second vendee if he is not brought on the record until after the expiration of the period of limitation prescribed for the suit.

Nabi Bakhsh v. Fakir Muhammad, 25 P. R. 1903; 74 P. L. R. 1903, relied upon.

Where a plea of limitation is not taken in the first Court or in the grounds of appeal but is raised in argument before the Appellate Court, the latter Court would be justified in refusing to entertain it if it involves further inquiry into facts for a proper decision.

Obiter dicta:—A plea of limitation taken in an original Court, before issues are fixed, must be entertained and decided. If it is taken at a later

SHAH MUHAMAD v. PIARA MAL.

stage and if it can be decided on the issues existing on the record as it stands, the Court is bound to take note of it and decide it. This rule holds good irrespective of how the matter has come to the notice of the Court.

But if, after the issues have been fixed and the case has proceeded to some length, a defendant raises the question of limitation and the Court sees that in order to decide the question, fresh issues of fact must be gone into and additional evidence taken, then the Court has the option of refusing to entertain the plea.

When a case has passed out of the original Court and is before a Court of appeal, the rule probably remains much the same An Appellate Court has generally an option of refusing to listen to a plea of limitation even though it can be decided without any further inquiry.

Duttu v. *Kasai*, 8 B. 535; *Ahmad Ali* v. *Waris Hussain*, 15 A. 123; *Bala Ram* v *Mangta Dass* 34 C. 941; 6 C. L. J. 237; 11 C. W. N. 959; *Venkata N. Naidu* v. *Bhashyakarlu Naidu*, 25 M. 367; 4 Bom. L. R. 543 (P. C.), relied upon.

Second appeal from the order of the Divisional Judge, Ferozepore Division, dated the 24th October 1907.

Mr. *Fazal-i-Hussain*, for the Appellants.

Rai Bahadur Lala *Lal Chand*, for the Respondents.

JUDGMENT.—This is a suit for possession by pre-emption of 10 *biswansis* of land out of village Abohar, *tahsil* Fazilka. The facts are that Piara Mal sold his share in the village to Hira Singh and others on 4th August, 1905, by a registered deed for Rs. 2,900. Before anybody brought a suit these vendees re-sold this land to Daulat Ram by a sale deed, dated 16th July 1906 for Rs. 4,000. Three sets of persons brought pre-emption suits, first Sundar Singh, whom we will call *A.* as the Divisional Judge does, who filed his suit on 25th July, 1906; second Rup Singh and others, *B.* who sued on 1st August, 1906; and third Shah Muhammad, *C*, who sued on 3rd August, 1906. *C.* impleaded Daulat Ram in his plaint from the beginning, but the other two sets of plaintiffs did not do so until 23rd August, *i e*, more than a year after the date of the sale. *A.* claimed to purchase the land for Rs, 1,300, *B.* for Rs. 2,900, and *C.* for Rs. 1,900. The first Court framed issues and came to the following conclusions:—

(1) Daulat Ram is not entitled to pre-emption under section 11 of the Pre-emption Act;

(2) *A.*, *B.* and *C.* are all members of agricultural tribes and have the right of pre-emption, but *C.* comes only under clause (*e*) of section 12, while *A.* and *B.* come under clause (*c*) of that section; and further, *A.*, as being a co-sharer in part of the land in suit, comes also under clause (*b*); and

(3) the price mentioned in the deed was not fixed or paid in good faith, and that the market-value is Rs. 2,300.

A decree was accordingly given in favour of *A.* for possession on payment of Rs. 2,300 *minus* a certain sum already paid in by him and the costs of the case.

Four persons appealed to the learned Divisional Judge, *viz*, *A.*, *B*, *C.* and Daulat Ram. That Court held that *A* and *B.* had equal rights and that the rights of *C.* were inferior to both. It, therefore, gave a joint decree in shares to *A.* and *B.* and a subsidiary decree to *C.* to be brought into operation should either *A.* or B. fail in taking up the bargain. The price arrived at by the learned Divisional Judge was Rs. 2,900, chiefly, it would seem, because *A.* and *B.* made a sort of compromise with Daulat Ram to the effect that Rs. 2,900 should be the figure.

The present appeal is by *C.* alone and two points are raised: *first*, that the suits of *A.* and *B.* are both barred by time under section 22 of Act XV of 1877 on the ground that Daulat Ram, second vendee, was added as a defendant in both those suits after the expiry of one year from the date of sale; and, *secondly*, that the price, Rs. 2,900, was not fixed in good faith and that the market-value of the land is less than Rs. 2,300 which should be taken as the proper price.

We have beard ingenious arguments on both sides regarding the point of limitation and there is a good deal to be said for the appellants' contention. *Nabi Bakhsh* v. *Fakir Muhammad* (1) seems to be in point. But out of the many arguments laid before us by Mr. Lal Chand for the respondents, with most of which we do not agree at all, there is one which, we think, has great force, *viz*, that the plea of limitation was taken too late. It was taken in argument before the learned Divisional Judge, who refused to entertain it, quoting *Duttu* v. *Kasai* (2) and *Ahmad Ali* v. *Waris Hussain* (3). In

(1) 25 P. R. 1903; 74 P. L. R. 1903.
(2) 8 B. 535.
(3) 15 A. 123.

our opinion the law regarding the consideration of questions of limitation by Courts may be stated in general terms as follows. In the original Court if a plea of limitation is taken before issues are fixed, it must, of course, be entertained and decided. If it is taken by the defendant at a later stage, and if it can be decided on the existing issues and on the record as it stands, here again the Court is bound to take note of it and to decide it. And this rule holds good whether the plea has been actually taken or not, if the matter has in any way come to the notice of the Court. But if, after the issues in the case have been fixed and the case has proceeded to some length, a defendant raises the question of limitation and the Court sees that, in order to decide that question, fresh issues of fact have to be gone into and additional evidence taken, then the Court has the option of refusing to entertain the plea. When a case has passed out of the original Court and is before a Court of Appeal, the rule probably remains much the same; but there is some conflict of authority as to whether in an Appellate Court, and certainly in a second Appellate Court, it is incumbent on the Judge to listen to a plea of limitation, even though it can be decided without any further inquiry. No doubt in 99 cases out of 100 it would be right for an Appellate Court in the latter case to entertain the plea, but we conceive that there would probably be an option. We need not expatiate on all these different propositions, nor need we discuss at length the various rulings from which we extract these rules. It seems to us a reasonable view and to be reasonable in accordance with *Balram* v. *Mangta Dass* (4), a case tried by a Special Bench of six Judges; *Ahmad Ali* v. *Waris Hussain* (3); *Duttu* v. *Kasai* (2) and *Venkata N. Naidu* v. *Bhaskyakarlu Naidu* (5). These rulings are not all exactly in accord, but there is no serious conflict, as the facts are different in each of the cases; and in the present instance we do not propose to lay down *all* the above propositions as the final views of this Court, for here, obviously, the point of limitation cannot be decided without going into fresh facts, and, therefore, only a limited question arises for decision The plea based upon *Nabi Bakhsh* v. *Fakir Muhammad* (1) can only be concurred in by this Court if it is shown that the sale to Daulat Ram was a genuine sale. Appellants themselves made rather ambiguous statements on this subject. They talked in their plaint, and in their pleas in the cross suits, about the sale to Daulat Ram being made '*farzi taur par*', and '*farzi wa najaiz*'; and even though we admit the correctness of their present explanation that they did not intend to intimate that the sale was entirely fictitious but merely that it was a dishonest sale intended to defeat them and containing an inflated price, yet we cannot lose sight of the fact that the opposite party always insisted that the sale was fictitious. Mr. Fazl-i-Hussain has tried to show us that the sale, from the circumstances and the history of the case, could not have been fictitious, and, no doubt, there are very strong indications to this effect. But no issue was fixed upon the point, and the opposite party has certainly a right to make an attempt to prove their allegation. This being so, it seems to us that this plea of limitation, for its proper decision, does involve further inquiry into facts, and, therefore, in our opinion, taken as it was, not in the first Court, nor in the grounds of appeal in the second Court, but only in argument in that Court, it was taken too late, and the Divisional Judge was correct in refusing to entertain it. This is not one of those cases in which there is any equity in favour of the appellant. *A.* and *B.* have undoubtedly a claim to pre-empt which is superior to that of *C.*, and we can see no reason for straining the law in favour of the appellants simply because *A.* and *B.* were misled, or perhaps deceived, by sudden re-sale to Daulat Ram within a few days of the expiry of the period of limitation for the suit.

These things being so it is not necessary for us to decide the matter of market-value. For these reasons we dismiss this appeal, but make no order as to costs.

Appeal rejected.

(4) 34 C. 941; 6 C. L. J. 237; 11 C. W. N. 950.
(5) 25 M. 367; 4 Bom. L. R. 543 (P. C.).

ADUSUPATTI VENKATA RAO *v.* SWAMI PILLAI.

(S. C. 11 M. L. T. 27: (1912) 1 M. W. N. 53)

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 22 OF 1909.

November 28, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Abdur Rahim.

ADUSUPATTI VENKATA RAO, EXECUTOR TO THE ESTATE OF THE DECEASED RAMANU JAAMMAL—PLAINTIFF—APPELLANT

versus

SWAMI PILLAI AND OTHERS—DEFENDANTS—RESPONDENTS

Attachment—Execution—Devisee's interest—Probate taken by Administrator-General—Administrator-General not made party in execution.

In exection of a pesonal decree against *A*. his deceased father's estate was attached and out of it the property which fell to the lot of *A*. was sought to be sold. The estate, when attached, was in the hands of the Administrator-General who had taken out Probate of the Will which *A*'s father had left. The Administrator-General was not a party to the execution proceedings:

Held, that *A*'s share could be sold.

The attachment of a judgment-debtor's property is not illegal merely because other property which did not belong to him was also included in the attachment. It does not matter whether the estate attached is in the hands of the Administrator-General or whether the Administrator-General has been made a party to the execution proceedings.

A bequest, unless the testator intended otherwise, as in the case of a contingent bequest, becomes a vested interest in the devisee or legatee from the date of the testator's death although he may not be entitled to receive what has been bequeathed to him except in due course of administration.

Srirangammal v. *Sandamal*, 23 M. 216, explained and distinguished.

Bhaiji Bhimji v. *Administrator-General of Bombay*, 23 B. 428, distinguished.

Appeal against order of the District Court of Chingleput, dated 7th November, 1908, on Appeal Suit No. 225 of 1907 presented against that of the Court of the District Munsif, Poonamalli in Execution Petition No. 774 of 1906 (O. S. No. 161 of 1894 on the file of the City Civil Court Madras), and Civil Miscellaneous Petitions Nos. 849 and 852 of 1906.

Mr. *Joseph Satya Nadar*, for the Appellant.

Mr. *T. R. Krishnasami Aiyar*, for Messrs. *T. R. Ramachandra Aiyar* and *T. M. Srinivasa Aiyengar*, for the Respondents.

JUDGMENT.—The District Judge is wrong in holding that because the Administrator-General, who had obtained Probate of the Will of the deceased father of David Pillai, the judgment-debtor, was not a party to the execution-petiton under which attachment was ordered in September, 1900, the attachment must be treated as illegal and cannot form the basis of a sale. The attachment, as we understand, was of the interest of David Pillai in the lands of the testator situated in a particular locality on the supposition that David was solely entitled to those lands including the property in dispute. Subsequent thereto, the estate has been divided among the different devisees and legatees, the property now sought to be sold falling to the share of David Pillai. That being so, it is difficult to see why the attachment, which still subsists, should be regarded as of no avail with respect to property attached to David Pillai. It does not seem to us to be reasonable to hold the attachment of a judgment-debtor's property to be illegal because property which did not in fact belong to the judgment-debtor had also been included in the attachment. Nor do we think there is force in the argument of the lower Courts that because the estate of the judgment-debtor's father was in the hands of the Administrator-General, the judgment-debtor had no enterest in the bequest which he receives under his father's Will on the date of attachment. A bequest, unless the testator intended otherwise as in the case of a contigent bequest, becomes vested in interest in the devisee or legatee from the date of the testator's death although he may not be entitled to receive what had been bequeathed to him except in due course of administration. This, we may point out, is clear from the provisions of sections 91, 106 and 107 of the Indian Succession Act upon general principles relating to construction of Wills: See Jarman on Wills, Vol. II, page 1357. In this connection we may observe that there is a dictum in *Srirangammal* v. *Sandamal* (1) referred to by both the Courts which is apparently construed to mean that in cases under the Indian Succession Act, the heir of a deceased person has no saleable interest in the heritage until an administrator has distributed the estate in due course of administration. The language used by the learned Judges in that case, which is rather vague, is perhaps capable of this construction,

(1) 23 M. 216.

but we do not think that is what was meant; for we do not know of any provision in the Indian Succession Act which contemplates any such result. An heir or a legatee may not be entitled to possession of what he inherits or is bequeathed to him except in the proper course of administration but that does not mean that he acquires no interest till then Perhaps, all that the learned Judges in that case intended to lay down was that an heir under the Indian Succession Act has no right to any specific property belonging to the estate until it has been allotted to him in the course of administration. Then, there is another fact relied on by the lower Courts in support of the view that the attachment of September, 1900, was void, *viz*, that the Administrator-General was not a party to the execution-petition on which the attachment was ordered. No doubt, he ought to have been made a party to the application but the omission, it seems to us, cannot form a valid ground of objection to the present application on the part of the judgment-debtor. No objection was taken to the attachment at the time it was made on that ground; if it had been taken, the defect could have been remedied in time. The estate of the judgment-debtor's father has now, as we understand, been fully administered and the Administrator-General has nothing further to do with the estate and as the attachment still subsists the application for sale must be regarded as in order. We may mention that, apart from the dictum already referred to, the decision in the case reported in *Srirangammal* v. *Sandamal* (1) has no application to the present case. In *Sirangammal* v. *Sandimal* (1) what was decided was that a suit for partition by the assignee of the devisees under the Will would not lie until the estate has been administered. *Bhaiji Bhimji* v. *Administrator-General of Bombay* (2) is also distinguishable from the present case. There a decree was obtained against a person as the heir and legal representative of the devisee's estate while the estate had become vested in the Administrator-General. The Administrator-General was not a party to the suit, and it was in execution of the decree that the estate of the deceased was attached without notice to the Administrator-General. It was held that neither the decree nor the attachment was binding upon the Administrator-General but no such question arises as the estate has been fully administered and the decree against David Pillai was in his individual capacity and not as legal representative of his father. It appears, however, that the respondents Nos 2, 3 and 5 preferred a claim to some of the properties sought to be sold and that claim has been allowed.

The result, therefore, will be that appeal will be allowed with costs as against the 1st respondent and dismissed with costs as against respondents Nos. 2, 3 and the Execution-Petition No. 774 of 1905 will be remitted to the District Munsif for disposal according to law.

Appeal partly allowed.

(1) 23 B. 428

(S. C. 83 P. R. 1911.)

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 836 OF 1909.

July 15, 1911.

Present:—Mr. Justice Rattigan and Mr. Justice Chevis.

DAN SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

PHANGAN SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.—

Pre-emption—Price over-stated in the deed fraudulently—Decree on payment of market-value—Subsequent suit by vendor's reversioners—Custom—Alienation—Pre-emptor not debarred from asserting real consideraiion—Real consideration for necessity—Conversion of sale into mortgage—Estoppel—Fraud—Particeps criminis.

A. and *B.* sold certain land for an alleged consideration of Rs 4,000. *C.* sued for pre-emption contending that the sale-price was really Rs. 3,000. The Court found that the price stated in the sale-deed was not fixed in good faith and decreed the claim for pre-emption on payment of the ascertained market-value, Rs. 3,240.

On the death of *A*, his sons sued *C.* for possession of the land on the ground that the sale by *A.* was neither for consideration nor for necessity while *B.*'s sons sued for a declaration that the sale by *B.* would not affect their reversionary rights.

It was found that the sum actually paid to the vendors was Rs. 3,000 and that this sum was for necessity:

Held, (1) that the pre-emptor was not debarred in the present suit from asserting that the sale was really for Rs. 3,000;

Kesar v. *Sundar Singh*, 27 P. R. 1909; 46 P. L. R. 1909; 33 P. W. R. 1909; 1 Ind. Cas. 884 and *Devi Chand* v. *Gurcharn Singh*, 127 P. R. 1906, referred to.

(2) that as the actual consideration of the sale was Rs 3,000 and this sum was for necessity and fairly represented the market-value of the land, the sale could not be converted into a mere mortagage but the suits of the vendor's sons should be dismissed.

DAN SINGH *v.* PHANGAN SINGH.

Wadhawa Mal v. *Wadhawa* 8 P. R. 1908; 144 P. L. R. 1906, 33 P. W. R. 1908, referred to.

Although a pre-emptor, who obtains a decree becomes in many respects identified in interest with the vendee, it would be contrary to all notions of equity and justice and repugnant to common sense to hold that a pre-emptor is bound, when he has obtained a decree on payment of the market-value which is less than the price stated in the deed, as *particeps criminis* with the vendee in the very fraud which it has been the object of the pre-emptor to bring to light and frustrate.

Second appeal from the order of the Additional Divisional Judge, Ferozepore Division, dated the 15th June 1909.

Pundit *Ram Bhaj Datta Chaudhri*, for the Appellants.

Mr. *Duni Chand*, for the Respondents.

JUDGMENT.—The facts of the case, so far as they are material for the purposes of the two connected appeals before us, are as follows:—

By deed of sale, dated the 2nd July, 1895, and duly registered, two brothers, Bur Singh and Dhul Singh, sold some 245 *kanals* of ancestral land in *mauza* Bagha Purana, Moga *tahsil*, to one Sarup Singh (father of defendants Nos. 2—4) for an alleged consideration of Rs. 4,000. This sum, according to the deed of sale, was made up of the following items, *viz*;—

(*a*) Rs. 2,200 paid to a creditor, Santu Singh, who held a mortgage, with possession, of the land for that amount;

(*b*) Rs. 1,000 paid before sale to the vendors;

(*c*) Rs. 800 paid to the vendors before the Sub-registrar.

Defendants Nos. 5—11, near collaterals of the vendors, forthwith instituted a suit for pre-emption of the said land, their claim being based on the ground that they were proprietors in the village, whereas one of the vendees owned no land at all therein and the other was a mere *malik-i-qabza*. In this suit for pre-emption the claimants contended that the sale price was really Rs. 3,000 and that the item of Rs. 1,000 had not been paid, but had been entered solely for the purpose of defeating their rights. The Court found that the price stated in the sale-deed had not been fixed in good faith and that the market-value of the property was Rs. 3,240. A decree was accordingly passed in favour of the pre-emptors, on the 17th December, 1896, for possession by pre-emption on payment of the said sum of Rs. 3,240. The pre-emptors paid this sum to the vendee and obtained possession of the land, mutation in their favour being effected in 1897. Thereafter, they sold part of the land to defendants Nos. 12—24.

Dhul Singh, one of the original vendors, died in 1900, and Bur Singh, the other vendor, is still alive. In 1908 the two sons of Dhul Singh, Sundar Singh and Ghamand Singh, instituted a suit for recovery of the land from defendants on the ground that the sale by their father was neither for consideration nor for necessity, and about the same time the sons of Bur Singh instituted a suit for a declaratory decree to effect that the sale effected by their father would not affect their reversionary rights, on the death of the latter, for the same reason. Both suits were tried and decided together, as the questions involved were the same in each of them.

The Sub-Judge found that the sale in 1895 was for consideration and necessity; that the present claim by plaintiffs was within time, but that their long silence amounted to acquiescence. In accordance with these findings he dismissed their suit with costs.

It is not quite easy to follow the judgment of the Sub-Judge, but his meaning would appear to be that the original sale was really for Rs 3,000 and that as the vendee had paid that amount, the mere fact that the actual market-value of the land was Rs. 3,240 did not justify him in converting the sale into a mortgage, as against the present defendants (the pre-emptors and their alienees). As he points out, the latter were not responsible "for the over-statement in the sale-deed" (that is to say, the allegation therein that the consideration was Rs. 4,000) and the principle laid down in *Wadhawa Mal* v. *Wadhawa* (1) applied to the facts of this case.

The learned Divisional Judge upon plaintiffs' appeal held that the sale of 1895 was alleged to be for a consideration of Rs, 4,000, that the present contesting defendants, who stood in the shoes of the other vendee, had to accept the fact that the consideration was put down at that figure, while, on the other hand, they could not in face of their pleas in the pre-emption suit be now allowed to assert that the said amount was actually paid to the vendors, and that the sum of Rs. 1,000 must, therefore, be held not to be a charge on

(1) 8 P. R. 1908; 144 P. L. R. 1906; 33 P. W. R. 1908.

DAN SINGH v. DHANGAN SINGH.

the land. He agreed with the Sub-Judge that the suits were within time, but he disagreed from the latter's finding, accepted the appeals in both cases and granted the plaintiffs "decrees for possession and declaration, respectively, on payment by each of Rs. 1,500."

From these decrees the defendants have preferred further appeals and in this judgment we shall dispose of both appeals.

We see no reason to differ from the concurrent views of the lower Courts upon the question of limitation, and we hold with them, that the suits are within time. For reasons which will presently appear, we find it unnecessary to deal with the plea of acquiescence, though there is, in our opinion, something to be said on both sides upon this point.

Upon the merits of the case we think the claims preferred by the sons of the vendors must fail. It was established in the pre-emption suit that the sale in 1895 to Sarup Singh was for Rs. 3,000 only and in the present suits both Courts are agreed that the said sum was actually paid to the vendors and that there was "necessity" *pro tanto*.

Now the present contesting defendants were the pre-emptors in the former suit and in that suit they contended, and with success, that the item of Rs. 1,000 formed no true part of the consideration-money for the sale. They pleaded, and proved, that the consideration was Rs. 3,000 only, and it is clear from the judgment of the Sub-Judge [and the reference in that judgment to *Wadhawa Mal* v. *Wadhawa* (1)] that they have in the present suits again raised the contention that the sale was merely for that amount. In these circumstances it would, we think, be unjust to hold (as the Divisional Judge has held) that the defendants stand entirely in the place of the vendees and if the vendees committed a fraud, they are equally bound by it. The defendants have from the outset protested against this fraud on the part of the vendees and in their suit for pre-emption they strenuously asserted that the item of Rs. 1,000 had been fraudulently stated in the sale-deed to be part of the consideration for the sale. They succeeded in establishing that plea, and their reward now is to be informed that they have stepped into the shoes of the vendees and are, therefore, bound by the very fraud which they succeeded in frustrating. In many respects a pre-emptor who obtains a decree becomes identified in interest with the original vendee, but we have no hesitation in saying that it would be contrary to all notions of equity and justice and repugnant to common sense to carry this principle to the length of holding that a pre-emptor was bound in circumstances, such as we have before us, as *particeps criminis* with the vendee in the fraud which it has been his object to bring to light. The principle *nemo allegans suam turpitudinem audiri potest* may possibly debar the vendee himself from urging, in a case such as the present, that the sale which was ostensibly for Rs. 4,000 was in fact merely for Rs. 3,000 and that an item of Rs. 1,000 had been entered fictitiously and for the purpose of keeping off pre-emptors [*Kesur* v. *Sunder Singh* (2)]. We confess to some feeling of doubt as to how far this principle can legitimately be carried in such cases, and there is authority for the view that it is open even to the vendee to raise the plea that a certain item of the alleged consideration should be disregarded when the Court has to decide whether full consideration was actually paid for the property sold [*Devi Chand* v. *Gurchirn Singh* (3)] But, be this as it may, we are of opinion that the principle cannot in reason and in justice be extended in order to debar a person who has, as pre-emptor, successfully asserted that part of the alleged consideration was fraudulently entered in the deed of sale, from thereafter maintaining that the true consideration for the sale was the amount actually found to have been paid by the vendee. In the present case the Courts are all agreed that the actual amount paid by the original vendee was Rs. 3,000 (*viz.*, Rs. 2,200 paid to the mortgagee, Santu Singh, and Rs. 800 paid to the vendors before the Sub-registrar) and that there was "necessity" for the alienation to that extent. This is a concurrent finding on a question of fact, but apart from this, we are ourselves fully satisfied upon the point. It has also been found, and we see no reason whatever to doubt the accuracy of the finding, that the market-value of the

(2) 72 P. R. 1909; 43 P. L. R. 1909; 33 P. W. R. 1909; 1 Ind. Cas. 882.

(3) 127 P. L. R. 1906.

property is about Rs. 3,240. This finding was arrived at in the pre-emption suit to which plaintiffs were no parties, and the latter are, therefore, technically not bound by it. But it was arrived at after very full inquiry in a case which was hotly contested by the original vendee and the pre-emptors, and it would be a useless waste of time and entail unprofitable expenditure, if we remanded the case for further inquiry upon this point. In this connection we may note that plaintiffs in their grounds of appeal in the lower Appellate Court did not challenge the finding of the Sub-Judge (based upon the finding in the pre-emption suit) that the market-value of the land was Rs. 3,240. We may take it, therefore, for the purposes of this case that in 18 5 the market value of the land was about Rs. 3,240. That being so, we find that a sum of Rs. 3,000 was actually paid to the vendors and as the latter sum fairly represents the real value of the land, we do not feel called upon to convert the sale into a mere mortgage [*Wadhawa Mal* v. *Wadhawa* (1)].

We hold accordingly that the plaintiffs have failed to prove that the sale in 1895 (which was really for Rs. 3,000) was invalid against defendants on the ground that consideration did not pass, or that necessity did not exist *pro tanto*.

The appeals are, therefore, accepted and plaintiffs' suits dismissed with costs throughout.

Appeal accepted.

[s. c. (1912) 1 M. W. N. 42.]

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1017 OF 1910.

November 28, 1911.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

RAMASWAMI AYENGAR—PLAINTIFF—APPELLANT

versus

Raja MUTHUSWAMI AIYER AND ANOTHER—DEFENDANTS—RESPONDENTS.

Attachment wrongful—Damages—Malice—Not necessary for damages—Master and servant—Tort by Government servant—No cause of action against Government.

When an act *prima facie* wrongful, *e. g.*, attachment of a person's property for revenue due from a stranger, is committed, and actual damages are thereby sustained, no malice need be proved to recover damages.

Where a tortious act is committed by a servant of Government, owing to carelessness, there is no cause of action against the Government.

Second appeal against the decree of the District Court of Trichinopoly, in Appeal Suit No. 91 of 1903, presented against that of the Court of the District Munsif of Kulitalai in Original Suit No. 570 of 1903.

Mr. *C. V. Anantakrishna Aiyar*, for the Appellant.

The Government Pleader, for the Respondents.

JUDGMENT.—For arrears of revenue due to Government, the first defendant, a Village Munsif, attached a bull which the plaintiff alleges belonged to him. The Government revenue being subsequently paid, the plaintiff got back his bull. The present suit against the Village Munsif and the Government is for damages sustained by him, both as actual pecuniary damages sustained and damages for injury to his reputation. The District Munsif found that the bull belonged to the defaulter and not to the plaintiff and dismissed the suit. On appeal the District Judge has confirmed the District Munsif's decree without deciding whether the bull belonged to the plaintiff or not. The only finding arrived at was that the attachment of the bull was not malicious. The Judge is wrong in holding that it was necessary for the plaintiff to prove any malice to be entitled to recover damages actually sustained by him by the attachment of his property for revenue due by a stranger. The second appeal is not pressed as against Government, as indeed it could not lie, there being no cause of action against Government.

We reverse the decree so far as the first defendant is concerned and remand the appeal as against him for fresh disposal according to law. The costs of the plaintiff and the first defendant will abide the result of the fresh hearing. The appellant will pay the costs of the second respondent in this Court.

Case remanded.

UMAR ALI *v.* NASIB-UN-NISSA.

(S. C. 82 P. R. 1911.)

PUNJAB CHIEF COURT.

MISCELLANEOUS CIVIL APPEAL No. 801 OF 1910.

June 17, 1911.

Present:—Sir Arthur Reid, Kt., Chief Judge, and Mr. Justice Kensington.

Mir UMAR ALI AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat NASIB-UN-NISSA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 2 (2)—Decree, definition of—"Rights of parties", meaning of—Preliminary and interlocutory orders—Appeal—Revision.

The words "rights of the parties," in the definition of decree in section 2 (2) of the Civil Procedure Code, 1908, must be taken to mean rights of the parties *inter se* in regard to the subject-matter of the suit

The following preliminary and interlocutory orders are not decrees and consequently not appealable:—

(1) An order on an objection as to part of the suit being based upon the terms of the Pensions Act.

(2) An order on a question as to how the portion of the claim dealing with profits is to be determined.

(3) An order on a demand by the defendant that security should be taken from the plaintiff before the case proceeds further.

(4) An order on an allegation by the defendant that the total Court-fee stamp required by the Court from the plaintiff is largely deficient.

Where an appeal will lie from the decree that may be passed in a suit, the High Court will not interfere on revision with merely preliminary and interlocutory orders.

Siri Dhar v. *Amar Nath*, 146 P. R. 1908, 33 P. W. R. 1908; 61 P. L. R. 1908, distinguished.

Miscellaneous appeal from the order of the District Judge, Rohtak, dated the 5th July, 1910.

The Hon'ble Rai Bahadur *Shadi Lal*, for the Appellants.

The Hon'ble Khan Bahadur *Muhammad Shafi*, for the Respondent.

JUDGMENT.—This is an appeal from two intermediate orders passed by the District Judge of Rohtak on the 20th June and 5th July, 1910, on a series of preliminary objections raised by the defendant at an early stage in the trial of a Civil suit covering property of large value.

The plaint was originally stamped with a Court-fee of Rs. 1,015. By the orders under appeal the plaintiff has been required to pay a sum of Rs. 160 more, making her total Court-fee Rs. 1,175, representing a valuation for jurisdictional purposes of Rs. 40,000 to Rs. 50,000. The objections raised by the defendant were numerous, but they have not all been pressed in this Court. The appellant has selected five points upon which the appeal is based, and the last of these has been given up by Counsel at the hearing, as having been framed inadvertently, without reference to the alteration made by Order III, rule 2 (*a*) of the Civil Procedure Code, to the provisions as to powers of attorney in the corresponding section 37 (*a*) in the Code of 1882. We have, therefore, to deal with four points, raised with reference to—

(1) an objection as to part of the suit based upon the terms of the Pensions Act;

(2) a question as to how that portion of the claim dealing with profits is to be determined;

(3) a demand by the defendant that security should be taken from the plaintiff before the case proceeds further; and

(4) an allegation by the defendant that the total Court-fee stamp now required from the plaintiff is largely deficient.

Counsel for the defendant explains that he considered himself bound to lodge this appeal, in case it should hereafter be held that the decision of the District Judge on all or any of these points amounts to a preliminary decree within the meaning of section 2 (2) of the present Code of Civil Procedure. It is pointed out that the definition of decree as now given differs materially from that contained in section 2 of the 1882 Code and Counsel represents that if any part of the District Judge's order amounts to a preliminary decree his client will by section 97 be precluded from questioning the correctness of the order unless an immediate appeal is preferred.

We have, therefore, to consider the points above with special reference to the terms of section 2 (2) of the Code in which a "decree" is defined as meaning "the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit." Counsel for the plaintiff at once raised the preliminary objection that none of the points stated amounts to a decree as so defined, and that in consequence no appeal lies at the present stage. It was urged by him that the orders under appeal do not conclusively determine the rights of the parties on any point, being concerned entirely with matters of procedure.

Coursel for the defendant could say little in reply to this contention, which appears to us to be obviously correct in regard to, at any rate, the last 3 out of 4 points stated. He did, however, refer to a portion of the commentary on the new Code of Civil Procedure by Woodroffe and Ameer Ali, at page 42, which deals more particularly with the new definition of a decree. We think that where the definition speaks of the rights of the parties, the meaning must be taken to be the rights of the parties *inter se* in regard to the subject matter of the suit. We cannot allow that an interlocutory order passed by a Court on any objection raised by the defendant, however frivolous, should be taken as coming within the definition of a decree and, therefore, justifying an immediate appeal to a higher Court. If the very extended interpretation of the word 'decree', which Counsel for the defendant desires us to take, should be permissible, a defendant will practically be always able to block a suit indefinitely by objections similar in character to those taken in the present suit, and it is difficult to see how the trial of important suits is to be conducted without inordinate delays. We do not suppose that this could have been the intention of the Legislature when framing the present definition of decree and we decline to adopt the interpretation suggested to us. We are satisfied that the orders now passed by the District Judge do not touch the essential merits of the case between the parties.

They deal with questions which are within the discretion of the Court by which the case is being tried, or with matters which lie between the plaintiff and the Government. On no single point has there been an adjudication which conclusively determines the rights of the defendant. Our finding is, therefore, that the orders in question do not amount to a preliminary decree and that no appeal lies to this Court at the present stage.

Counsel for the defendant then pressed us to deal with the question on revision quoting as his authority the ruling *Siri Dhar* v. *Amar Nath* (1), in which a Division Bench of this Court passed orders on revision on a question affecting the valuation of a suit for the purposes of Court-fee. We have no difficulty in distinguishing the ruling quoted. The case was then before this Court with reference to an erroneous order passed not by the first Court but by a lower Appellate Court. The Munsif had declined jurisdiction and the lower Appellate Court had improperly held the suit to be within the jurisdiction of the Munsif. The circumstances under which this Court felt bound to interfere on revision are entirely different from the circumstances under which the present case is now before us. We are quite clear that no appeal lies, and that we have no right to interfere on revision in the present case. An appeal will lie from the decree in the suit, and the defendant is seeking to anticipate such remedy as he may eventually have by appeal when the case is finally decided. We cannot prejudice the plaintiff by attempting to determine beforehand whether the defendant will eventually have or will require any such remedy.

The petition is accordingly dismissed whether it is treated as one of appeal or one for revision. We allow Rs. 80 costs in this Court to the plaintiff.

Plaintiff's Counsel has asked us to take notice of the manner in which the trial of the suit has been blocked by defendant's persistent objections, proceedings having been stayed in this Court since the 4th August, 1910. We agree that the attitude taken up by the defendant is for the most part indefensible, and we trust that the District Judge will now be able to proceed with the trial of the suit on the merits without further dilatory tactics on the part of the defendant. It will be part of the duty of the District Judge to endeavour to secure that definite issues are now drawn with as little further delay as possible.

Appeal rejected.

(1) 146 P. R. 1903; 34 P. W. R. 1903; 61 P. L. R. 08.

SEENI AMMAL v. ANGAMUTTU NADAR.

(s. c. (1912) 1 M. W. N. 99.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 972 OF 1910.

January 9, 1912.

Present:—Mr. Justice Miller and Mr. Justice Sundara Aiyar.

SEENI AMMAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

ANGAMUTTU NADAR, MINOR, BY NEXT FRIEND SAMI NADAR AND ANOTHER—PLAINTIFF AND 3RD DEFENDANT—RESPONDENTS.

Hindu Law—Alienation of ancestral land for maintenance and marriage expenses—Validity.

An alienation of ancestral land by the managing member of a Hindu family to provide for the maintenance and expenses of the marriage of his step-sister is valid.

Second appeal against the decree of the District Court of Trichinopoly, in Appeal Suit No. 172 of 1909, presented against that of the Court of the District Munsif of Srirangam in O. S. No. 226 of 1908.

The plaintiff, a minor, sues for partition and for delivery of his share of certain properties gifted by his father, 3rd defendant, to the latter's step-mother, 1st defendant, and step sister 2nd defendant, in lieu of maintenance and expenses of marriage. The 3rd defendant was the only son of his father who left about 22 *acres* of *nanjai* lands and no debts. Exhibit A was executed by which the 3rd defendant gave to the 1st and 2nd defendants with power of alienation in full satisfaction of the 1st defendant's claim for maintenance and the 2nd defendant's claim to be maintained till her marriage and for the expenses of her marriage the suit land measuring 3 acres and 22 cents valued at Rs 1,000. His contention was that a complete alienation was illegal and invalid and that in this case it was excessive.

The District Munsif dismissed the suit holding that the alienation for maintenance was proper and the one for marriage expenses was imperative. The District Judge modified the decree on the ground that the manager of a Hindu family is not entitled, as a matter of course, to alienate immoveable property absolutely in favour of maintenance-holders.

Mr. *G. Krishnaswamier*, for the Appellants.

A Hindu manager can alienate for the maintenance of the members of the family. A brother can also give a marriage portion for his sister. Both are well-established propositions.

Mr. *P. R. Narayanaswamier*, for the Respondents.

The statement of the law of the District Judge is not quite correct. But that amounts to a finding that in this particular case the manager was not entitled to alienate so great a proportion of the ancestral lands. That finding of fact ought not to be interferred with in second appeal.

JUDGMENT.—We are unable to agree with the District Judge that an outright gift of a portion of the family property by way of a provision for maintenance is necessarily beyond the powers of a family manager. In this case the gift has been found by the District Munsif to represent a very small portion of the family property, and that finding has not been attacked in the appeal to the District Judge.

We cannot, therefore, hold that the gift was invalid and we allow the appeal and restore the decree of the Court of first instance with costs here and in the lower Appellate Court. The memorandum of objections is dismissed with costs.

Appeal allowed.

PATHANA v. NABA.

(s. c 87 P. R. 1911.)

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1196 OF 1910.

November 10, 1911.

Present:—Mr. Justice Robertson.

PATHANA—DEFENDANT—APPELLANT

versus

NABA—PLAINTIFF AND WALIA—DEFENDANTS—RESPONDENTS.

Pre emption—Pre-emptor and vendee equally related to vendor—Sharing in holding gives no superior right—Division of property between vendee and pre-emptor having equal rights—Price fixed in bad faith—Market-value to be paid—Punjab Pre emption Act (II of 1905), ss. 12 a), 14 b), 22.

Where two persons are equally related to the vendor, sharing in the holding in which the land sold is situate, gives no superior right of pre-emption to either.

Where the pre emptor and the vendee have equal rights of pre emption, the pre-emptor is entitled to pre-empt one-half of the property sold and the vendee is entitled to retain the other half.

When it is proved that the sale price has been fixed in bad faith, the *market-value* of the property must

be ascertained and taken as the price to be paid by the pre-emptor.

Second appeal from the order of the Divisional Judge, Shahpur Division, at Sargodha, dated 13 h August 1910.

Mr. *Nanak Chand*, for the Appellant.

JUDGMENT.—The lower Courts appear to have both overlooked the provisions of sections 12 (*a*) and 14 (*b*) of the present Pre-emption Act. Under that Act relationship gives the first right and when persons are equally related to the vendor, sharing in the holding gives no superior right to either.

Consequently the pre-emptor and the vendee in this case had equal rights of pre-emption. That being the case, under section 14, clause (*b*), the pre-emptor is entitled to pre-empt one-half and the vendee is entitled to retain one half, as pre-emptor and vendee are found by the lower Courts to be equally related to the vendor.

As to price the learned Divisional Judge seems to have again overlooked the provisions of the present Pre-emption Act. Section 22 provides that whenever the price has been fixed in bad faith the *market-value* must be fixed and taken as the price to be paid.

The price has been found to be Rs. 400.

I accordingly accept the appeal and decree that the plaintiff shall be entitled to one-half of the land claimed on payment of Rs. 200 within one month of date. If not so paid the suit stands dismissed with costs. If so paid each party to bear his own costs throughout.

Appeal accepted.

(s c. 14 O C. 343.)

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL APPLICATION No. 23 OF 1911.

December 5, 1911.

Present:—Mr. Piggott, J. C., and Mr. Lindsay, A. J. C.

BRIJ MOHAN LAL—DEFENDANT

versus

Musammat MUNNI BIBI—PLAINTIFF.

Caveat-emptor, *applicability of—Attaching creditors, responsibility of—Decree-holder, liability of, for improper attachment—Warranty of title of judgment-debtor—Reivision by High Court—Provincial Small Cause Courts Act (IX of 1887, s 25.*

Per *Lindsay, A. J. C*—The rule of *caveat-emptor* has no application in India in the case of ordinary sales of goods by private contract.

In India an attachment is made at the risk of the attaching creditor and he is responsible for any results which can be traced to an unlawful attachment carried out upon application made by him In the case of sale in execution in India although there is no warranty given by the Court or by the officer entrusted with the duty of carrying out the sale, but there is a warranty by the decree holder that the property does belong to the judgment-debtor. The property is sold as the property of the judgment-debtor on a representation to that effect made to the Court by the decree-holder who is taking out execution

A stranger whose property is sold behind his back without any authority does not need to have the sale set aside.

Where the decree-holder pointed to a carriage as the property of the judgment-debtor which was thereupon attached and at the sale was purchased by the plaintiff's predecessor-in-title but subsequently on a suit brought by a third person claiming the carriage it was decreed to him and the purchaser lost it:

Held, that the plaintiff was entitled to recover the purchase-money from the decree holder.

Per *Piggott, J.C.*—It is no doubt advisable that the High Court should in exceptional cases assert a general power of revision in suits tried by Small Cause Courts where the decision arrived at appears to be capricious or perverse or arrived at in defiance of well known principles of law. But it is not at all an adequate ground for interfence, under section 25, Provincial Small Cause Courts Act, that the presiding Judge of the Small Cause Court had before him for determination a doubtful issue of law, and that his decision on the said issue, though honestly arrived at and upon a reasonable and fair consideration of the law applicable to the point and the authorities thereon, is one which this Court might not have been prepared to affirm if the matter had come before it in a second appeal.

Application against the decree of the Judge of the Court of Small Causes, City Lucknow, dated 21st November 1910.

Pandit *Tara Shankar*, for the Appellant.

Babu *Bisheshar Nath Srivastava*, holding the brief of Mr. *Jagmohan Nath Ohak*, for the Respondent.

JUDGMENT.

LINDSAY, A. J. C.—This is an application under section 25 of the Provincial Small Cause Courts Act (IX of 1837) for revision of a decree passed by the Judge of the Small Cause Court, Lucknow, on the 21st November, 1910, in a suit brought by Lachman Prasad and Ram Das against Brij Mohan Lal for the recovery of Rs 67.

The plaintiffs were the successors-in-interest of one Behari Lal, deceased, who on the 11th November, 1907, at an auction sale in execution of a decree, obtained by the defendant Brij Mohan Lal, purchased a carriage (*palki gari*) for Rs. 67-7-0.

BRIJ MOHAN LAL v. MUNNI BIBI.

The purchase-money was deposited and was in due course paid to the decree holder.

The decree had been obtained against two persons Dilawar and Subhan and previous to the sale the carriage had been attached while in the possession of Dilawar. In July 1908, a suit was brought by one Yasin Khan for recovery of the carriage on the ground that it was his property and not the property of either of the judgment-debtors. The defendants to that suit were the decree-holder, the two judgment-debtors and the auction-purchaser. The claim was decreed, the Court holding it to be proved that the carriage was the property of the plaintiff. The result was that the purchaser had to deliver the carriage to Yasin Khan. The present suit was brought after the death of the purchaser by his legal representatives against the decree-holder, Brij Mohan Lal, their case being that they were entitled to have the purchase-money refunded as it had turned out that neither of the judgment-debtors had any title to the property sold.

The Court below decreed the claim. In revision it is contended on behalf of the decree-holder that the Court was wrong. It is argued that as there was no warranty of title at the sale in execution the rule of *caveat-emptor* applies and the purchaser has no remedy if, after the sale, he loses the property purchased on the ground that it did not belong to the judgment-debtor.

Before proceeding to deal with this argument it is necessary to set out the facts relating to the attachment and sale of the property in question. The proceedings, it may be noted, were taken under the former Code of Civil Procedure (Act XIV of 1882), which was in force at the time.

The decree-holder, Brij Mohan, applied on the 22nd July, 1907, for execution of his decree against his judgment-debtors, Dilawar and Subhan, by a "general attachment" of their property. A notice was issued first under section 248 of the Code to the judgment-debtors to show cause. No cause was shown and an order of attachment, directed to the Nazir, was then issued. This order gives the names of the judgment-debtors and directs the Nazir to attach the moveable property "of the said judgment-debtors" according to the schedule attached, or such property as the decree-holder might point out. No list was attached to the order and attachment was carried out eventually with the assistance of an agent of the decree-holder who pointed out a carriage as property liable to be seized. The seizure was made on the 4th September, 1907.

Thereafter, a sale proclamation was issued under section 287 of the Code in which the property directed to be sold is described as belonging to the judgment-debtor (whose name appears in the heading as Dilawar Khan). A description of the property is added at the bottom of the proclamation "a *pilki gari*, black colour, No. 139, bearing the name of Yasin Khan, *etc*" Finally the auction-sale was held and the property so described was, as already said, purchased by Behari Lal. To come now to a consideration of the argument advanced on behalf of the applicant to the effect that the auction-purchaser has no remedy in a case of this kind and that the rule of *caveat emptor* applies. It may be observed in the first place that this rule has no application in India in the case of ordinary sales of goods by private contract (*cf.* section 109 of the Indian Contract Act). It may, however, be conceded that the rule of law laid dawn in this section does not of its own force apply to sales *in invitum*. In England it has been held that in the case of sale by a Sheriff in execution in ordinary course there is nothing from which, according to English Law, any intention to warrant the title of the execution-debtor can be inferred; accordingly, a purchaser of goods seized and sold in execution in ordinary course by the Sheriff cannot recover the purchase-money he has paid by reason that it turns out that the goods did not belong to the execution-debtor. The following passage from *Eicholtz* v. *Bannister* (1) explains the reason of this rule:—"The fact of the sale taking place under such circumstances, (*i. e.*, the case of the sale by the Sheriffs of goods seized under a *fi fa*) is notice to buyers that the Sheriff has no knowledge of the title to the goods and the buyers consequently buy at their own peril. Many contracts of sale tacitly express the same sort of disclaimer of warranty." It is, however, to be remembered that the law of execution in England is different from that in India as pointed out in the Privy Council

(1) 17 C. B. (N. S.) 708; 34 L. J. C. P. 105; 11 Jur. (N. S.) 15; 12 L. T. 73; 13 W. R. 96.

judgment in *Kissori Mohan Roy* v. *Harsukh Das* (2).

At page 442 of the report their Lordships remark:—

"The appellants mainly relied upon the English case of *Walker* v *Olding* (3) which was cited as an authority for the proposition that a judgment-creditor is not responsible for the consequences of a sale, under a judicial order of goods illegally taken in execution in satisfaction of his debt. *Walker* v. *Olding* (3) would have been an authority of importance had the law of execution been the same in India as in England, but there is in that respect no analogy between the two systems. In England the execution of a decree for money is entrusted to the Sheriff, an officer who is bound to use his own discretion and is directly responsible to those interested for the illegal seizure of goods which do not belong to the judgment-debtor. In India warrants for attachment in security are issued on the *ex parte* application of the creditor who is bound to specify the property which he desires to attach and its estimated value. In the present case, by the terms of the *yarwana*, no discretion was allowed to the officer of the Court in regard to the selection of the goods which he attached, his only duty was to secure under legal fence all bales of jute in the respondents' premises which were pointed out by the appellants. The illegal attachment of the respondents' jute was thus the direct act of the appellants for which they became immediately responsible in law."

This description of the law in India regarding attachment before judgment applies equally well to the law relating to attachment in execution of decree and particularly to a case like the present when the attachment of goods was carried out under the direction of an agent of the decree-holder himself. It seems to follow from this exposition of the law that in India the attachment is made at the risk of the attaching creditor and that he is responsible for any results which can be traced to an unlawful attachment carried out upon application made by him. It does not seem to be correct to say that in the case of a sale in execution in India there is no warranty of title. No doubt, there is no warranty given by the Court or by the officer entrusted with the duty of carrying out the sale: but it may, I think, be properly said that there is a warranty by the decree-holder that the property does belong to the judgment-debtor. In execution of his decree the property which he can attach and bring to sale is the property of the judgment-debtor (section 266 of the former Code of Civil Procedure) and all steps taken by the Court in the way of attachment and sale are taken on the strength of his representation that the property to be seized and sold does in fact belong to his debtor.

As has been pointed out, the property attached in the present case was described as belonging to the debtor both in the warrant of attachment and in the sale proclamation. The decree holder is responsible for this declaration and cannot, in my opinion, be heard to say that there was no warranty of title and that the auction-purchaser bought at his own risk.

A case very similar to the present was dealt with in *Framji Bhani Dustur* v. *Hormasji Petanji Framji* (4), in which the whole law upon the subject is discussed in an exhaustive judgment of Green, J.

In that case, at page 264 of the report, after referring to the observations of Erle, C. J., in *Eichholtz* v. *Bannitser* (1) cited above he says:—

"But if in a sale by the Sheriff there is not only no disclaimer of warranty, but even an express assertion that the goods are the property of the execution-debtor, I cannot see why the Sheriff and the execution creditor (if responsible for such assertion) should not be held bound by such warranty to this extent at least that the Sheriff (if he has still in his hands the purchase-money) or the execution-creditor (if the money has been paid over to him) is bound to restore it to the purchaser in case it has turned out that the purchaser has not got that for which he paid."

In the case with which the learned Judge was dealing the property sold consisted of certain shares in a trading company and it was proved, as it is in the present case, that the property was described in the warrants for attachment and sale, as the property of the judgment-debtor, and as it turned out

(2) 17 C. 426; 17 I. A. 17.

(3) 1 H. & C. 621; 32 L. J. Ex. 142; 9 Jur. (N. S.) 53; 7 L. T. 633; 11 W. R. 186.

(4) 2 B. 258.

BRIJ MOHAN LAL v. MUNNI BIBI.

that this description was wrong and that the shares belonged to a third party he directed the decree-holder to refund the money.

In this connection it may be noticed that whereas under the first Code of Civil Procedure, Act VIII of 1859, it was provided by section 249 that in all cases of sale the proclamation should declare that all that was to be sold was the "right, title and interest of the defendant in the property specified therein," the subsequent Codes, *i.e.*, Acts X of 1877 and XIV of 1882, contain no such provision. Under section 249 of Act VIII of 1859 it might very well have been held that the declaration referred to therein amounted to a disclaimer of any warranty of title and that the purchaser took the property with all its defects. Under the present law there is no such disclaimer. The property is sold as the property of the judgment-debtor on the representation to that effect made to the Court by the decree-holder who is taking out execution. The learned Counsel for the applicant relied upon the case of *Dorab Ally Khan* v. *Abdool Azeez* (5) and in particular on a passage in the judgment to be found at page 126 of the report which reads:—

"Now it is, of course, perfectly clear that when the property has been so sold under a regular execution and the purchaser is afterwards evicted under a title paramount to that of the judgment-debtor, he has no remedy either against the Sheriff or the judgment-creditor. This, however, is because the Sheriff is authorized by the writ to seize the property of the execution debtor which lies within his territorial jurisdiction and to pass the debtor's title to it without warranting that title to be good."

In my opinion this case cannot help the applicant here. Their Lordships were dealing with a case in which a sale had been made by the Sheriff in execution of the decree of the High Court of Calcutta on its original side. The Civil Procedure Code of 1859 did not apply to suits instituted in Courts established by Royal Charter except in so far as it related to the examination of witnesses under commission and to the execution of decrees out of the jurisdiction of the Courts by which they were passed (*cf.* section 382 of Act VIII of 1859) The law relating to sales in execution of decrees of the High Court on its original side at that date appears to have been the law obtaining in England. As already remarked, that law has no analogy with the law of execution as laid down in India in the Code of Civil Procedure.

There remains to be noticed one point which was raised in the course of argument, namely, that the sale at which Behari Lal purchased, has never been set aside and is absolute. It has been suggested that this fact is an obstacle to the recovery of the purchase-money from the decree holder. In my opinion it is not. It is true that in the suit filed by Yasin Khan for recovery of his property, he did not ask that the sale should be set aside nor was any such declaration made. But Yasin Khan was under no obligation to have the sale set aside. He was no party to the decree obtained by Brij Mohan Lal. A stranger whose property is sold behind his back without any authority does not need to have the sale set aside [*Narasimha Naidu* v. *Ramasami* (6) and *Kadir Hussain* v. *Hussain Sahib* (7)] A suit to set aside a sale would lie only at the instance of a plaintiff who would be bound by the sale if he did not succeed in getting it set aside. It cannot be contended that Yasin Khan who was no party to the decree was a person who would be so bound.

In my opinion, therefore, the decree of the Court below is correct. I would dismiss this application with costs.

PIGGOTT, J. C.—I have had the advantage in this case of reading the order prepared by my learned colleague. I am not able to concur unreservedly in the view which he has taken of the facts of this case and of the law applicable to the same. My objection to the position in which the parties concerned are left by the result of the litigation, so far as it has at present gone, is a very simple one. The persons who apparently benefit by that result are Dilawar and Subhan, the judgment-debtors in the original suit, whose judgment-debt has apparently been satisfied to the extent of Rs. 67 by the sale of a carriage which belonged to somebody else. They, at any rate, deserve no consideration, and, indeed, I find it very difficult to believe in the good faith of their proceedings in connection with the attach-

(5) 5 I. A. 116, 2 C. L. R. 529; 3 C. 803.

(6) 18 M. 478.

(7) 20 M. 118.

ment of this carriage and its sale for the benefit of their decree-holder. It may, no doubt, be said that, after the result of the suit brought by Yasin Khan, the position was such that one of two innocent persons must suffer, either the decree-holder Brij Mohan Lal or the representatives of the auction-purchaser Behari Lal. There is, therefore, no doubt, force in the argument that, under such circumstances, the responsibility should be held to lie rather upon the decree-holder who set the law in motion and obtained the attachment and sale of a carriage which did not in fact belong to his judgment-debtors. It seems to me, however, that the point cannot be finally and satisfactorily determined without going into the further question as to whether the suit brought by Yasin Khan was or was not rightly decided. On this point I think it sufficient to say that I entertain grave doubts. My learned colleague has not thought it proper to make any allusion to a circumstance alleged before us in argument, but as to which there does not seem to be satisfactory evidence on this record. The allegation was that Yasin Khan had in fact objected to the attachment of this carriage and preferred a claim to the same as being his own property under the provisions of section 278 of the former Code of Civil Procedure (Act XIV of 1882) in the course of the execution proceedings which preceded the auction-sale. If this was in fact the case, I should be disposed to hold that Yasin Khan was not a person entitled to the present possession of the said carriage within the meaning of section 10 of the Specific Relief Act (I of 1877). It may be that he would have been entitled to compensation by way of damages as against the person or persons held by the Court to be responsible for the loss which he had suffered; or that he might have recovered possession of the carriage upon a suit so framed as to involve a declaration of the nullity of the auction sale. He could not, I think, have pleaded the provisions of section 11 of the Specific Relief Act, unless it was shown that possession of the carriage had been "wrongfully transferred" by some act involving violence, fraud, or bad faith. If, however, the suit brought by Yasin Khan was wrongly decided, the question to my mind would arise as to the responsibility of the defendant-auction-purchaser for submitting to the said decree instead of seeking his lawful remedy by way of appeal.

These are in brief my reasons for being unable to concur unreservedly in the view of the case taken by my learned colleague. I do not feel it incumbent upon me, however, to dissent from the order proposed by him. The matter before us is an application in revision under section 25 of the Provincial Small Cause Courts Act (IX of 1887). There seems to me a growing tendency to invoke the provisions of this section before this Court in a manner never contemplated by the Legislature. An order passed by the Judge of a Court of Small Causes in the rightful exercise of his jurisdiction is not appealable at all. It is not appealable even on grounds which would justify a second civil appeal under the provisions of section 100 of the Code of Civil Procedure. The revisional jurisdiction conferred upon this Court by section 25 of the Provincial Small Cause Courts Act (IX of 1887) is, undoubtedly, wide and general, and is not limited by any precise conditions such as are imposed by section 115 of the Code of Civil Procedure upon the High Court's exercise of its revisional jurisdiction generally. It is, no doubt, advisable that the High Court should in exceptional cases assert a general power of revision in suits tried by Small Cause Courts, where the decision arrived at appears to be capricious or perverse, or arrived at in defiance of well-known principles of law. It would be, however, contrary to the clear intention of the Legislature if this Court were to allow itself to be drawn into such an exercise of its powers as would virtually make section 100 of the Code of Civil Procedure applicable to all decisions pronounced by Small Cause Court Judges. It is not to my mind at all an adequate ground for interference under section 25 of the Provincial Small Cause Courts Act (IX of 1887) that the presiding Judge of the Small Cause Court had before him for determination a doubtful issue of law, and that his decision on the said issue, though honestly arrived at and upon a reasonable and fair consideration of the law applicable to the point and the authorities thereon, is one which this Court might not have been prepared to affirm if the matter

AMAN-ULLAH v. ABDUL GHAFUR.

had come before it in a second civil appeal. The present case is a peculiarly strong one. The question of law raised before the learned Judge was of so doubtful a nature that my learned colleague and myself have been unable to come to an entire agreement in respect of it. Moreover, my own opinion is that the point could not be adequately decided without calling for and examining the record of another suit, namely, that of the suit in which Yasin Khan appeared as plaintiff. On the record of the present case as it stands, I am not able even to determine with certainty the pure question of fact whether Yasin Khan had or had not filed an objection under section 278 of Act XIV of 1882 in the course of the previous execution proceedings. I am altogether indisposed in connection with a matter like the present to press the revisional jurisdiction of this Court so far as to call for the record of these execution proceedings, and of the suit subsequently brought by Yasin Khan, and to subject them to that consideration which would, in my opinion, be necessary before I could return a definite finding on the issue of law which has been argued before us. I am content, therefore, to say that I find no adequate reason for interference in revision with the order of the Court below, and that I concur, therefore, with my learned colleague in directing the dismissal with costs of the present application.

Application dismissed.

(S. C. 85 P. R. 1911.)

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1207 OF 1909.

October 26, 1911.

Present:—Mr. Justice Kensington and Mr. Justice Johnstone.

Mir AMAN-ULLAH AND OTHERS—DEFENDANTS—APPELLANTS

versus

ABDUL GHAFUR AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Punjab Laws Act (IV of 1872), ss. 25, 29, 31—Insolvency—Appeal from order under s. 25 passed before administration of estate—Order not a decree—Meaning and effect of order—Order refusing or granting discharge not to be made till estate fully administered—Rules under s. 31—Rule allowing appeal from order under s. 25 ultra vires.

An order under section 25 of the Punjab Laws Act refusing to discharge an insolvent passed before the administration of the estate is complete is not a decree and is, consequently, not appealable.

The rule allowing appeal to the Chief Court from such an order is *ultra vires* of Government.

Ram Lal v. *Ladha Singh*, 62 P. R. 1886, followed.

An insolvency Court should not discharge, or refuse to discharge an insolvent until the estate is fully administered. If an order refusing discharge is made before the administration of the estate is complete, it should be taken to mean that at that stage the Court saw no sufficient grounds for a discharge. When the administration is complete, the Court has full power to again consider whether the insolvent should be discharged or not.

First appeal from the order of the Judge, Insolvents Estates Court, at Amritsar, dated the 30th August, 1909.

Mr. *Fazl-i Husain*, for the Appellants.

Mr. *Duni Chand*, for the Respondents.

JUDGMENT.—This was an insolvency case under Act IV of 1872, sections 22, *et seq.* It is unnecessary, for the purposes of this appeal, to discuss the facts in great detail, as it seems to us clear that no appeal lies, but some discussion is necessary in order to make clear an error into which the lower Court has fallen, which might otherwise give rise to further trouble.

The applicants, who form a firm, were duly declared insolvents at the instance of two creditors, two creditors opposing the declaration. The Court then began administration of the estate, and presently the insolvents applied for their discharge. The Court held an inquiry into the conduct of the insolvents, and then, with advertence to section 25 of the Act, ruled that while it was not necessary to commit them to jail, they were not entitled to their discharge and so rejected the application. It then proceeded with the administration of the estate. Meantime, however, the insolvents filed the present appeal against the order of refusal to grant discharge, and it is this appeal which we think does not lie. No doubt in the rules under section 31, Act IV of 1872, an appeal to the Chief Court is allowed; but in *Ram Lal* v. *Ladha Singh* (1) which was followed in *Ram Chand* v. *Billu Mal* (2) that rule was declared *ultra vires* of Government and it was held that no appeal lay in such cases, unless the order complained of amounts to a "decree," which the present order, as explained below, certainly does not. We see no reason why we should not follow that ruling; and we do not

(1) 62 P. R. 1886.

(2) 64 P. R. 1911; 12 Ind. Cas. 807.

see our way to treating the case as one of revision.

Under Act IV of 1872, the Court should not, so far as we can see, either grant discharge or refuse discharge until the estate has been fully administered, see section 29. Insolvents themselves prematurely move the Court to discharge them, and, in our opinion, though the Court was probably right in inquiring into their conduct, in order to see whether punishment under section 25 was called for or not, it should not have given any definite finding or order as to their right to discharge until the administration of the estate was complete. The order should be taken to mean that at that stage the Court saw no sufficient grounds for a discharge; and it should be fully understood that, when the administration is complete, the Court will have full power to consider again whether discharge should be granted or not.

In these circumstances, we dismiss the appeal, and direct that appellants do pay Rs. 32 costs to those respondents who have appeared.

Appeal dismissed.

(s. c. 14 O. C. 335.)

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 140 OF 1910.

November 23, 1911.

Present:—Mr. Piggott, J. C., and Mr. Lindsay, A. J. C.

PARMESAR DAT AND OTHERS—DEFENDANTS

versus

RAJA MOHAMMAD ABUL HASAN KHAN AND ANOTHER—PLAINTIFFS.

Construction of decree—Dahyak—*Under-proprietary right—Oudh Rent Act (XXII of* 1886), *s.* 3, *cls.* (8) *and* (9)—*United Provinces Land Revenue Act (III of* 1901), *s.* 4, *cl.* (15)—*Civil Court Jurisdiction—Declaration of a person as a mere* Thekadar.

The defendants' ancestors brought a suit in the Settlement Court for sub-settlement on the assertion that they held the village in *birt*-tenure. The claim for sub-settlement was disallowed and all that they were held entitled to was a decree confirming their existing possession coupled with a condition that the *Talukdar* was always to retain the power of fixing their rent and of renewing the lease. It was also declared that they were entitled to an allowance as *dahyak* of 10 per cent on the amounts of rent fixed by the *Talukdar*. If they accepted the terms of the lease offered by the *Talukdar* they were to be entitled to deduct the allowance from the rent payable by them. In case they refused to accept the terms they were to be paid 10 per cent. out of the annual rental received by the *Talukdar*. It was admitted that for some years subsequent to the Settlement decree they were out of possession, the superior proprietor having leased the village to other persons during that time:

Held, that, whether or not the right to receive *dahyak* is hertitable and transferable, a right of possession such as was conferred by the above decree is neither heritable nor transferable

Held, further, that having regard to the language of the decree as a whole the right of the defendants did not amount to an under-proprietary right as defined in the Oudh Rent Act and the United Provinces Land Revenue Act (III of 1901).

Held, also, that a Civil Court has no jurisdiction to make a declaration that a person is a "mere *thekadar*" as such declaration amounts to a determination of the class of tenancy which is exclusively within the cognizance of the Revenue Courts.

Appeal against the decree of the Subordinate Judge, Gonda, dated 28th November, 1910.

Babu *Bisheshar Nath Srivastava*, for the Appellants.

The Hon'ble Rai Bahadur *Sri Ram*, for the Respondent No. 1.

Babu *Basudeva Lal*, for the Respondent No. 2.

JUDGMENT.—First Civil Appeals Nos. 140 of 1910, 24 of 1911 and 29 of 1911. These three appeals have arisen out of a suit for declaration brought by the plaintiffs who are superior proprietors of the village of Kapurpur (with its hamlet Sabalpur) against Parmeshar Dat and ten other defendants who are in possession of the village.

The declaration which the plaintiffs sought is set out in paragraph 23 of the plaint, namely, to the effect that—

"the defendants have neither superior proprietary rights nor under-proprietary rights nor proprietary rights of any sort by way of *birt* or perpetual lease in the said village Kapurpur together with its hamlet Sabalpur.....nor have they any right more than that of mere *thekadars* (lessees) in the said village."

The suit was resisted on a variety of grounds of which, for the purpose of deciding these appeals, it is necessary to refer to one only, namely, that the defendants had under-proprietary rights in and were under-proprietors of the village in question.

The lower Court granted a declaration that the defendants had neither proprietary nor under-proprietary rights in the village,

but refused to make any of the further declarations set out in the paragraph of the plaint referred to above.

Both sides have appealed. The defendants claim that they are under-proprietors and have under-proprietary rights and say that the Court below was wrong in refusing to recognise their status.

Each of the plaintiffs has preferred a separate appeal on a common ground, to the effect that the declaration granted by the Subordinate Judge is inadequate.

The only points, therefore, which we have to determine are,—

(1) Whether the defendants-appellants are or are not under-proprietors with under-proprietary rights in the village in dispute? and

(2) Whether the plaintiffs were entitled to any further declaration than that allowed them by the Subordinate Judge?

In order to explain the object of the suit brought by the plaintiffs it is necessary to refer to certain previous proceedings between the parties in the Rent Courts. In 1904, the plaintiffs attempted to eject the defendants by notice under the provisions of section 53 of the Oudh Rent Act. The defendants contested the notice and their objections was upheld on a finding that they were not ordinary *thekadars* (lessees) liable to ejectment under that section. This decision was affirmed in appeal by the Commissioner of the Fyzabad Division in his order, dated the 21st September 1904. It is this refusal of the Rent Courts to treat the defendants as ordinary *thekadars* which has driven the plaintiffs to the Civil Court for a declaration of the defendants' status.

The first question then is—Are the defendants-appellants under-proprietors or not? It is common ground that in 1871 the predecessors-in-interest of the defendants brought a suit in the Settlement Court against the then *talukdar* and obtained a decree defining their rights. Whatever may have been the legal relation existing between the parties prior to this litigation it seems perfectly clear that the present relation between the plaintiffs and defendants must be determined with reference to the terms of the decree.

In order, therefore, to decide the question whether or not the defendants are under-proprietors, we have to interpret the provisions of the decree, and to consider whether the rights conferred by it upon the defendants' ancestors were under-proprietary rights the possession of which entitled them to be styled under-proprietors.

According to the judgment of the Settlement Court, it would appear that the suit brought by the defendants' ancestors was one for sub-settlement, and their claim was based on an assertion that they held the villages in *birt* tenure. Their allegation was that the *birt* tenure had been conferred upon them for valuable consideration—an allegation which does not appear to have been made good, for the terms of one of the *birt pattars*, re-produced in the judgment, shows that the grant was *bishun prit khushast* which is not a grant for valuable consideration at all, but a grant by favour (*raiyati*). The claim for sub-settlement was disallowed and all that the plaintiffs were held entitled to was a decree confirming their existing possession coupled with a condition that the *Talukdar* was always to retain the power of fixing the rent and of renewing the lease. It was declared that the plaintiffs were entitled to an allowance as *dahyak* of 10 per cent. on the amount of the rent fixed by the *Talukdar*. If the plaintiffs accepted the terms of the lease offered by the *Talukdar* and got possession they were to be entitled to deduct the allowance from the rent payable by them. In case they refused to accept the terms and the *Talukdar* took the villages under direct management (*kham*) the plaintiffs were to be paid 10 per cent. out of the annual rental income received by the *Talukdar*.

According to our interpretation of this decree, what was given to the plaintiffs was a right to receive 10 per cent. of the rental of the villages whether they were in possession or not. They got no right of permanent possession: on the contrary, their right to possession was to depend upon contract between themselves and the superior proprietor. In short, the status of the plaintiffs was declared to be that of *dahyak*-holders and it has been laid down by a Bench of this Court in *Deputy Commissioner, Gonda* v. *Bhagwan* (1) that a right to *dahyak* (or *daswant*) does not now necessarily connote a right to possession of land as

(1) 12 O. C. 124, 2 Ind. Cas. 297.

PARMESHAR DAT v. MOHAMMAD ABUL HASAN KHAN.

under-proprietor or in any other capacity (see the authorities referred to at page 126 of the report). It is plain to us that the right conferred upon the ancestors of the defendants in this case was a right to which this description applies. There is nothing whatever in the language of the decree conferring a right to possession other than that which might arise out of a contract between the parties.

Can it be said, then, that the defendants-appellants are, in virtue of the rights so conferred upon their predecessors, "under-proprietors" or that they possess "under-proprietary rights"? This depends upon the meaning of these expressions. They are defined in the Oudh Rent Act, as also in the Land Revenue Act (United Provinces Act III of 1901). No other definition has been placed before us and we are not aware of any other criterion by which we could determine the status of the defendants-appellants.

According to section 3, clause (8) of the Oudh Rent Act, an "under-proprietor" means any person possessing a heritable and transferable right of property in land for which he is liable to pay rent, and under clause (2) of the same section "under-proprietary right" means an under-proprietor's right in land.

Clause (3) of the same section provides a definition of "land" which is said to include the ungathered produce of land, whether spontaneous or not and whether growing in earth or water, but not land for the time being occupied by dwelling-houses or manufactories or appurtenant thereto, so long as such land is not let to agricultural tenants.

The expression "land" as so defined cannot, in our opinion, be held to embrace the rent derived from land and we are unable, therefore, to see how a right to receive 10 per cent. of the annual rental of a village can *per se* amount to a right in "land." Nor again, can we see how a person whose right to possession of land is made to depend purely upon his willingness to accept the terms of a lease offered by the *Talukdar* can be said to have a heritable and transferable right of property in land. Whether or not the right to receive *dahyak* is heritable and transferable a right of possession such as is conferred by the decree under consideration is in no sense so.

In support of the case put forward by the defendants-appellants we were referred to certain rulings of the Board of Revenue, namely, *Ram Bharos* v. *Lal Achal Ram Singh* (2); *Tulsi Ram* v. *Lal Achal Ram Singh* (3) and *Ram Nidh* v. *Lal Achal Ram Singh* (4), all of which are reported at pages 196-202 of the Selected Decisions of the Board of Revenue (edited by Jacob).

In the first of these cases the point that was decided was that the appellants were not mere tenants and were not liable to ejectment under section 53 of the Rent Act.

The second case was similar to the present one, the language of the Settlement decree there being almost identical with that of the decree before us. It is true that on the language of that decree the learned Members of the Board held that the appellants were under-proprietors—but they give no reasons whatever for this decision. To say that because the decree contains the words "*bi istehqaq birt*" or (as in the present case) *bar binai birt*" the necessary conclusion is that the decree-holders are *bi-tdars* and, therefore, under-prorietors does not dispose of the matter. We have to look at the language of the decree read as a whole and to determine whether the rights of the claimants as declared by the decree and as limited by rights conferred at the same time upon the superior proprietors amount to "under-proprietary rights" in the sense in which that term is defined by the statute.

In the present case for the reasons just given, we hold that they do not.

The third of the cases referred to above was decided in accordance with the ruling we have just considered and calls for no further comment.

We may notice here in connection with the matter of possession that it was admitted by the defendants in their pleadings that for some years subsequent to the date of the Settlement decree they were out of possession—the superior proprietor having leased the village to other persons during that time. It is clear, therefore, that the provision of the decree relating to the power of the landlord to fix the rent and to give a lease to other persons

(2) S. D. No 30 of 1891.
(3) S. D. No. 31 of 1891.
(4) S. D. No 32 of 1891.

in the event of the decree-holders refusing to accept the landlord's terms were given effect to.

We hold that the defendants-appellants have failed to establish that they are under-proprietors and as they do not pretend to be proprietors it follows that, so far as they are concerned, the Court below was right in finding that they possessed neither proprietary nor under-proprietary rights.

The only other matter for decision is that raised in the cross-appeals of the two plaintiffs who complain that the declaration given in their favour does not go far enough. In other words, their case is that the Subordinate Judge should have added a declaration to the effect that the defendants were "mere *Thekadars*." The expression "*Thekadar*" is defined in section 3, clause (10) of the Oudh Rent Act, which further declares that for the purposes of certain specified sections of the Act a "*Thekardar*" is to be deemed a "tenant." One of the sections so specified is section 53 which declares the liability of a certain class of tenants to be ejected by notice. As already said, it was an attempt on the part of the *Talukdars* to eject the defendants by notice under this section which led to the institution of the suit out of which this appeal has arisen. It is settled law that a Civil Court has no jurisdiction to determine the class of tenant to which any particular person belongs: that is a matter exclusively within the cognizance of the Revenue Courts and it appears to us, therefore, that if we were to accede to the claim of the plaintiffs-appellants by granting them a declaration that the defendants are "mere *thekadars*" we should be arrogating a jurisdiction which we do not possess. We are of opinion that the lower Court was right in the view it took of its powers in this connection and that the plaintiffs appellants were not entitled to the further declaration they are now asking for.

The result is that all three appeals fail and are dismissed with costs in each case to the respondents.

Appeal dismissed.

(S. C. 79 P. R. 1911.)

PUNJAB CHIEF COURT,

SECOND CIVIL APPEAL No. 13 OF 1910.

April 26, 1911.

Present:—Sir Arthur Reid, Kt., Chief Judge.

KARM ILAHI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SULTAN ALAM AND OTHERS—DEFENDANTS—RESPONDENTS

Jurisdiction of Civil or Revenue Courts—Suit for declaration of non-liability to pay bakri *and* thana patti *dues—Allegation of absence of custom—Punjab Land Revenue Act (XVII of* 1887*)*, s. 158 (2) *(VI)—Punjab Tenancy Act (XVI of* 1887*)*, s. 77 (3) *(i)*.

A suit by the *malikan kabza* and non-proprietary residents of a village and owners of houses occupied by them for a declaration that they were not liable to pay *bakri* and *thana patti* dues as there was no custom for the realization of such dues in their district or village is not cognizable by a Civil Court.

Gimu v. *Karim Khan*, 33 P. R. 1908; 171 P. L. R. 1908; 83 P. W. R. 1908, followed.

Sheikh Muhammad v. *Habib Khan*, 67 P. R. 1905; 113 P. L. R. 1905, distinguished.

Second appeal from the order of the Divisional Judge, Jhelum Division, dated the 1st June, 1910.

The Hon'ble K. B. *Muhammad Shafi*, for the Appellants.

Rai Sahib Lala *Sukh Dail*, for the Respondents.

JUDGMENT.—The question for consideration is whether the suit is cognizable by a Civil Court. The learned Advocate for the respondents does not support the lower Appellate Court's finding that section 158 (2) (VI) of the Revenue Act bars the suit.

The plaintiffs-appellants alleged that they were *malikan kabza* and non-proprietary residents of the village and owners of the houses occupied by them and that there was no custom as to realization of *bakri* and *thana patti* dues" in their district or village and that they were not liable to pay such dues.

The plaintiffs examined and did not say that although some inhabitants of the village were liable to pay these cesses or dues, they were not. The facts are, therefore, distinguishable from those in *Sheikh Muhammad* v. *Habib Khan* (1) and on all fours with those of *Gimu* v. *Karim Khan* (2).

The distinction from the general rule in favour of *Sheikh Muhammad* v. *Habib Khan*

(1) 67 P. R. 1905; 113 P. L. R. 1905.

(2) 33 P. R. 1908; 83 P. W. 1908; 171 P. L. R. 1908.

AJODHYA PRASAD *v.* JAGDISH SINGH.

(1) drawn by the Full Bench in the 1908 judgment "that although certain cesses were payable, the plaintiffs were not themselves liable to payment by reason of not belonging to classes from which payment could be claimed" does not exist here.

The appeal fails and is dismissed with costs. Counsel's fee Rs. 32 in addition to Rs. 16 payable for the last hearing.

Appeal dismissed.

(s. c. 14 O. C. 321.)

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 130 OF 1911.

November 23, 1911.

Present:—Mr. Piggott, J. C., and Mr. Lindsay, A. J. C.

AJODHYA PRASAD AND OTHERS—DEFENDANTS

versus

JAGDISH SINGH—PLAINTIFF AND HEM SINGH AND OTHERS—DEFENDANTS.

Evidence Act (I of 1872), s. 92, *Provisos* (2) *and* (4)—*Mortgage by way of conditional sale—Oral agreement converting mortgage by conditional sale into an usufructuary mortgage—Civil Procedure Code Act (V of* 1908), *O XLI, r.* 23.

When a case is remanded under Order XLI, rule 23, the Judge of the Court to whom the case is returned has authority to form his own conclusions irrespective of any finding arrived at by his predecessor at the original trial in respect of matters which were not touched by the Appellate Court.

In a suit for redemption of a mortgage by way of conditional sale evidence was adduced to show that the mortgagors and the mortgagee had entered into an oral agreement by which the latter was put in possession of the mortgaged share *plus* a further fractional share on the understanding that profits were to be appropriated in lieu of interest.

Held, that the alleged agreement, which in substance was one coverting the mortgage by conditional sale into an usufructuary mortgage, is in no sense such an agreement as is referred to in proviso (2) to section 92 of the Evidence Act and the evidence adduced in proof of it was, therefore, inadmissible.

Held, further, that as the mortgage was created by a registered document, no such agreement could be proved under proviso (4) except by means of a duly registered document.

Kedar Singh v. *Sumer Singh*, 10 Ind. Cas. 196, distinguished.

Appeal against the decree of the District Judge of Sitapur, dated 1st February, 1911, upholding that of the Subordinate Judge of Kheri, dated 30th May, 1910.

The Hon'ble Rai *Sri Ram*, Babus *Basudeva Lal* and *Chhail Behari Lal*, for the Appellants.

Pandit *Gokaran Nath Misra*, for the Respondent No. 1.

JUDGMENT.—This second appeal has arisen out of a suit for redemption based upon a mortgage, dated the 4th June 1867. The suit was brought by the transferees of the equity of redemption and the defendants were the successors-in-interest of the mortgagee.

The mortgage was by way of conditional sale and the principal defence raised was that the mortgage had been foreclosed and that there was no right to redeem outstanding This defence prevailed in the first Court, but on appeal it was decided by the District Judge that as proceedings to foreclose had not been taken in accordance with law the mortgage was still redeemable.

This decision was upheld on second appeal to this Court and the case was sent back for determination of the sum which the plaintiffs were liable to pay in order to get redemption.

The Court of first instance has decided that the amount so payable is Rs. 1,685-9-0 and this finding has been maintained by the District Judge in appeal.

The finding is challenged now upon two grounds.

The first is that the Court of first instance was wrong in going behind a finding arrived at in the original trial and which it was claimed was final between the parties.

In order to understand this plea it is necessary to set out the following facts. The plaintiffs had claimed to be entitled to redeem on payment of the principal sum only, alleging that in 1871 the mortgagors and mortgagee had entered into an oral agreement by which the latter was put in possession of the mortgaged share *plus* a further fractional share on the understanding that the profits were to be appropriated in lieu of interest and that in consequence the mortgage could thereafter be redeemed on payment merely of the principal amount. This agreement was denied by the mortgagee's representatives and the issue was decided against the plaintiffs, the Subordinate Judge holding that no such agreement was proved. In the appeal made from the first judgment to the District Judge this finding was not touched. All he

decided was that the first Court was wrong in holding that the plaintiffs had no right to redeem. Again, in the second appeal preferred here this particular finding was not disturbed.

Having found that the mortgage was redeemable the District Judge had remanded an issue for determination of the amount payable by the plaintiffs. This order of remand purported to be made under Order XLI, rule 25 of the first Schedule to the Code of Civil Procedure: but it was held in second appeal to this Court that order was in reality ore under Order XLI, rule 23, and it must be taken, therefore, that under the judgment of this Court in appeal the case was to be dealt with in the Courts below as if there had been only a decision of the case on a preliminary issue relating to the right to redeem which had been reversed, leaving the other points in the case to be determined after remand.

The Subordinate Judge who dealt with the case after remand treated it on this footing, and his finding as to the amount due by the plaintiffs has been come to on the ground that the oral agreement of 1871, set up by the plaintiffs, was proved and that the effect of this agreement was to stop the accrual of interest and to release the mortgagee from any liability to account for the profits of the property delivered into his possession.

It is argued that the Subordinate Judge had no authority to go behind the finding of his predecessor that this agreement had not been proved: but in view of what we have said as to the circumstances in which the case came to be sent back we are unable to yield to this contention. We think that the Subordinate Judge, who was directed by the order of this Court to inquire into the amount payable by the plaintiffs for redemption, had authority to deal with all the evidence affecting this issue and to form his own conclusions irrespective of any finding come to by his predecessor. So far as this ground of appeal is concerned, the appellants have no case.

The other ground is that evidence to prove the oral agreement set up by the plaintiffs was not admissible under the provisions of section 92, proviso (4) of the Indian Evidence Act. We notice that this plea was raised in the Courts below, but there is no reference to it in the judgments which we have now under consideration, though we are informed that the point was pressed before the District Judge. Be that as it may, the question is one of law and the appellants are entitled to raise it here.

The mortgage in suit is a registered document and having been proved it follows that no evidence of any oral agreement can be admitted for the purpose of contradicting, varying, adding to or subtracting from the terms of the written contract unless the case can be brought within any of the provisos to section 92 of the Evidence Act. It was suggested for the respondent that proviso 2 might apply, or again that the case was covered by proviso 4: but it seems quite clear that neither of these provisos can be called in aid of the plaintiffs' case.

What was the original contract? It was a contract of mortgage by conditional sale under which the mortgagors were to retain possession of the mortgaged property and were to pay interest at the rate of 24 per cent. per annum compound with yearly rests. The period of mortgage was five years and the mortgagors were entitled to redeem on payment of the mortgage-debt within that period, in default the deed was to operate as a sale-deed.

What is the agreement set up by the plaintiffs? It is in substance an agreement converting the mortgage by conditional sale into an usufructuary mortgage the terms of which were that the income of the property handed over to the mortgagee was to be applied in satisfaction of the interest and that the mortgagors were to be entitled to redeem upon payment merely of the principal sum.

Such an agreement is in no sense one such as is referred to in proviso (2) to section 92, namely, an agreement as to any matter on which a document is silent and which is not inconsistent with its terms.

If it is not an entirely new agreement it is certainly an agreement to modify the pre-existing contract: and as the latter was created by a registered document it follows that no such agreement can be proved under proviso (4) except by means of a duly registered document.

The respondent's learned Pleader argues that the new agreement did not operate to modify the terms of the previous contract and relied upon a decision of this Court reported in *Kedar Singh* v. *Sumer Singh* (1).

(1) 10 Ind. Cas. 196.

That case, however, is very different from the one now before us. The arrangement set up by the mortgagors who were seeking redemption was held to amount only to a fresh mode of payment of interest and not to modify a single term of the original contract. The mortgages were usufructuary from the beginning and their nature and incidents were not in any way affected by the subsequent agreement. This cannot be said of an agreement the effect of which is to convert a mortgage by conditional sale into a pure usufructuary mortgage.

We must hold, therefore, that evidence in proof of the oral agreement set up by the plaintiffs was not admissible so as to make out a fresh contract between the parties. The result is that the plaintiffs cannot claim to have redemption upon payment of the sum found by the Subordinate Judge.

The question then remains as to the sum on payment of which redemption should be allowed. In the written statement filed by the mortgagees-defendants it was asserted that an account taken in accordance with the terms of the mortgage-deed would show a sum of over thirty-one lakhs of rupees due by the mortgagors. At a later stage when the case was before the Subordinate Judge for the second time it was claimed that the amount payable came to over fifty-two lakhs and apparently the Subordinate Judge has found that this claim is substantially correct assuming that the terms of the deed are adhered to. In their petition of appeal to the District Judge the mortgagees, however, stated that the value of the property was not more than Rs. 13,000 and that this might be taken as the price of redemption—if redemption were to be allowed. Court-fee was paid accordingly on the difference between this sum and Rs. 1,685-0-0, the amount declared to be due in the judgment of the Subordinate Judge. A similar valuation has been put on the subject-matter of the appeal in this Court.

In these circumstances, we find it unnecessary to remand the case for a finding as to the state of the account between the parties. There can be no doubt that any account taken on the footing of the mortgage-bond would show as due a sum greatly in excess of what the mortgagees are now willing to accept. The result is that we allow the appeal and substitute for the decree of the Court below a decree allowing the plaintiffs to redeem on payment of Rs. 13,000. A decree in the usual form will be prepared accordingly and six months from the date of this Court's decree will be allowed for payment.

The appellants will get their costs from the respondents in all three Courts.

Appeal allowed.

(S. C. 1 P. W. R. 1912, Rev.)

COURT OF FINANCIAL COMMISSIONER, PUNJAB.

REVENUE CASE NO. 168 OF 1910-1911.

August 4, 1911.

Present:—The Hon'ble Mr. H. J. Maynard, Financial Commissioner.

BAHAWAL AND OTHERS—APPLICANTS—PETITIONERS

versus

NURKHAN AND ANOTHER—OTHERSIDE—RESPONDENTS.

Petition—Defective mode of partition—No appeal preferred by persons injured against it - Irregularities—Revision—Power of Financial Commissioner to interfere in revision—Punjab Land Revenue Act (XVII of 1887), ss. 17, 110, 117.

When in a partition case many share-holders were not consulted, the possession of almost all was unreasonably disturbed and several other material irregularities were committed, the proceedings were set aside on revision by the Financial Commissioner. In partition cases it is essential that possession should be maintained as far as possible.

Case reported by the Commissioner, Rawalpindi, under section 15 (3) of Act XVII of 1887, on 14th June, 1911.

FACTS.—In this case the claim was the partition of 20,823 *kanals* and 1 *marla* of land situate at *mauza* Kotebra, *tahsil* Talagang, District Rawalpindi.

On 22nd March, 1910, the mode of partition drawn by the *Tahsildar* was sanctioned in the first instance by the Assistant Collector, 1st class, Attock. But on further consideration he found the mode defective in several respects and applied to the Collector for permission to review his order.

On 21st December, 1910, the Collector refused to allow review, principally on the ground that there was no appeal against the mode of partition by the dissatisfied persons. Thereupon Bahawal and others applied to the Commissioner of Rawalpindi.

MAHBUB BAKHSH *v.* ABDUL RAHMAN.

On 31st May 1911, the Commissioner forwarded the proceedings of the case to the Financial Commissioner recommending that the orders of the subordinate Revenue Officers be set aside, and submitting certain remarks, an extract from which is given below :

"I think there are good reasons for holding that a large number of share-holders (211 in all) have never really been consulted either as to the method, effect and sanction. In fact, I scent corruption from beginning to end. In particular, I would call attention to the proceedings of the *Tahsildar* Abdul Aziz on the 25th, 26th and 28th February 1913. The files had been sent to the *kanungo* in order that he might carry out the very important work of verification and attestation on the spot, and yet without any report from him the *Tahsildar* accepted a report from the *patwari* and then made a lucid statement of there being no objection. There is nothing to show that even those who are supposed to have agreed had any clear knowledge of the actual results of the partition. It is of such paramount importance in a case of this kind that particular share of each should be indicated on the spot. In the absence of this, it is impossible to say that they should abide by the results. .....Lala Sada Ram reports that the possession of many has been disturbed against their wishes. If we act upon the method which though not wholly bad, but which appears never to have been announced in the village and to which sanction was accorded on the statement of 66 out of 211 share-holders, we make it more difficult for the local Officers to dispose of the case satisfactorily than if we allow proceedings *de novo*."

Mr. *N. C. Mehra*, for the Petitioners.
Mr. *Brij Lal*, for the Respondents.

JUDGMENT.—Both parties are represented before me and I heard the Pleader for the respondents. For reasons which have been fully set forth by the Commissioner, I hold that all the proceedings in this case have been irregular and unsatisfactory, and I direct that they be recommenced from the outset and a fresh method of partition now laid down. None of the subordinate Revenue Officials who have dealt hitherto with the case should be permitted to have any hand in the future conduct of it. I pass no order as to costs.

Revision allowed.

(s. c. 4 P. W. R. 1912.)

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No 230 OF 1911.

November 22, 1911.

Present:—Mr. Justice Robertson.

Hafiz MAHBUB BAKHSH—PLAINTIFF—APPELLANT

versus

ABDUL RAHMAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Partition—Plaintiff keeping back property in his possession—Suit not maintainable.

A suit for partition is not maintainable if the plaintiff keeps back some property in his possession which must have been put into *hotch potch*.

Second appeal from the order of the Divisional Judge, Delhi, dated the 31st August, 1910, reversing that of the Additional Munsif, 1st Class, Delhi, dated the 31st March, 1910, decreeing plaintiff's claim.

Rai Sahib Lala *Sukh Dial*, for the Appellant.

Mr. *Nand Lal*, for Abdul Rahman, Respondent.

JUDGMENT.—There is no ground for interference. The learned Divisional Judge has found on the facts that the plaintiff is keeping back property in his own possession which must have been put into the "*hotch potch*" to make his suit maintainable. This is the only point on which the petition was admitted under section 70 (1) (*b*) and on the facts found the learned Divisional Judge was clearly right No other point can be raised on the order of my brother Chevis. The appeal is dismissed with costs.

Appeal dismissed.

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

In re PERUMAL NAICKEN.

MADRAS HIGH COURT.

CRIMINAL APPEAL No 434 OF 1911.

REVISION CASE No. 575 OF 1911.

January 4, 1912.

Present:—Mr Justice Abdur Rahim, Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

In re PERUMAL NAICKEN—APPELLANT.

Penal Code Act XLV of 1860, ss 300, 302 and 304—Murder - Culpable homicide not amounting to murder—Injury of a vital character—Absence of intention to cause death—Offence.

Accused, suspecting his wife of infidelity, stabbed her 4 times on the back with a clasp-knife. She ran up to the deceased, her aunt, for protection and clasped her arms round deceased's waist. Deceased begged accused not to stab his wife. Accused then plunged the knife into deceased's back:

Held, per Sundara Aiyar and Abdur Rahim, JJ., (Spencer J dissenting).—That the accused was only guilty of culpable homicide not amounting to murder, as he had no intention of killing the deceased, or of causing a *vital* injury, *i. e.*, a wound at a place and of a character which would naturally cause death.

Per Abdur Rahim J.—The wound actually inflicted was, no doubt, sufficient in the ordinary course of nature to cause death, but that is not enough to bring the case under section 302, Indian Penal Code. To make the offence murder, it must be shown that the accused *intended* to inflict *such* injury.

Per Spencer, J.—The offence was murder as the accused must have intended, or have known himself to be likely, when he stabbed the deceased in the back, to cause such bodily injury as would be sufficient in the ordinary course of nature to cause death.

Appeal against the order of the Court of Session of the Coimbatore Division in Case No. 60 of the Calendar for 1911.

Mr. *V. Krishnaswami Aiyengar*, for Appellant.

Mr. *M. D. Devadoss*, for the Public Prosecutor, on behalf of the Crown.

JUDGMENT.

SUNDARA AIYAR, J.—In this case the appellant, Perumal Naicker, was convicted by the Sessions Court of Coimbatore of attempting to murder his wife and of murdering one Murady, his wife's aunt, and sentenced to transportation for life. This Court issued notice to the accused to show cause why the sentence passed on him should not be enhanced. The accused has appealed against his conviction and the sentence passed on him. The evidence set out in the judgment of the Sessions Judge shows conclusively that the accused attempted to murder Prosecution 1st witness, his wife, and caused the death of Murady by stabbing her on the back. The testimony of the eye-witnesses—Prosecution witnesses Nos. 1 and 2—is strongly corroborated by the fact that in consequence of a statement made by the accused to the Police, the knife produced before the Court was recovered from the Prosecution 8th witness who says that the accused gave it to him the day after the commission of the offence. The Prosecution 7th witness says that the accused received the knife from him as a loan on the morning of the day that the offence was committed. The accused in his statement before the Sessions Court said that the case was concocted against him because his wife was on terms of improper intimacy with her sister's husband, the Prosecution 3rd witness. But in his statement before the Magistrate, Exhibit L, he did not allege any motive on the part of any one for the concoction of the case, but merely denied that he committed the crime.

I have then to consider whether his offence in causing the death of Murady amounts to murder. I am of opinion that on the facts proved he was guilty only of culpable homicide not amounting to murder. As observed by the Sessions Judge, there is nothing to show that he had any quarrel with the deceased, and he had no previous intention of causing her any injury. He apparently intended to cause the death of his wife, the Prosecution 1st witness. He "stabbed her 4 times on the back with a pen-knife. Prosecution witness ran up to the deceased for protection and clasped her arms round her waist. Deceased begged accused not to stab Prosecution witness No. 1. Accused then plunged the knife into deceased's back."

The question for decision is, did the accused intend to cause such injury to the deceased as would in the ordinary course of events cause her death? He stabbed her but once. The wound inflicted on her was an incised wound to the left of the spine, which punctured the diaphragm and the spleen and penetrated the abdominal cavity. If the evidence is sufficient to show that the accused intended to cause a wound at the place and of the character described above, then his act might amount to murder, but there is no such evidence in the case. The accused having no quarrel with the deceased, his only object apparently was to make the

In re PERUMAL NAICKEN.

deceased let go his wife so that he might wreak his vengeance on her. There is nothing in the circumstances to show any further intention on his part than to stab the deceased in some part of her back so as to make his wife release her hold of the deceased. It may be that he must be taken to have known that a stab with the knife was likely to cause the death of Murady. But that would only make his act culpable homicide not amounting to murder. In order that he might be convicted of murder it must be shown that his intention extended to the causing of a vital injury, *i.e.*, in this case, a wound at a place and of a character which would naturally cause Murady's death. I am of opinion that the evidence and the circumstances of the case do not prove this. The Sessions Judge holds that the accused must have known that the injury actually caused would result in death, but he does not find what kind of injury the accused intended to cause when he stabbed the deceased.

I am of opinion that the finding with respect to the second charge should be altered into "guilty of culpable homicide not amounting to murder." It follows from this finding that the sentence passed on the accused cannot be enhanced.

I would alter the conviction as indicated above and confirm the sentence.

SPENCER, J.—There is clear evidence to prove that the accused after stabbing his wife five times with a knife stabbed the deceased who was interposed as a shield between him and his wife. The stab fell on the middle of the back on the left side of the spinal column. The Civil Apothecary, who conducted the *post mortem*, found that the diaphragm and the spleen had been punctured, the knife with which the blow was dealt having penetrated the abdominal cavity and caused a wound one inch long, half an inch broad and deep enough to come in contact with the above-mentioned vital organs. Death in the opinion of the medical officer, was due to hemorrhage resulting from these injuries. He pronounced his opinion in his statement before the Stationary Sub Magistrate that death was the direct result of the injuries found.

Upon these facts the learned Sessions Judge has, in my opinion, rightly convicted the accused of the offence of murder. He states in paragraph 12 of his judgment, "There can be no reasonable doubt that accused must have known that the infliction of such a wound with a clasp knife with a blade about five inches long and three-fourth inch broad would probably cause death." In the next paragraph he observes, "I find that it is not proved that accused intended to kill deceased, and, as his knowledge of the effect of the wound he inflicted on her is only one of inference, I abstain from passing a capital sentence." Where the Sessions Judge uses the word 'intended' in this sentence he evidently intended it to convey the same meaning as if he had said 'premeditated.' Under section 300, clause 3, Indian Penal Code, "culpable homicide is murder if the act, by which the death is caused, is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death." A man's acts are usually a good index of his intentions. And in the present case it cannot be supposed that the accused did not intend to cause bodily injury to the deceased Murady. The position of the wound in that part of the body where vital organs are situated and the nature of the weapon which is produced in Court and has been inspected by us are, to my mind, clear indications that the accused must have known that the injury he inflicted was of such a nature as would ordinarily prove fatal. The Apothecary who conducted the *post mortem* was not examined in the Sessions Court and he was not asked in the Committing Magistrate's Court whether such injuries might be expected in the ordinary course of nature to result in death. But, having regard to the depth of the wound and the damage done to such vital organs as the spleen and the diaphragm, there can be no doubt that, if the question had been put to him, his answer would have been in the affirmative. I consider that the accused must have intended, or have known himself to be likely, when he stabbed the deceased in the back, to cause such bodily injury as would be sufficient in the ordinary course of nature to cause death. The offence is, therefore, murder (section 302, Indian Penal Code). As I can find no extenuating circumstances in favour of the accused, who murdered one woman and attempted to murder another woman, I consider that the

proper sentence for this offence is one of death. The offence of attempting to murder Thalal *alias* Kappayee has been established against the accused, and I agree in thinking that the conviction and sentence on the first count should be confirmed.

SUNDARA AIYAR, J.—We both agree that the conviction and sentence on the first count should be affirmed.

As we do not agree entirely in our opinion, the case must be placed before another Judge of this Court for his decision under section 429 of the Criminal Procedure Code.

Mr. *V. Krishnaswami Aiyangar*, Vakil, for the Accused.

Mr. *M. D. Devadass*, for the Public Prosecutor, for the Crown.

The appeal and the revision case coming on for final hearing before the Honourable Mr. Justice Abdur Rahim under section 429 of the Criminal Procedure Code, the Court delivered the following

JUDGMENT.—The facts in this case are quite clear. The accused who suspected his wife of criminal intimacy with another man waylaid her as she was returning with two other women and attacked her with a clasp knife with a blade five inches long and three-fourths of an inch broad. He inflicted several injuries on his wife—none of which, however, proved fatal—when she ran to the deceased, one of her companions, for protection and clasped her arms round her waist. The deceased begged of the accused not to strike his wife, who thereupon stabbed the deceased with the same knife with which he had attacked his wife. The blow fell on the deceased's back and she fell down and died. There can be no doubt, as found both by Sundara Aiyar, J., and Spencer, J., that the accused intended to kill his wife, and it is equally clear that he did not want to kill the deceased. He struck her because she intervened and tried to prevent him from killing his wife. Did he then want to inflict on her an injury which he knew was likely to cause her death or which was sufficient in the ordinary course of nature to cause death? No doubt, in such cases the accused's own act, as Spencer, J., points out, is a good index of his intention. The accused must be taken to have intended to cause some injury to the deceased, but I agree with Sundara Aiyar, J., that one would not under the circumstances be justified in presuming that he intended to cause such injury to the deceased as was likely to cause her death or was sufficient in the ordinary course of nature to cause her death. The wound actually inflicted was, no doubt, sufficient in the ordinary course of nature to cause death, but that is not enough to bring the case under section 302, Indian Penal Code. To make it an offence of murder, it must also be shown that the accused *intended* to inflict *such* injury. The wound caused was one inch long and half an inch broad, but it penetrated the diaphragm and also the spleen and thus proved fatal. The accused stabbed the deceased in the excitement of the moment, and I do not think it would be safe to assume that he intended to cause her a fatal injury, though he did in fact cause her such injury.

I, therefore, confirm the conviction and sentence under section 307, Indian Penal Code, and alter the conviction under section 302 into one under section 304, Indian Penal Code, and sentence him under section 304, Indian Penal Code, to transportation for life.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 390 OF 1911.

CRIMINAL REVISION PETITION No. 293 OF 1911.

November 30, 1911.

Present:—Sir Ralph Benson, Judge, Mr. Justice Sundara Aiyar and Mr. Justice Miller.

In re CHOCKALINGAM PILLAY—PETITIONER

Penal Code (Act XLV of 1860), ss. 378, 379—Theft of flowing water—Possession—Intention—"Taking", meaning of—Essence of theft.

Whether in the case of any particular river, channel or reservoir, Government can be said to be in possession of water must depend on circumstances and the question must be regarded as one of fact to be decided on the evidence in each case.

Waters in rivers are presumably vested in Government. And when the Government has taken elaborate steps and employed a large establishment to control the use of water in a river or channel and to prevent any person, not having the right to do so

In re CHOCKALINGAM PILLAY.

from using it, the water in the river or channel should be regarded as being in possession of Government so as to be the subject of theft.

Per Sundara Aiyar, J.—The word "taking" in section 378, Indian Penal Code, means "relating to possession", that is, the moving of property should be effected with a view to obtain the possession or custody of the property. Unless the intention of an accused person is to reduce the property into his own possession, he cannot be guilty of theft.

Per Benson, J. (*Miller, J.*, concurring).—The essence of the offence of theft consists in the dishonest taking of property *out of the possession* of the owner, rather than in the taking of it into the *thief's own possession*, that is, it is only necessary that the thief should "*intend* to take," it is not necessary that he should *succeed* in taking.

Per Benson and *Miller, JJ.*, (*Sundara Aiyar, J.*, dissenting).—A person who diverts more water to his lands than he is entitled to by lowering the door of the sluice of a Government canal without the permission of the Officers of Government, commits theft in respect of water under section 378, Indian Penal Code.

Petition, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of the Sessions Court of Tinnevelly, in Criminal Appeal No. 10 of 1911, presented against that of the Court of the District Magistrate of Tinnevelly, in Calendar Case No. 1 of 1911.

Dr. *S. Swaminadhan*, for the Petitioner.

Mr. *P. R. Grant*, for the Public Prosecutor, on behalf of the Crown.

ORDER.

SUNDARA AYAR, J.—In this case the accused has been convicted of the offence of theft by raising the door of sluice No. 154 on the Kannadian canal without the permission of the Officers of Government and thereby lowering the level of the water therein. The object of the accused in doing so was to divert more water to his lands than they would otherwise receive. He was charged in addition with the offence of mischief and convicted of both offences by the District Magistrate of Tinnevelly. But the Sessions Judge on appeal reversed the conviction for mischief. The question to be decided by this Court is whether the conviction for theft can be sustained.

The main question considered by the lower Courts was whether the water in the Kannadian canal could be said to be in the possession of the Government when the sluice door was raised by the accused. It was apparently assumed that, if it was, the accused would be guilty of theft. The Courts below held that the possession of the water in the channel by Government was proved in this case. The District Magistrate observes: "In the case of the Kannadian channel now in question, it is in evidence that it takes off from the Tambraparni river through a head sluice (or regulator), that it flows ultimately into a Government tank and that the Government throws *bunds* across it at pleasure. In fact, it takes off from a Government source through a sluice that can be cut off at any place and ends in a tank controlled by Government. It runs on Government land, the bed and banks belonging to Government, and can in fact be converted into one or more Government lakes at will and its water is let out to the fields by Government sluices. I think it impossible to hold that water so controlled has not been reduced to possession." The Sessions Judge on appeal says: "No argument has been based on the occasional raising of dams or the surplussing of the tank. The result is that the water in question is controlled by, and is charged for by, Government, and treated by it as water in Government channels normally is." Having regard to the right possessed by the Government to control all irrigation channels in this country and the fact that control is actually exercised by it, having regard also to the provisions of section 2 of Madras Act III of 1905, the Sessions Judge was of opinion that the water was in possession of the Government. The prevailing view in English Law, no doubt, is that water in a pond or running in a channel is not the subject of larceny. Sir James FitzJames Stephen in his Digest of the Criminal Law of England, Sixth Edition, Article 315, says: "Running or standing water is not capable of being stolen unless (it seems) it is stored in pipes or reservoirs for the purpose of sale or use in which case it is capable of being stolen, although money penalties are provided for an improper use of it." The learned author in a foot-note cites a passage from Stephen's Commentaries on the Common Law of England, Vol. I:—"water regarded as water is a moveable wandering thing and must of necessity continue common by the law of nature, so that I can only have a temporary and usufructuary property therein." In Halsbury's Laws of England, Vol. 9, page 643, it is stated that water running in a channel cannot be the subject of theft. In Gould on Waters, page 469, it is stated

when collected in reservoirs or pipes and separated from the source of supply, the water is personal property like harvested ice or gas in pipes and is the subject of larceny." See also Farnham on Waters and Watercourses, Vol. I, page 815. Malicious acts with respect to rivers and water channels are punished in England as offences under special statutes enacted for the purpose and not as larceny. See Russell on Crimes, Vol. II, Chap 48, page 1315. Fitz James Stephen in his Digest of the Criminal Law, page 250, puts a specific case. "Would a man who drew a pail of water out of a reservior covering many acres be guilty of theft?" The answer given is 'Hardly, I should think." The diversion of water from its natural channel seems to be regarded in America as a nuisance and not as theft. The Indian Penal Code has also enacted several sections with a view to punish interference with irrigation sources and channels and treated them as mischief. No case is to be found in the reports where it has been held that the diversion of water flowing in a channel would amount to theft. In *Emperor* v. *Sheikh Ariff* (1) Geidt and Woodroffe, JJ., held that a conviction for theft could not be upheld in such a case. Geidt, J., observes at pages 438 and 439: "The water runs freely through the channel from the river and flows into some *Khal* or *Jhil*, unless it is diverted for irrigation. This fact distinguishes the present cases from *Ferens* v. *O'Brien* (2) quoted in Mr. Garth, where the water was confined in pipes, which were closed by taps. There the water was reduced into the possession of the Water Company which supplied it. In the present case the water running freely along the channel is not reduced to possession, till it is actually brought on to the land irrigated. The factory, therefore, cannot be said to be in possession of the water taken by the accused, and the offence of theft was not committed by taking it." Woodroffe, J, says, at page 442: "As regards the conviction under section 379, I think it cannot stand, as it is at least doubtful on the facts proved whether the water can be said to have been so reduced into possession as to be the subject of theft. I agree, therefore, that the conviction under section 379 must be reversed."

(1) 35 C. 437; 12 C. W. N. 534, 7 Cr. L. J. 367.

(2) 52 L. J. M. C. 70, 11 Q. B. D. 21, 31 W. R. 643; Cox. C. C. 332 47 J. P. 472.

The Sessions Judge is wrong in observing that the judgment in that case proceeded on any peculiar features so far as the charge of theft was concerned. The special features are referred to by Geidt, J, only to support the conviction for mischief. In *Ferens* v. *O'Brien* (2), where a conviction for larceny by the Court was upheld, the facts were that the water had been cut off from its natural source and conveyed to underground pipes laid down by the complainant and supplied to houses occupied by his workmen by means of branch pipes to which taps were attached. Two buckets of water were taken by the accused from one of the taps without the consent of the complainant. The Justices refused to convict the accused. The Judges of the Queen's Bench Division, Field and Mathew, JJ., were of opinion that water under the circumstances and in the condition described in the case would be the subject of larceny at Common Law.

Notwithstanding the current of authority referred to above it may be doubted whether it could be held with regard to all irrigation channels in this Presidency that the water has not been reduced by Government into their possession. It is not easy to understand why water in a pond, at any rate where it is not a very large one, should not be regarded as being in the possession of its owner. He has undoubtedly the means of controlling it and of preventing the use of the water by strangers and there seems to be no reason why the same intention to control the custody of the water should not be attributed to the owner as is ascribed to the owner of a plot of land. It would seem to be right to do so in this country where water is a highly-priced commodity. In England, water flowing in a river is regarded as not owned by any person. The right of the riparian proprietor is to use it. He is not the owner of the water which he is entitled to use. The bed of a river which is not tidal and navigable is vested partly in one owner and partly in another, *i. e*, in the riparian proprietor on either side of the river. On the other hand, in this Presidency, at least in *Ryotwari* tracts, the bed of the river is vested in the Government. See *Khundukuri Mahalakshmamma* v. *Secretary of State* (3); *Secretary of State* v. *Ambalavana*

(3) 34 M. 295; 1 M. W. N. 505; 8 M. L. T. 339; 20 M. L. J. 823; 8 Ind. Cas. 67.

In re CHOCKALINGAM PILLAY.

Pandarasannidi (4). It has been held by this Court that the waters in rivers are presumably vested in Government. The Government has taken elaborate steps and employed a large establishment to control the use of the water in rivers and channels and to prevent any person not having the right to do so from using it. It appears to be by no means clear why, in the circumstances, the water in a channel should not be regarded as being in the possession of Government. In the American Cyclopædia of Law and Procedure, Vol. 25, page 12, it is stated that "any substance which has length, breadth and thickness may be the subject of larceny, whether it is a solid, a liquid, or a gas, provided it is the subject of private ownership." If water in channels is owned by the Government in this country, there is no reason why Government should not be regarded as having reduced it to possession in the circumstances proved in this case and why it may not be regarded as the subject of theft. Whether in the case of any particular river, channel, or reservoir, Government can be said to be in possession must depend on the circumstances. The question must be regarded as one of fact to be decided on the evidence in each case. The cases referred to in Weir's Criminal Rulings, Vol. I, on pages 384 to 386, regarding the taking of fish from Government tanks and channels may probably be explained on the ground that fish being *feræ naturæ* were regarded as not being reduced to possession until special steps are taken to indicate control over them. In High Court Proceedings, dated 10th April 1880, No. 663, reported at page 384, Vol. I of Weir's Criminal Rulings, it seems to have been assumed that if fish were stored in a tank for consumption they may be the subject of theft. On the other hand, chanks in a chank-bed in Palk's Bay adjoining the Ramnad coast but beyond a marine league from low water mark were regarded as being in the possession of the Ramnad *zemindar*. (Weir's Criminal Rulings, Vol. I, page 386.) There seems to be no great difficulty, therefore, in holding this case, in the circumstances pointed out in the judgments of the lower Courts, that the water in the Kannadian channel was in the possession of the Government.

But there is another question to be considered before the accused can be convicted of theft. According to the definition in the Penal Code, "whoever, intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft," it does not seem to be necessary that the accused should have succeeded in obtaining effective possession or custody of the property. Thus, a person who moves money in the pocket of another's coat may be guilty of theft though he may not have succeeded in moving it entirely out of the pocket. But is it not necessary that the moving should be effected with a view to obtain the possession or custody of the property? The correct answer would appear to be in the affirmative, because there must be the intention to *take*. Taking means 'reducing to possession'. Fitz James Stephen in a note on 'possession' in his Digest of the Criminal Law, page 426, observes as follows:—"It will be found upon consideration that the distinctions between these cases all arise out of the doctrine of possession, but it is, I think, less generally perceived that the important point is not the taking out of the possession of the owner, but the taking into the possession of the thief." It would, perhaps, be more accurate to say that there must be the intention to take the thing into the possession of the thief. Suppose a person cuts the strings by which a bull is tied to a tree and the bull escapes. If he has not the present intention of reducing it into his own possession, would he be guilty of theft? Apparently not. Illustration (*c*) to section 425 of the Indian Penal Code is instructive. "*A* voluntarily throws into a river a ring belonging to *Z* with the intention of thereby causing wrongful loss to *Z*. *A* has committed mischief." Apparently it would not be theft. There is nothing to show that the water flowing through the sluice would be in the possession of the accused or that he intended to take any steps to secure effective custody of it. If he took steps similar to those taken by Government effectively to control the flow of the water along their channels, he might be said to be in possession. But there is a

(4) 24 M. 566; 9 M. L. T. 47; 2 M. W. N. 119; 8 Ind. Cas. 357.

In re CHOCKALINGAM PILLAY.

evidence that he did so. There is no evidence regarding the distance of his fields from the sluice or the width of the channel after it left the sluice and before it reached his fields. As soon as the water flowed into his fields it would probably no longer remain in the shape of water which can be possessed; at any rate there is no evidence as to what depth of water flowed into his fields.

The conviction for theft cannot, therefore, be sustained. The accused must, in my opinion, be acquitted and the fine, if paid, must be refunded.

BENSON, J.—I agree with the Courts below and with my learned brother, whose judgement I have had the advantage of perusing, that water in a Government channel, controlled as the water in the present case is found to have been controlled, is in the possession of the Government so as to be the subject of theft. I will only add that (as stated by Lightwood in regard to possession of land) the physical element in possession may be said to consist, positively, in the exercise of control by the possessor; and, negatively, in the exclusion of others. Control is shown by acts of ownership, and in ascertaining whether in any given instance possession of water can be proved, we must inquire (1) whether the alleged possessor is exercising suitable acts of ownership; (2) whether other persons are excluded (Lightwood's Possession of Land, page 13), and" by possession is meant possession of that character of which a thing is capable." [Per Lord Fitzgerald in *Lord Advocate* v. *Young* (5] "Acts of dominion over part of a thing in dispute may be evidence of *de facto* possession of the whole" (see Pollock and Wright on Possession, page 31, and cases there quoted). Judged by these tests, I think the water in the present case was in the possession of the Government. I do not think that the case, *Emperor* v. *Sheikh Ariff* (1), need be regarded as an authority to the contrary. The question of possession must be decided in each case by a reference to the degree of control exercised, and the facts stated in that case do not indicate the same degree of control as is indicated in the present case. To mention only one point:—In that case the water is said to have run freely through the channel from the river and to have flowed into some *Khal* or *Jhil* unless diverted for irrigation. In the present case the access of the water to the channel is controlled by a Government head-sluice or regulator. Its flow in the channel is at times controlled by dams built by the Government, and the flow ends in a reservior or tank in the possession and under the control of the Government and, in fact, belonging to the Government.

It is, however, suggested that it is not shown that the water flowing through the sluice would be in the possession of the accused or that he intended to take any steps to secure effective custody of it after it left the Government channel, and that one of the necessary elements of theft is, therefore, wanting.

I am unable to accept this suggestion. Section 378, Indian Penal Code, enacts that "whoever *intending to take dishonestly* any moveable property *out of the possession* of any person, without that person's consent, *moves that property, in order to such taking*, is said to commit theft." Explanation III shows that in the contemplation of this section a person moves a thing by removing an obstacle which prevents it from moving, as well as by actually moving it. In the present case there is no question but that the accused when he raised the sluice gate removed an obstacle which prevented the Government water from flowing by the force of gravity to his own land. His whole object and purpose was to thus cause the water to move under the influence of gravity to his own land in order to irrigate it. It seems to me to be beyond question that he had the *animus furandi*, and that he "intended to take" the water not only "out of the possession" of its owner, but also to cause it to move under the influence of gravity on to his own land. That it would not be under his control while flowing along the channel between the sluice and his land is immaterial, for illustration (*b*) to section 378 shows that theft may be completed without the property ever being in the possession of the thief. In that illustration the thief intending to take the dog out of his owner's possession put bait in his pocket and thus induced the dog to follow him. The theft was complete as soon as the dog began to follow him. The essence of the offence consists in the dishonest taking of property

(5) (1883) 12 A. C. 544 at p. 556.

out of the possession of the owner, rather than in the taking of it into the thief's own possession. If, however, the word "take" is to be regarded as connoting the idea of the custody passing to the taker, I still think the requirements of section 378 are fulfilled in the present case, for it is only necessary that the thief should "*intend* to take," not necessarily that he should succeed in taking, and I find it difficult to understand what other intention the accused can have had if it was not to "take" the water to his land where it would be in his possession and custody. That some of it might soak into the ground and so be no longer in his custody, or under his control, is immaterial. If any drop of it was capable of being in the thief's custody the argument would have no force.

I would, therefore, accept the finding of the Courts that the accused is guilty of theft and I would dismiss the petition.

As we do not agree with regard to this case it must be placed before another Judge of this Court for decision under section 429 of the Code of Criminal Procedure.

Dr. *S. Swaminathan*, for the Petitioner.

Mr. *M. D. Devidoss*, for the Public Prosecutor, for the Crown.

The case coming on for final hearing under section 429, Criminal Procedure Code, on the 11th January 1912, before the Hon'ble Mr. Justice Miller and having stood over for consideration till 17th January 1912, the Court passed the following

ORDER.—Both the learned Judges who heard the revision petition were of opinion that the water was in the possession of the Government. With that opinion I agree, and need, therefore, only consider the further question upon which their opinions differ.

Now, when once it is decided that the water was capable of being stolen, it seems to me impossible to resist the conclusion that it has been stolen in this case. The petitioner certainly intended to take it to his own field, and he took steps which he must have considered were calculated to bring it there. He did not have it in his custody during the transit, but that, as Benson, J., points out, is not necessary. If the petitioner's intention had been merely to let the water run to waste, possibly the case might have been different, though with regard to illustration (*c*) to section 425, Indian Penal Code, it is to be observed that the illustration does not show that *A* took the ring from *Z*'s possession to throw it away.

The petition is dismissed.

Petition dismissed.

(S. C. 1 P. W. R. 1912 Cr.)

PUNJAB CHIEF COURT.

CRIMINAL PETITION No. 1396 OF 1911.

December 4, 1911.

Present:—Mr Justice Chevis.

ISA—COMPLAINANT—PETITIONER

versus

Musammat RANON AND OTHERS—ACCUSED—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), *s.* 25—*Minor complainant-Guardian not responsible—Muhammadan Law—Marriage before* Iddat *null and void.*

The marriage of a Muhammadan woman before expiry of the period of *Iddat* is null and void.

Under section 250 of the Code of Criminal Procedure, a guardian or next friend of a minor complainant cannot be ordered to pay compensation to the accused.

Petition for revision, under section 439 of the Criminal Procedure Code, of the order of the Sessions Judge, Ferozepur Division, dated the 3rd October 1911, confirming that of the Magistrate, 1st Class, Ferozepur, dated the 21st June 1911, dismissing the complaint, discharging the accused persons and awarding compensation to them from the complainant-petitioner.

Mr *Nihal Chand Mehra*, for the Petitioner.

Mr *Miran Buksh*, for the Respondents.

JUDGMENT.—The complainant, a minor, suing through his uncle, charges *Musammat* Ranon, Ibrahim and others under section 494, Indian Penal Code. Complainant pleads that *Musammat* Ranon, who was the widow of Dulla, brother of complainant, married him on 2nd July 1910, and that she has now married Ibrahim. The Magistrate dismissed the complaint, because the date of Dulla's death is shown in the entry of 6th June 1910 in the *Patwari's* register, as 31st May 1910. If Dulla died on 31st May 1910, a marriage on 2nd July 1910, would be *null and void*, as *iddat* had not expired.

It is urged that the *Patwari* through enmity entered a false date, but it is hard to see what object the *Patwari*, even assuming him to be hostile, could have in post-dating Dulla's death at the time of making the entry on 6th June 1910.

So I decline to re-open the case. The

order discharging the accused will stand. But complainant has been ordered to pay compensation. Mr. Miran Bukhsh for respondents admits that complainant as a minor cannot be made to pay compensation, but he urges that complainant's uncle should be made to pay. But section 250, Criminal Procedure Code, only provides for an order against the complainant, it does not provide for the responsibility of a next friend or guardian. The order as to payment of compensation is, therefore, set aside, and the compensation-money, if paid, will be refunded.

Complaint dismissed.

(s. c. 14 Bom. L. R. 41.)

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 393 OF 1911.

December 13, 1911.

Present:—Mr. Justice Russell and Mr. Justice Batchelor.

EMPEROR—PROSECUTOR

versus

BALWANT KONDO PATOLE—ACCUSED.

Criminal Procedure Code (Act V of 1898), *s.* 235, *illus.* (f)—*Joinder of charges—"Same transaction"—Causing grievous hurt for the purpose of extorting information—Making false entries to attribute another cause for the death of the injured person—Penal Code (Act XLV of* 1860), *ss.* 114, 193, 218, 330, 331.

The accused was charged with voluntarily causing grievous hurt to a person with a view of extorting information from him and he was also charged with making a series of false entries so as to attribute another cause for the death of that person who died from the effects of the injuries inflicted by the accused. The accused was tried at one trial for offences under sections 114, 193, 218, 330 and 331 of the Penal Code. He was convicted of offences punishable under sections 193, 218 and 331.

Held, that the trial was not bad on the ground of misjoinder of charges.

There was no misjoinder as the case fell under section 235, illustration (*f*), of the Criminal Procedure Code. The act of making a series of false entries so as to attribute another cause for death was in continuation and pursuance to the transaction of causing voluntarily grievous hurt and the two acts formed part of the same transaction.

Appeal from the conviction and sentence recorded by the Sessions Judge of Poona.

Mr. *Coyaji*, with him Mr. *B. V. Vidwans*, for the Accused.

Mr. *G. S. Rao*, Government Pleader, for the Crown.

JUDGMENT.

RUSSELL, J.—Notwithstanding the very ingenious arguments of Mr. Coyaji in this case, we are of opinion that we must uphold the conviction and sentence.

On the first point with regard to misjoinder of charges, section 233 of the Code of Criminal Procedure says: "For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections 234, 235, 236 and 239." And section 235 says: "If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence." And I would refer to illustration (*f*) to section 235 which I read. It seems to us that we must have regard to the words of the section itself, "One series of acts so connected together as to form the same transaction." In the present case the accused is charged with voluntarily causing grievous hurt with the view of extorting information and that is a "transaction," and in continuation of and pursuance to the same transaction he was charged with and found guilty of making a series of false entries so as to attribute another cause for the death of the deceased Ganu. It appears to us, looking to the plain words of section 235 and illustration (*f*), that these charges distinctly come within that section, and, therefore, the first point urged by Mr. Coyaji has no basis, and must, therefore, fail.

With regard to the second point, in our opinion, that also must fail. He was charged with causing grievous hurt to the deceased for the purpose of extorting information under section 331. That was one charge. Then he was charged with another offence under sections 330 and 114 of which the latter is the abetment section. The Jury were unanimously of opinion that he was guilty of the main offence, *viz.* causing grievous hurt to the deceased under section 331. If that is so, it is apparent from what the Judge in express terms inferred from their unanimous verdict that they must be taken to have found the accused personally guilty under section 331, and, under these circumstances, it was not necessary for them to go into the other question whether he abetted the offence. Under these circumstances, we think, the conviction and sentence are correct and must, therefore, stand.

BATCHELOR, J.—I agree with what my

learned brother has said and need only add a word on the third point which was taken by Mr. Coyaji for the appellant, and which is that the appellant had been prejudiced by the joinder of four charges even although that joinder was not technically a misjoinder so as to invalidate the entire trial. Assuming that there was no misjoinder, and I agree with my learned brother that there was none, then I am of opinion that there was also no prejudice in the admission of evidence as to the fabrication of false reports by the appellant with a view to screen the offence committed by him upon the deceased Ganu: for it appears to me that whether there was a separate charge or not in regard to the fabrication of these false reports, their fabrication would have been a most material and important piece of evidence on behalf of the prosecution on the charge under sections 330 and 331. I may, perhaps, add that we have now discussed all the points which were taken in this appeal, and that Mr. Coyaji in introducing his arguments stated quite correctly that since there was a unanimous verdict of the Jury against him, he was not in a position to address us on any question of fact. I agree that the conviction and sentence should be maintained.

Conviction and sentence confirmed.

(s. c. 16 C. W. N. 263)

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No 2 OF 1908.

May 6, 1908.

Present:—Mr. Justice Stephen and Mr. Justice Holmwood.

THE DEPUTY SUPERINTENDENT AND LEGAL REMEMBRANCER—APPELLANTS

versus

CHULHAN AHIR AND OTHERS—RESPONDENTS.

Penal Code (Act XLV of 1860), ss. 143, 149, 425, 427—Mischief—Unlawful assembly—Intention—Making ditch through Railway—Motive—Letting water run off fields of accused.

The accused, fifty in number, finding their fields flooded, cut a channel through the Railway to let the water run off their fields. Ten or fifteen only of the accused were engaged in digging while all were present:

Held, that, although the motive of the accused was to free their fields from water, their intention was to make a ditch through the Railway and they were guilty of mischief and unlawful assembly with the common object of damaging the Railway.

Appeal by the Government against the judgment of acquittal passed by the Sessions Judge of Chapra, dated November 15th, 1907, on appeal from the conviction and sentence passed by the Deputy Magistrate of Saran on October 9th, 1907 on the accused.

Mr. *Orr*, Deputy Legal Remembrancer, for the Appellant.

Babus *Joy Gopal Ghosha* and *Raghu Nath Singh*, for the Respondents.

JUDGMENT.—In this case the accused were convicted by the Deputy Magistrate of Saran of offences under sections 144 and 427, read with section 149, Indian Penal Code. Their conviction were set aside by the Sessions Judge on appeal, and the case now comes before us in appeal from his judgment.

The facts of the case are exceedingly simple and they are that the appellants finding their fields flooded cut a channel through the Railway to let the water run off their fields. The learned Sessions Judge has set aside their conviction on the ground that neither their intention nor the means employed by them to effect their intention were criminal. He holds that their intention was not to cause mischief but to cause the water to run off their fields. In this, however, he makes not altogether an uncommon error in confusing motive with intention. Their intention was to make a ditch through the Railway. Their motive was to free their fields from water. There can be no doubt that what they did to the Railway amounted to mischief and that they must have been fully aware of this fact. The learned Sessions Judge is also wrong in finding that the means employed by them were not criminal. It appears that about 50 men were present, some of whom carried spears. Of these some 10 or 15 only were engaged in digging. It, therefore, seems certain that the whole constituted an unlawful assembly, with the common object, as alleged, of damaging the Railway.

On looking at the evidence it appears that the act of mischief and the unlawful assembly are very plainly proved. There is, however, no proof of an offence under section 144.

There is clear evidence that some of the persons present were armed with spears, but there is no evidence that any of the accused were so armed. The conviction under section 144 is, therefore, improper.

Under these circumstances, we set aside the judgment of the Sessions Judge and we also set aside the conviction under section 144,

EMPEROR v. HARI GOVIND LIMAYE.

Indian Penal Code, by the District Magistrate. We convict the accused of the offences under sections 143 and 427, read with section 149, Indian Penal Code.

In considering the question of sentence we have to bear in mind that the result of what offences the men did might have been most serious, as the accused must have known and it is necessary that people should remember, that they are not to do anything on Railways which may damage the life of people using them. As, however, we have set aside the conviction under section 144, Indian Penal Code, we think it right that the sentence of six months' rigorous imprisonment under section 144 passed by the Deputy Magistrate should be reduced to four months' rigorous imprisonment. We do not regard a fine as a suitable punishment in this case. We, therefore, inflict no sentence of fine. We do not think it necessary to pass any sentence under sections 427 and 149, the conviction now standing under section 143 instead of section 144, Indian Penal Code. We have no power to order the accused persons to enter into bonds. We, therefore, make no order in respect of that.

Let a copy of this order be sent to the Sessions Judge and let the District Magistrate take steps to have the accused arrested and dealt with.

Appeal allowed.

(s. c. 14 Bom. L. R. 40.)

BOMBAY HIGH COURT.

CRIMINAL REVISION APPLICATION No. 290 OF 1911.

November 16, 1911.

Present:—Mr. Justice Russell and Mr. Justice Chandavarkar.

EMPEROR—PROSECUTOR

versus

HARI GOVIND LIMAYE—ACCUSED.

Printing Presses and Books Act (XXV of 1867)), ss. 1, 3 —"Book" includes portion of pamphlet - Printer of portion bound to print his name and place of printing.

The word 'book', as defined in section 1 of the Printing Presses and Books Act, 1867, includes part of a volume or pamphlet.

Therefore, the printer of a portion of a pamphlet is bound to print thereon his name and the place of printing and failure to do so constitutes a breach of the provisions of section 3 of the Act.

Application against conviction and sentence recorded by the Acting Second Presidency Magistrate of Bombay.

Mr *J. R. Gharpure*, for the Accused.

Mr. *G. S. Rao*, Government Pleader, for the Crown.

JUDGMENT.—In this case, the accused has been convicted under section 3 of Printing Presses and Books Act, XXV of 1867, inasmuch as he being the keeper of a press called "Mumbai Vaibhav Steam Press" printed a portion of the pamphlet in question called "Kavyaratnavali" in Bombay and did not comply with section 3 of the Act. Section 3 says:—"Every book or paper printed within British India shall have printed legibly on it the name of the printer and the place of printing, and (if the book or paper be published) (the name) of the publisher and the place of publication." And it appears that the accused is the man who made the declaration in the form laid down under section 4, *viz.*,—"I, *A. B.*, declare that I have a press for printing at. . ."

We have had a very elaborate argument addressed to us upon this point by Mr. Gharpure. But it seems to us that when regard is had to the definition of the word "book" in section 1 of the Act, the whole of the argument falls to the ground. A "book," it says, "includes every volume, *part or division of a volume, and pamphlet*, in any language, etc." Here there is no question but that the accused had printed a part of this pamphlet in Bombay, the rest was printed at Jalgaon and the name of the printer of that latter press appears on the book. But the accused's name does not appear on the book. Therefore, we think, he is guilty of not having complied with the provisions of section 3 of the Act and we confirm the conviction and sentence and dismiss the application.

Application dismissed.

In re GORLE KANDUNGADU.

MADRAS HIGH COURT.

REFERENCE No. 20 OF 1911.

January 8, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

In re GORLE KANDUNGADU—ACCUSED.

Jury trial—Charge to Jury—Misdirection—Penal Code (Act XLV of 1860), ss. 379, 411—Theft—Receiving stolen property—Possession of stolen property—Presumption—Conviction for theft.

Where the accused was found in possession of stolen property three weeks after the theft:

Held, that the proper presumption was not that he committed the theft, but that he received the property knowing or having reason to believe it to be stolen.

Where a Sessions Judge directed the Jury, in a case where the accused was found in possession of stolen property, that the presumption was more in favour of the possessor being the thief than the receiver unless there was evidence to the contrary and that no presumption as to the latter should be made unless, besides the discovery of the stolen property, there was something to show that the accused received it knowing it to be stolen:

Held, that there was misdirection.

As to which of the two presumptions should be drawn in any particular case, whether of theft or of receipt of stolen property, would depend on the circumstances, the length of time that has elapsed after the theft, how much of the stolen property is found in possession of the person in question, the circumstances which led to the discovery, and other facts connected with the discovery of the property.

It is not necessary to raise a presumption in favour of the possessor of the stolen property being the receiver, that there should be evidence that he knew it to be stolen.

Reference under Section 307 of the Criminal Procedure Code by the Sessions Judge of Vizagapatam in Case No. 36 of the Calendar for 1911.

Mr. *John Adam*, Public Prosecutor, for the Crown.

JUDGMENT.—In this case the Sessions Judge of Vizagapatam has referred to this Court under section 307, Criminal Procedure Code, Sessions Case No 36 of 1911, in so far as the case against the 2nd accused is concerned. He was charged with house-breaking by night and theft in a building. The only evidence as against him is that material object No 47, one of the jewels stolen from the Prosecution 1st witness's house, was traced to his possession. The 1st accused stated that he had given it to the second accused and on the Police going to the house of the latter with the 1st accused and others he delivered it up. He denied, at the trial, that he gave up this jewel. But the evidence that he did deliver it must be accepted. The question is, what presumption arises against him in the circumstances? The property was traced to him about three weeks after the theft took place. The 1st accused stated that he had given it to him, and only one of the jewels stolen was found in his possession.

In these circumstances, we think the proper presumption is not that he was one of those who committed the theft, but that he received the jewel, knowing, or having reason to believe, it to be stolen property. The learned Sessions Judge, unfortunately, did not ask the Jury to find whether he was guilty of receiving stolen property. The Judge first states, quite correctly, that if a person is found in possession of stolen property soon after the theft and cannot explain his possession that person either stole the property or received it, knowing it to be stolen. This statement is in accordance with illustration (*a*) to section 114 of the Evidence Act. The Judge then says: "generally speaking, the presumption is rather more in favour of the possessor being the thief than the receiver, unless there is any evidence, of course, which would prove the contrary." This statement cannot be regarded as quite correct. Which of the two presumptions should be drawn in any particular case, whether of theft or of receipt of stolen property, would depend on the circumstances, the length of time that has elapsed after the theft, how much of the stolen property is found in the possession of the person in question, the circumstances which lead to the discovery, and other facts connected with the discovery of the property. The Judge's next statement is even more incorrect because he says: "There is nothing in this case to show or suggest that the accused received the property knowing it to be stolen. The question, therefore, you have to consider is, whether the possession in this case is sufficiently recent to raise the presumption that the accused are the thieves." It is certainly wrong to say that besides the discovery of stolen property in the possession of the accused there should be something to show that the accused received the property knowing it to be stolen to justify the Jury in inferring or presuming that the accused is guilty of the receipt of stolen property. This statement is, in fact, inconsistent with the first statement of the Judge that either presumption may be drawn from the fact of

possession of stolen property. The result is, that the learned Judge did not leave to the Jury the question whether the accused could be convicted of receipt of stolen property. We think the Jury were right in not convicting the 2nd accused of theft. As he had been under detention for several months, we do not consider it necessary to make an order that he should be now tried for receiving stolen property.

The 2nd accused is acquitted of the offences of house-breaking by night and theft in a building and he must be released from custody.

Accused released.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 635 OF 1911.

January 17, 1912.

Present:—Mr. Justice Karamat Husain.

In re ABDUL GHAFOOR AND ANOTHER—APPLICANTS

versus

RAZA HUSAIN—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 439, 476—Sanction to prosecute given by Assistant Collector—High Court's power to interfere on criminal side—Duty of Court to inquire—Accused not given opportunity to cross-examine witnesses—Legality—Irregularity.

An Assistant Collector of the 1st Class acting under section 476, Criminal Procedure Code, directed certain persons to be prosecuted under section 193, Indian Penal Code. On appeal the District Judge confirmed the order of the Assistant Collector. An application for revision was made to the High Court on the Criminal side: *Held*, that the High Court had no jurisdiction to interfere in the matter under section 439 of the Criminal Procedure Code.

In re Bhup Kunwar, 26 A. 249; 1 Cr. L. J. 73; A. W. N. (1904) 15, followed.

When a Magistrate takes action under section 476 of the Code of Criminal Procedure, it is not necessary to the validity of his order that he should hold a preliminary inquiry, and, therefore, if the Magistrate refuses to give the accused an opportunity to cross-examine the witnesses he does not act in the exercise of his jurisdiction illegally or with material irregularity.

Queen-Empress v. *Matabadal*, 15 A. 392, followed.

Application for revising the order of the District Judge of Banda.

Mr. *Rahmat Ullah*, for the Applicants.

Mr. *Durga Charan Banerji*, for the Respondents.

ORDER.—In this case an Assistant Collector of 1st Class acting under section 476, Criminal Procedure Code, directed the applicants to be prosecuted under section 193 of the Indian Penal Code. The applicants appealed to the learned District Judge of Banda for revoking the sanction. The application was rejected by the learned District Judge and the order of the Assistant Collector was confirmed. The applicants came to this Court in revision on the criminal side. The learned Vakil for the opposite party, relying on the Full Bench ruling of this Court in *In the matter of the petition of Bhup Kunwar* (1), contends that the High Court has no jurisdiction in the exercise of its revisional powers on the criminal side, under section 439 of the Code of Criminal Procedure, to interfere with such orders. The Full Bench Ruling in the case referred to is binding upon me. The learned Vakil for the applicants prays that permission may be given to him to alter the application into a Civil revision inasmuch as the order passed by the Assistant Collector of 1st Class is based on the statements of the witnesses who were not allowed to be cross-examined by the applicants. In *Chota Sadoo Peadah* v. *Bhoobun Chuckerbutty* (2) it was laid down that the preliminary inquiry need not be held in the presence of the accused, and in *Queen-Empress* v. *Matabadal* (3) it was ruled that when a Magistrate takes action under section 476 of the Code of Criminal Procedure, it is not necessary to the validity of his order that he should hold a preliminary inquiry. I am, therefore, of opinion that the Magistrate, in refusing to give the applicants an opportunity to cross-examine the witnesses, did not act in the exercise of his jurisdiction illegally or with material irrigularity. For the above reasons I reject the application

Application rejected.

(1) 26 A. 249; 1 Cr. L. J. 73; A. W. N. (1904) 15.
(2) 9 W. R. 3 Cr.
(3) 15 A. 392.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 634 OF 1911.

January 10, 1912.

Present:—Mr. Justice Tudball.

BANSI AND OTHERS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 425, 430—Mischief—Unlawfully taking water from canal.

BAISNAB CHARAN MANJHI v. GATI NATH MUNSHI.

The applicants, who wanted water for the purpose of sowing their field, stole it by breaking through the wall of a canal:

Held, that they were guilty of having committed mischief under section 436 of the Indian Penal Code.

Application for revision against the order of the Sessions Judge, Mainpuri.

Mr. *C. Dillon*, for the Applicants.

Mr. *Malcomson*, Assistant Goverment Advocate, for the Crown.

ORDER.—The applicants have been convicted by the Magistrate of an offence under section 430 of the Indian Penal Code. They were sentenced to one year's rigorous imprisonment each. On appeal the Sessions Judge reduced the sentence to three months' rigorous imprisonment. In revision it is urged on their behalf that the convictions should be really under section 70 of Act VIII of 1873, in the absence of evidence to show that any diminution of the supply of water for agricultural purposes was caused or likely to be caused by the act done by the applicants. The object of this application is really to secure a reduction of sentence. I have examined the record and there is nothing in the evidence to show of what class the canal was the bank of which was cut, that is, whether it was the bank of a main canal or of a distributory. It is impossible in the absence of evidence on the point to hold that the act done was one which caused or was likely to cause a diminution of the supply of water for agricultural purposes. It appears that the applicants wanted water for the purpose of sowing their field. As they were unable to obtain it in a lawful manner they proceeded to steal it. As the record stands, it is impossible to uphold the conviction under section 430 of the Indain Penal Code. In any case, mischief was committed. It is an act of wilful mischief for any person to make a breach in the wall of a canal. It is an act which causes such a change in property as destroys or diminishes its value or utility or affects it injuriously. There is nothing on the record to show the extent of damage done. The conviction must, therefore, be held under section 426 of the Penal Code. It is true that the act is also covered by section 70 of the Canal and Drainage Act. But the offence committed is far from trivial. Section 71 shows clearly that section 70 does not bar the prosecution under any other law of any offence punishable under the Canal Act. The maximum sentence under section 426 is three months' rigorous imprisonment. The sentence upheld by the lower Appellate Court is, therefore, not in excess of the maximum allowed by law. The offence is a serious one and the act done might have resulted in very great loss not only to the accused but to other persons as well. In the circumstances of the case, I see no object in interfering with the sentence as maintained by the lower Court. I alter the conviction to one under section 426 of the Indian Penal Code and uphold the sentence. The applicants, if on bail, will surrender.

Application rejected.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No 826 OF 1911.

January 18, 1911.

Present:—Mr. Justice Holmwood and Mr. Justice Sharf-ud-din.

BAISNAB CHARAN MANJHI AND OTHERS—FIRST PARTY—PETITIONERS

versus

GATI NATH MUNSHI AND OTHERS—SECOND PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 107, 145—Binding party under s. 107—Whether Magistrate can institute proceedings under s. 145.

The fact that one party had been bound down to keep the peace under section 107, Criminal Procedure Code, does not take away from a Magistrate his jurisdiction to act under section 145 when the circumstances so require.

Rule against the order of the Deputy Magistrate of Magura, dated May 4th, 1911, directing the attachment of the disputed *jalkar* under section 146 of the Criminal Procedure Code, until the rights of the parties thereto have been determined by a competent Court.

Babu *Narendra Kumar Bose*, for the Petitioners.

Babus *Manmotha Nath Mukherjee* and *Kumar Sankar Roy*, for the Opposite Party.

JUDGMENT.—This was a Rule calling upon the District Magistrate and the opposing party to show cause why the order attaching a certain *jalkar* should not be set aside on the ground that the Magistrate had no jurisdiction to proceed after all the members of the second party had been bound down, under section 107, Criminal Procedure Code, on the 19th December 1910 in a prior proceeding.

GURUSAWMI NADAN v. EMPEROR.

The proceedings under section 145 were taken on the 23rd February 1911 and the order complained of was passed on the 4th May 1911, and the Magistrate finding it impossible to determine who was in possession of the *jalkar* attached the property under section 146. Now it would be impossible for us to say that in no case can the fact, that one party had been bound down to keep the peace under section 107, leave the Magistrate any jurisdiction to act under section 145, when the circumstances so require; and we cannot see our way to making this Rule absolute without laying down such a general proposition. Certainly, on the facts of this case, it was quite open to the Magistrate to hold that there was a probability of a breach of the peace in respect of the possession of this *jalkar*, even although the members of the second party had been bound down. There were many persons, who are said to be interested in the *jalkar*, who absconded at the time of the 107 proceeding. The second party say that they have a reasonable apprehension that these persons may, by claiming rights in this *jalkar*, cause a breach of the peace with the first party, who are admittedly fishermen; or the first party being fishermen may very naturally seek to enforce their rights against the second party who have been bound down; in which case the order binding down the second party will have the effect of ousting them from any possession which they may have.

It would seem that in this state of facts the right course for the Magistrate to take would be the course he has taken, namely, to try and discover who is in actual possession of this *jalkar*. He finds himself unable to do so and he, therefore, properly exercises his jurisdiction under section 146. The fact that the order under section 107, Criminal Procedure Code, expired in December 1911, does not, of course, in any way, affect the legal aspect of the case, but it certainly renders us less disposed in the exercise of our discretion to interfere with any measure that the Magistrate has thought it necessary to take for the preservation of the peace in his District.

The Rule is discharged.

Rule discharged.

[S. C. (1912) 1 M. W. N. 47; 11 M. L. T. 32.]

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 529 OF 1911.

CRIMINAL REVISION PETITION No. 399 OF 1911.

January 2, 1911.

Present:—Mr. Justice Abdur Rahim.

GURUSAWMI NADAN AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 107—Security for breach of peace—Vague apprehension—Order—Duties of the Magistrate—Lawful exercise of right—Unlawful opposition.

Where there is no evidence that the accused are likely to commit a breach of the peace or disturb the public tranquillity or do any act which would probably occasion a breach of the peace, an order under section 107, Criminal Procedure Code, should not be passed merely on a vague apprehension.

A Magistrate should use his power to protect persons seeking to exercise their rights allowed by law and to restrain persons threatening to disturb the exercise of such rights.

Any person who wants unlawfully to oppose another in the exercise of a lawful right, ought to be bound down to keep the peace, and not the person who wants to exercise his ordinary right.

Petition under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the proceedings of the Sub-Divisional Magistrate of Sattur, in this Miscellaneous Case No. 5 of 1911.

Dr. *S. Swaminathan*, for the Accused.

Mr. *E. R. Osborne*, for the Public Prosecutor.

ORDER.—There is absolutely no warrant for the order of the Sub-Divisional Magistrate. There is no evidence to show that the accused were likely to commit a breach of the peace or disturb the public tranquillity or to do any act which would probably occasion a breach of the peace. All that is found is that on a previous occasion, about a year ago, the Nadars asserted their right to carry *palkis* through the public street on occasions of marriage, and there was a breach of the peace, as some people in the village opposed the Nadars taking *palkis* in procession on the ground apparently of the Nadars' caste, which, in their opponents' estimation, is not high enough to justify their using *palkis* during marriage. Nothing particular happened at the time the present proceedings were instituted, except that the marriage session was fast approaching and the Police and the Sub-Divisional Sub-Magistrate were apprehensive that, if the Nadars insisted on

their right as before and other party opposed them, there might be a disturbance. It is not even shown that the accused had any marriages to celebrate in their family, and that they were preparing to carry *palkis* in procession. All that is alleged against them is that they are leading men of their community. Supposing that some of the Nadars or the accused themselves wanted this year to take palanquins in procession through public streets, they would have every right to do so, and if any person wanted unlawfully to oppose them in the exercise of such right, they ought to be bound down, and not persons who were lawfully exercising or wanted to exercise their ordinary right. It is the duty of the Sub-Divisional Officer who is responsible for the peace of his Division to use his authority for the protection of persons who seek to exercise a right which the law allows them, and to restrain persons who threaten to obstruct the exercise of such right, and for this purpose to enforce, if necessary, the provisons of section 107, Criminal Procedure Code, not against the former but against the latter. I set aside the order under section 107, Criminal Procedure Code, and the bonds executed by the accused will be discharged.

Order set aside.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 475 OF 1911.

CRIMINAL REVISION PETITION No. 357 OF 1911.

January 18, 1912.

Present:—Sir Ralph Benson, Judge.

In re KOLLI APPIAH AND OTHERS—PETITIONERS.

Criminal Procedure Code (Act V of 1898), s. 476—Order passed before cross-examination of prosecution witnesses—Illegality.

Where a Magistrate passed an order under section 476, Criminal Procedure Code, before the prosecution witnesses were cross-examined and without giving the defence an opportunity of showing that the prosecution evidence was false:

Held, that the order was illegal and should be set aside.

Petition, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the order of the Joint Magistrate of Narasarowapet, in C. C. No. 74 of 1911, according sanction under section 476, Criminal Procedure Code, for prosecution of the petitioners for an offence under section 193, Indian Penal Code.

Mr. *V. Ramadoss*, for Petitioners.

Mr. *E. R. Osborne*, for Public Prosecutor, *Contra*.

ORDER.—The Public Prosecutor conceded that the Magistrate's order under section 476, Criminal Procedure Code, was made before the witnesses for the prosecution had been cross-examined on their evidence that the search list was a "false one" and before the defence had any opportunity to show that the search list was not a false one. This action was obviously premature and wrong. Cross-examination might have shown that the prosecution evidence was untrustworthy, or its truth might have been disproved by other evidence.

Again, the Magistrate's order is open to objection in that it does not specify or even indicate in any way, how or in what respect the search list was "a false" one. The Magistrate's order under section 476 is, for these reasons, improper and is set aside.

Order set aside.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 518 OF 1911.

January 8, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

EMPEROR—APPELLANT

versus

ANDIASAVALOO NAIDOO—ACCUSED.

Madras City Muncipility Act (III of 1904), ss. 262, 420—Keeping a pandal without license—"Shall be made," meaning of—Absence of proof that accused constructed the building—Acquittal.

The expression "shall be made," in section 262 of the Madras City Muncipality Act, means only 'shall be constructed' and does not mean 'shall be composed of.'

The mere existence of a *pandal*, etc., with inflammable materials does not in the absence of proof that the accused constructed it constitute an offence.

Appeal, under section 417 of the Criminal Procedure Code, against the judgment of acquittal passed on the accused by the Presidency Magistrate, Egmore, Madras, in C. C. No. 612 of 1911.

Mr. *J. Adam*, Crown Prosecutor, for the Crown.

Mr. *M. B. Doraiswamy Ayyangar*, for the Accused.

JUDGMENT.—This is an appeal by the Government against the order of acquittal

passed by one of the Presidency Magistrates of Madras in C. C. No. 612 of 1911 in which the accused was charged with an offence under sections 262 and 420 of the Madras City Municipality Act by failing to take out a license for keeping a *pandal* having an external roof covered with inflammable materials. The Municipality was unable to prove that the accused constructed the building. The Magistrate, in consequence, acquitted him. Section 262 is in these terms: "No external roof, verandah, *pandal* or wall of a building shall be made of grass, leaves, mats or other inflammable material except with the written permission of the President."

The contention for the Crown is that the expression "shall be made" does not mean "shall be constructed" but means "shall be composed of" and that, therefore, the existence of a *pandal* composed of grass, leaves, mats or other inflammable materials without the permission of the President would be an offence. It is clear to our minds that this is not the natural and usual meaning of the word "made" and the Act itself makes it clear that that is not the meaning, for in Schedule XVI of the Act, section 262 is set out in these words: "Construction of external roof, etc." Besides, if it is the existence of such a roof that constitutes the offence, who is the offender and who is to be taken to have contravened the provisions of section 26 ? We must hold that the order of acquittal is right and dismiss the appeal.

Appeal dismissed.

[S. C. (1912) 1 M. W. N. 136; 11 M. L. T. 127.]

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 32 OF 1911.

January 2, 1912.

Present:—Sir Ralph Benson, Judge, Mr. Justice Sundara Aiyar and Mr. Justice Abdur Rahim.

THE PUBLIC PROSECUTOR—APPELLANT

versus

MUSHUNOORU SURYANARAYANA MOORTY—ACCUSED.

Penal Code (Act XLV of 860), ss 299, 300, 301—Murder—Death of the person killed need not be intended

S. with the intention of killing *N* gave him poisoned *halva* to eat. *N* ate a little, and threw the rest away and this was picked up by *R.* who ate it and died:

Held, that *S.* was guilty of the murder of *R.*

The Indian Law on culpable homicide discussed and compared with the English Law.

Appeal under section 417 of the Code of Criminal Procedure against the judgment of acquittal passed on the accused on the 1st count of murder in Sessions Case No. 14 of 1910 by the Sessions Judge of Ganjam Division.

Mr. *K. N. Aiya*, for the Accused.

Mr. *P. N. Grant*, Contra.

This appeal came on for hearing before the Honourable Mr. Justice Benson and the Honourable Mr. Justice Sundara Aiyar on Wednesday and Thursday, the 3rd and 4th days of May 1911 ; and having stood over for consideration till Thursday, the 2nd day of November 1911, the Court delivered the following

JUDGMENT.

BENSON, J.—This is an appeal by the Public Prosecutor on behalf of Government against the acquittal of one Suryanarayana Murthi, on a charge of having murdered the girl, Rajalakshmi.

The facts of the case, so far as it is necessary to state them for the purposes of this appeal, are as follows :—

The accused, with the intention of killing Appala Narasimhulu (on whose life he had effected large insurances without Appala Narasimhulu's knowledge, and in order to obtain the sums for which he was insured), gave him some sweetmeat (*halva*) in which a poison containing arsenic and mercury in soluble form had been mixed. Appala Narasimhulu ate a portion of the sweetmeat, and threw the rest away. This occurred at the house of the accused's brother-in-law where the accused had asked Appala Narasimhulu to meet him. Rajalakshmi, who was aged 8 or 9 years, and who was niece of the accused, being the daughter of accused's brother-in-law, took some of the sweetmeat, and ate it and gave some to another little child who also ate it. According to one account Rajalakshmi asked the accused for a portion of the sweetmeat, but according to the other account, which we accept as the true account, Appala Narasimhulu, after eating a portion of the sweetmeat, threw away the remainder, and it was then picked up by Rajalakshmi without the knowledge of the accused. The two children who had eaten the poisoned sweetmeat died from the effects of it, but Appala Narasimhulu, though the poison

PUBLIC PROSECUTOR v. MUSHUNOORU SURYANARAYANA MOORTY.

severely affected him, eventually recovered. The accused has been sentenced to transportation for life for having attempted to murder Appala Narasimhulu. The question which we have to consider in this appeal is whether, on the facts stated above, the accused is guilty of the murder of Rajalakshmi.

I am of opinion that the accused did cause the death of Rajalakshmi and is guilty of her murder. The law on the subject is contained in sections 299 to 301 of the Indian Penal Code, and the whole question is whether it can properly be said that the accused "caused the death" of the girl, in the ordinary sense in which these words should be understood, or whether the accused was so indirectly or remotely connected with her death that he cannot properly be said to have "caused" it. It is not contended before us that the accused intended to cause the death of the girl, and we may take it, for the purpose of this appeal, that he did not know that his act was even likely to cause her death. But it is clear that he did intend to cause the death of Appala Narasimhulu. In order to effect this he concealed poison in a sweetmeat and gave it to him to eat. It was these acts of the accused which caused the death of the girl, though, no doubt, her own action, in ignorantly picking up and eating the poison, contributed to bring about the result. Section 299 of the Indian Penal Code says: "whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that he is likely by such act to cause death commits the offence of culpable homicide." It is to be observed that the section does not require that the offender should intend to kill (or know himself to be likely to kill) any particular person. It is enough if he "causes the death" of any one by doing an act with the intention of "causing death" to any one, whether the person intended to be killed or any one else. This is clear from the first illustration to the section, "*A.* lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. *Z.*, believing the ground to be firm, treads on it, falls in and is killed. *A.* has committed the offence of culpable homicide."

Nor is it necessary that the death should be caused directly by the action of the offender, without contributory action by the person whose death is caused or by some other person. That contributory action by the person whose death is caused will not necessarily prevent the act of the offender from being culpable homicide, even if the death could not have occurred without such contributory action, is clear from the above illustration, and that contributory action by a third person will not necessarily prevent the act of the offender from being culpable homicide, even if the death could not have occurred without such contributory action, is clear from the second illustration, *viz*, "*A.* knows *Z.* to be behind a bush. *B.* does not know it. *A.*, intending to cause, or knowing it to be likely to cause, *Z*'s death, induces *B.* to fire at the bush. *B.* fires and kills *Z.* Here *B.* may be guilty of no offence; but *A.* has committed the offence of culpable homicide."

The language of the section and the illustration seem to me to show that neither the contributory action of Appala Narasimhulu in throwing away part of the sweetmeat nor the contributory action of the girl in picking it up and eating it prevent our holding that it was the accused who caused the girl's death. The Indian Law Commissioners in their report (1846) on the Indian Penal Code call attention to the unqualified use of the words to "cause death" in the definition of culpable homicide, and rightly point out that there is a great difference between acts which cause death immediately, and acts which cause death remotely, and they point out that the difference is a matter to be considered by the Courts when estimating the effect of the evidence in each case. Almost all, perhaps all, results are caused by a combination of causes, yet we ordinarily speak of a result as caused by the most conspicuous or efficient cause, without specifying all the contributory causes. In Webster's Dictionary "cause" is defined as "that which produces or effects a result; that from which anything proceeds and without which it would not exist", and again "the general idea of cause is that without which another thing, called the effect, cannot be; and it is divided by Aristotle into four kinds known by the name of the *material*, the *formal*, the *efficient* and the *final* cause. The *efficient* cause is the agent, that is, prominent or conspicuous in producing a change or result."

In the present case I think that the accused's action was the efficient cause of the girl's death, though her own action in picking up and eating the poison was also necessary in order to effect her death; just as in the illustration given in the Code the man who laid the turf and sticks over the pit with the intention of causing death was held to be the cause of the death of the man who ignorantly fell into the pit; although the death would not have occurred if he had not of his own free will walked to the spot where the pit was. The Code says that the man who made the pit is guilty of culpable homicide, and, in my opinion, the accused in the present case, who mixed the poison in the sweetmeat and gave it to be eaten, is equally guilty of that offence. The *mens rea* which is essential to criminal responsibility existed with reference to the act done by the accused in attempting to kill Appala Narasimhulu, though not in regard to the girl whose death he, in fact, caused, and that is all that the section requires. It does not say "whoever voluntarily causes death," or require that the death actually caused should have been voluntarily caused. It is sufficient if death is actually, even though involuntarily, caused to one person by an act intended to cause the death of another. It is the criminality of the intention with regard to the latter that makes the act done and the consequence which follows from it an offence.

Turning now to section 300, Indian Penal Code, we find that culpable homicide is murder if the act by which death is caused is done with the intention of causing death, and does not fall within certain specified exceptions, none of which are applicable to the present case.

It follows that the accused in the present case is guilty of murder, and this is rendered still more clear by section 301 of the Code. The cases in which culpable homicide is murder under section 300 are not confined to cases in which the act by which the death is caused is done with the intention of causing death. Section 300 specifies other degrees of intention or knowledge which may cause the act to amount to murder, and then section 301 enacts, that "If a person, by doing any thing which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends not knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause."

The section does not enact any rule not deducible from the two preceding sections, but it declares in plain language an important rule deducible, as we have seen, from these sections, just as an explanation to a section does. The rule could not well be stated as an explanation to either section 299 or section 300 as it relates to both. It was, therefore, most convenient to state the rule by means of a fresh section. The rule makes it clear that culpable homicide may be committed by causing the death of a person whom the offender neither intended, nor knew himself to be likely, to kill, a rule which though it does not lie on the surface of section 299 yet is, as we have seen, deducible from the generality of the words "causes death" and from the illustration to the section; and the rule then goes on to state that the *quality* of the homicide, that is, whether it amounts to murder or not, will depend on the intention or knowledge which the offender had in regard to the person intended or known to be likely to be killed or injured, and not with reference to his intention or knowledge with reference to the person actually killed, a rule deducible from the language of the sections 299 and 300, though not, perhaps, lying on their very surface. The conclusion, then, at which I arrive, is that the accused in this case is guilty of murder as defined in sections 299 to 301, Indian Penal Code.

This conclusion is in accord with the view of Norman, Offg C. J., and Jackson, J., in the case reported in *Letter No.* 151, *dated the* 8*th February* 1870 (1), where it is said: "The prisoner gave some poisoned rice-water to an old woman who drank part herself and gave part to a little girl who died from the effect of the poison. The offence of the prisoner, under section 301 of the Indian Penal Code, is murder." That the present accused would be guilty of murder under English law is clear from the case of *Agnes Gore*. In that case Agnes Gore mixed

(1) 13 W. R. Cr. Letters 2.

PUBLIC PROSECUTOR v. MUSHUNOORU SURYANARAYANA MOORTY.

poison in some medicine sent by an Apothecary, Martin, to her husband, which he ate but which did not kill him, but afterwards killed the Apothecary, who to vindicate his reputation tasted it himself, having first stirred it about. It was resolved by all the Judges that the said Agnes was guilty of the murder of the said Martin, for the law conjoins the murderous intention of Agnes in putting the poison into the electuary to kill her husband, with the event which thence ensued; sc. the death of the said Martin; for the putting of the poison into the electuary is the occasion and cause; and the poisoning and death of the said Martin is the event, *quia eventus est qui ex causa sequitur, et dicuntur eventus qui ex causis eveniunt*, and the stirring of the electuary by Martin with his knife without the putting in of the poison by Agnes could not have been the cause of his death." (King's Bench. 77 English Reports, page 853, at page 854).

A number of other English cases have been referred to, but it is unnecessary to discuss them as we must decide the case in accordance with the provisions of the Indian Penal Code, and these are not necessarily the same as the English law.

In the result I would allow the appeal by Government and convict the accused of the murder of Rajalakshmi.

The accused was originally sentenced to 7 years' rigorous imprisonment for having attempted to murder Appala Narasimhulu. This sentence was enhanced to one of transportation for life by this Court acting as a Court of Revision in December 1910, when this appeal was not before them. Looking to these facts, I am unwilling to now impose a sentence of death, though it would have been appropriate if the accused had been convicted of murder at the original trial.

SUNDARA AYYAR, J.—In this case the accused Suryanarayana Murthi was charged by the Sessions Court of Ganjam with the murder of a young girl named Rajalakshmi and with attempt to murder one Appala Narasimhulu by administering poison to each of them on the 9th February 1910. He was convicted by the Sessions Court on the latter count, but was acquitted on the former count and was sentenced to 7 years' rigorous imprisonment. He appealed against the conviction and sentence in Criminal Appeal No. 522 of 1910, and this Court confirmed the conviction and enhanced the sentence to transportation for life. The present appeal is by the Government against his acquittal on the charge of murdering Rajalakshmi.

The facts, as found by the lower Court, are that the accused, who was a clerk in the Settlement Office at Chicacole, got the life of Appala Narasimhulu, the Prosecution 1st witness, insured in two Insurance Companies for the sum of Rs. 4,000 in all, having paid the premia himself; that the 2nd premium for one of the insurances fell due on the 12th January 1910, and the grace period for its payment would elapse on the 2th February 1910; that the Prosecution 1st witness being at the same time badly pressed for means of subsistence asked the accused for money on the morning of 9th February; that the latter asked him to meet him in the evening at the house of his (the accused's) brother-in-law, the Prosecution 8th witness; that at that house the accused gave the Prosecution 1st witness a white substance which he called '*halva*' but which really contained arsenic and mercury in soluble form; that the Prosecution 1st witness having eaten a portion of the *halva* threw aside the rest; that it was picked up by the daughter of the Prosecution 8th witness, the deceased Rajalakshmi, who ate a portion of it herself and gave another portion to a child of a neighbour, and that both Rajalakshmi and the other child were seized with vomiting and purging and finally died, Rajalakshmi some 4 days after she ate the *halva* and the other child 2 days earlier. After the Prosecution 1st witness had thrown away the *halva*, both he and the accused went to the bazar and the accused gave Prosecution 1st witness some more *halva*. The Prosecution 1st witness suffered in consequence for a number of days but survived. The accused, as already stated, had been sentenced to transportation for life for attempting to murder the Prosecution 1st witness.

The case for the prosecution with reference to the poisoning of Rajalakshmi was, as sworn to by the Prosecution 1st witness, that when the accused gave him

the '*halva*', the girl asked for a piece of it and that the accused, though he reprimanded her at first, gave her a small portion. But I agree with the learned Sessions Judge that this story is improbable. The girl was the accused's own niece being his sister's daughter. He and her father (the Prosecution 8th witness) were on good terms. He had absolutely no motive to kill her, and there was no necessity for giving her the *halva*. The accused, in his statement to the Magistrate (the Prosection 22nd witness), soon after the occurrence, said that the girl had picked up the *halva* and eaten it. He had made a similar statement to the Prosecution 8th witness when the latter returned to his house on the evening of the 9th immediately after the girl had eaten it. This statement is in accordance with the probabilities of the case, and we accept the Sessions Judge's finding that the *halva* was not given to the girl by the accused, but picked up by her after the Prosecution 1st witness had thrown it away. The question we have to decide is whether on these facts, the accused is guilty of the murder of the girl. At the conclusion of the arguments we took time to consider our judgment, as the point appeared to us to be one of considerable importance, but we intimated that, even if the accused should be held to be guilty of murder, we would not consider it necessary, in the circumstances, to inflict on him the extreme penality of the law.

It is clear that the accused had no intention of causing the death of the girl, Rajalakshmi. But it is contended that the accused is guilty of murder as he had the intention of causing the death of the Prosecution 1st witness, and it is immaterial that he had not the intention of causing the death of the girl herself. Section 299, Indian Penal Code, enacts that "whoever causes death by doing an act with the intention of causing death, or with the knowledge that he is likely by such act to cause death commits the offence of culpable homicide." Section 300 says: "culpable homicide is murder, if the act by which the death is caused is done with the intenion of causing death." Section 301 lays down, that "If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause." The contention of the learned Public Prosecutor, to put it very shortly, is (1) that it was the accused's act that caused the death of the girl, and (2) that the accused had the intention of causing death when he gave the poison to the Prosecution 1st witness and was, therefore, guilty of any death that resulted from his act. He urges that the sections of the Penal Code practically reproduce the English law, according to which the causing of death with malice aforethought, though the malice may not be directed against a particular individual whose death ensues, would amount to murder. Before referring to the English law, I shall consider the provisions of the Penal Code bearing on the subject. If Mr. Napier's contention be sound, it would make no difference whether Appala Narasimhulu, the Prosecution 1st witness, also died in consequence of the poison or not; nor would it make any difference if, instead of the poison being picked up by the girl and eaten by herself, she gave it to some one else and that one to another again and so on if it changed any number of hands. The accused would be guilty of the murder of one and all of the persons who might take the poison, though it might have been impossible for him to imagine that it would change hands in the manner that it did. The contention practically amounts to saying that the intervention of other agencies, and of any number of them, before death results, would make no difference in the guilt of the accused, that causing death does not mean being the proximate cause of death, but merely being a link in the chain of the causes or events leading to the death, and that, further, any knowledge on the part of the accused that such a chain of events might result from his act is quite immaterial. It is *prima facie* difficult to uphold such an argument. Now is there anything in the sections of the Penal Code to support it? Section 39 provides that "A person is said to cause an effect 'voluntarily' when he causes it by

means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it." The illustration to the section is that if a person sets fire by night to an inhabited house in a large town for the purpose of facilitating robbery, and thus causes the death of a person, he would be taken to have caused the death voluntarily if he knew that he was likely to cause it even though he may not have intended to cause death and may even be sorry that death had been caused by his act. The section and the illustration both show that causation with respect to any event involves that the person should have knowledge that the event was likely to result from his act. Section 299, Indian Penal Code, in my opinion, does not lead to a different conclusion. But, before dealing with it, I must turn to section 301, Indian Penal Code. That section apparently applies to a case where the death of the person whose death was intended or known to be likely to occur by the person doing the act, does not, as a fact, occur, but the death of some one else occurs as the result of the act done by him. It evidently does not apply where the death both of the person whose death was in contemplation and of another person or persons, has occurred. Can it be said that, in such a case, the doer of the act is guilty of homicide with reference to those whose death was not intended by him and could not have been foreseen by him as likely to occur? Are we to hold that a man who knows that his act is likely to cause the death of one person is guilty of the death of all the others who happen to die, but whose death was far beyond his imagination? Such a proposition it is impossible to maintain in Criminal Law. Section 301 of the Indian Penal Code has reference to a case where a person intending to cause the death of *A.*, say by striking or shooting him, kills *B.* because *B.* is in the place where he imagined *A.* to be, or *B.* rushes in to save *A.* and receives the injury intended for *A.* The reason for not exculpating the wrong doer in such cases is that he must take the risk of some other person being in the place where he expected to find *A*, or, of some one else intervening between him and *A.* The section is a qualification of the rule laid down in section 299, and is evidently confined to cases where the death of the person intended or known to be likely to be killed does not result. If the Public Prosecutor's general proposition were right, section 301 of the Indian Penal Code would seem to be unnecessary, as section 299 would be quite enough. If a person is intended by section 299 to be held to be guilty for deaths which are not known to be likely to occur, then that section might itself have been worded differently so as to show that the particular death caused need not have been intended or foreseen and, what is more important, section 301 of the Indian Penal Court would not be limited to cases where the death of the particular individual intended or foreseen does not occur. The general theory of the Criminal Law is that the doer of an act is responsible only for the consequences intended or known to be likely to ensue; for otherwise he could not be said to have caused the effect "voluntarily," and a person is not responsible for the involuntary effects of his acts. Illustrations *A.* and *B*, in my opinion, support this view. Sections 323 and 324 show that a person is responsible in the case of hurt or grievous hurt only for what he causes voluntarily; and section 321 shows that hurt to the particular person in question must have been intended or foreseen. In the eye of the law, no doubt, a man will be taken to have foreseen what an ordinary individual ought to foresee, and it will not be open to him to plead that he himself was so foolish as, in fact, not to foresee the consequence of his act. A person might in some cases be responsible for effects of which his act is not the proximate cause where the effect is likely to arise in the ordinary course of events to result from the act. This rule will certainly hold good where a person's act set in motion only physical causes which lead to the effects actually occuring; when the effect is not due merely to physical causes set in operation by an act, but other persons' wills intervening are equally necessary causes with the original act to lead to the result, it is more difficult to decide whether the act in question can be said to be the cause of the effect finally produced. The Code throws very little light on the question. Ordinarily, a man is not criminally responsible for the acts

of another person, and ordinarily his act should not be held to be the cause of a consequence which would not result without the intervention of another human agency. Sir J. Fitz James Stephen, in his History of the Criminal Law of England, Vol. III, p. 8, say: "A more remarkable set of cases are those in which death is caused by some act which does unquestionably cause it, but does so through the intervention of the independent voluntary act of some other person. Suppose, for instance, *A.* tells *B.* of facts which operate as a motive to *B.* for the murder of *C.* It would be an abuse of language to say that *A.* had killed *C.*, though, no doubt, he has been the remote cause of *C.'s* death." The learned author proceeds to point out that, even when a person counsels, procures or commands another to do an act, he would be only guilty as an abettor but not as a principal offender whose act caused the result, say murder. This is the well settled principle of the English Law, though there appear to be one or two exceptions, to be hereafter pointed out. No such exceptions are mentioned in the Indian Code. They may, perhaps, be recognised where the doer of the act knew that it would be likely that his own act would lead other persons, not acting wrongfully, to act in such a manner as to cause the effect actually produced. But the scope of the exceptions cannot cover those cases where the doer could not foresee that other persons would act in the manner indicated above. This is the principle adopted in determining civil liability for wrongs. See the discussion of the question in *Baker* v. *Snell* (2). A stricter rule cannot be applied in cases of criminal liability.

Now, can it be said that the accused in this case knew it to be likely that the Prosecution 1st witness would give a portion of the *halva* to the girl Rajalakshmi? According to section 26 of the Indian Penal Code, "A person is said to have 'reason to believe' a thing if he has sufficient cause to believe that thing but not otherwise." A trader who sells a basket of poisoned oranges may be said to have sufficient "reason to believe" that the buyer would give them to various persons to eat; but one who gives a slice of an orange to another to eat on the spot could not be said to have 'sufficient reason to believe,' that he would give half of that slice to another person to eat or that he would throw away a portion and that another would eat it. The poison was thrown aside here not by the accused but by the Prosecution 1st witness. The girl's death could not have been caused but for the intervention of the Prosecution 1st witness's agency. The case, in my opinion, is not one covered by section 301 of the Indian Penal Code. The conclusion, therefore, appears to follow that the accused is not guilty of culpable homicide by doing an act which caused the death of the girl. Mr. Napier, as already mentioned, has contended that the law in this country on the question is really the same as in England; and he relies on two English cases in support of his contention, *viz*, *Saunder's* case and *Agnes Gore's* case. I may preface my observations on the English Law by citing Mr. Mayne's remark that "culpable homicide is perhaps the one branch of Criminal Law in which an Indian student must be most careful in accepting the guidance of English authorities." According to the English Law, "Murder is the unlawful killing, by any person of sound memory and discretion, of any person under the King's peace, with malice aforethought, either *express or implied by law*. This malice aforethought which distinguishes murder from other species of homicide is not limited to particular ill-will against the person slain, but means that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit; a heart regardless of social duty, and deliberately bent upon mischief. Any formed design of doing mischief may be called malice; and, therfore, not only killing from premeditated hatred or revenge against the person killed; but also, in many other cases, killing accompanied with circumstances that shew the heart to be previously wicked, is adjudged to be killing of malice aforethought and, consequently, murder"—Russell on Crimes and Misdemeanours, 7th Edition, Volume 1, page 655. It will be observed that, in this definition, malice is made an essential requisite and all cases have to be brought under it. Knowledge that the act is likely to cause

(2) (1908) 2 K. B. 825; 77 L. J. B 1000, 24 T. L. R. 811; 99 L. T. 753; 21 Cox. C. C. 716.

PUBLIC PROSECUTOR v. MUSUNOORU SURYANARAYANA MOORTY.

death is not part of the definition. Nor have we any words to import is what contained in the explanations to section 299 of the Indian Penal Code, or in clauses 2, 3 and 4 of section 300. The law was worked out in England to its present condition by a series of judicial decisions. This accounts for the statement that general malice is enough and that it need not be directed against the particular individual killed. Hence, also, the proposition that wicked intention to injure is enough and intention to kill the individual is not necessary. See Roscoe's Criminal Evidence, 13th Edition, pages 617 to 619. Malice, again, is explained to mean malice implied by law as well as malice in fact. The result is, the law in England is not as different from that in India as a comparison of the definitions might, at first sight, indicate. This is apparent from the statement of the English Law at pages 2 —22, Volume 3 of Stephen's History of the Criminal Law. The statement, however, shows that the law is not identical in both countries. In England an intention to commit any felony will make the act murder if death results. Again," if a child under years of discretion, a madman, or any other person of defective mind, is incited to commit a crime, the inciter is the principal *ex necessitate*, though absent when the thing was done. In point of law the act of the innocent agent is as much the act of the procurer as if he were present and did the act himself." See Russell on Crimes, Vol 1, page 104. The Indian law does not make the abettor guilty of the principal offence in such circumstances. There is also a presumption in the English Law that "All homicide is malicious and murder, until the contrary appears from circumstances of alleviation, excuse, or justification ; and it is incumbent upon the prisoner to make out such circumstances to the satisfaction of the Court and Jury, unless they arise out of the evidence produced against him." See Russell on Crimes, Vol. I, page 654. There is no such presumption here. In *Saunder's* case, as stated in Roscoe's Criminal Evidence, page 154, where the prisoner intending to poison his wife gave her a poisoned apple which she, ignorant of its nature, gave to a child who took it and died. This was held murder in the husband although being present he endeavoured to dissuade his wife from giving it to the child. In Hale's Pleas of the Crown, Vol. I, 436, it is not stated that the prisoner endeavoured to dissuade his wife from giving the apple to the child. On the other hand, the author says: "if *A* commands or counsels *B*. to kill *C*. and before the fact is done *A*. repents and comes to *B*. and expressly discharges him from the fact and countermands it, if after the countermand *B*. does it, it is murder in *B*., but *A*. is not accessory." The decision apparently proceeded on the English rule that the innocence of intervening agents had the effect of holding the prisoner liable as the principal offender. In *Agnes Gore's* case, 77 English Reports, 853, the wife who mixed ratsbane in a portion sent by the Apothecary to her husband which did not kill him but killed the Apothecary who, to vindicate his reputation, tasted it himself, having first stirred it up, was held guilty of murder because the wife had the intention of killing the husband though not of killing the Apothecary. It is possible that an Indian Court may hold in such a case that it was the duty of the wife to warn and prevent the Apothecary from tasting the portion and that she was guilty of an illegal omission in not doing so. Whether the case might not come under section 301, Indian Penal Code, also, it is unnecessary to consider. In *The Queen* v. *Latimer* (3) "the prisoner, in striking at a man, struck and wounded a woman beside him. At the trial of an indictment against the prisoner under 24 and 25 Vic. c. 100, section 20, for unlawfully and maliciously wounding her, the Jury found that the blow was unlawful and malicious and did, in fact, wound her, but that the striking of her was purely accidental, and not such a consequence of the blow as the prisoner ought to have expected." The Court of Crown Cases Reserved held that the prisoner was guilty. The decision proceeded upon the words of the statute. Section 18 enacted that "Whosoever shall unlawfully and maliciously cause any grievous bodily harm to any person with malicious intent shall be guilty of felony." Then, section 20, leaving out the intent, provided that whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person

(3) 17 Q. B. D. 359

shall be guilty of misdemeanour. Lord Coleridge, C. J., pointed out that the language of sections 18 and 20 was different and that the earlier statute had been altered which provided that the intention should be against the person injured. In *Regina* v. *Michael* (4), where a bottle containing poison was put on the mantle-piece where a little child found it and gave part of the contents to the prisoner's child who soon after died, the Judges were of opinion that "the administering of the poison by the child was, under the circumstances of the case, as much in point of law an administering by the prisoner as if the prisoner had actually administered it with her own hand." This decision also, no doubt, proceeded on the ground of want of discretion in the intervenor, the child. The Indian Courts may hold that a person who keeps poison at a place where others might have access to it must be taken to know that death is likely to result from the act. It is clear that English decisions are not always a safe guide in deciding cases in this country where the provisions of the Penal Code must be applied. In *Shankar Balkrishna* v. *Emperor* (5), the Calcutta High Court held that the prisoner in the case, an Assistant Railway Station Master, was not liable where death would not have resulted if the Guard had not acted carelessly, as the prisoner could not be taken to know that the accident to the train, which resulted in the loss of human life, was likely to lead to death. In *Empress* v. *Sahae Rae* (6), which may be usefully compared with *The Queen* v. *Latimer* (3), and where also the prisoner was held guilty, the decision was put on the ground that the prisoner knew it to be likely that the blow would fall on a person for whom he had not intended it. Holding, as I do, that, in the circumstances of this case, the prisoner could not be said to have known that it was likely that the Prosecution 1st witness could throw aside the *halva* so as to be picked up and eaten by some one else and that the prisoner was not responsible, in the circumstances, for the voluntary act of Prosecution 1st witness, I must come to the conclusion that the prisoner is not guilty of the murder of the girl Rajalakshmi. It is not contended that there was a legal duty on the part of the accused to prevent the girl from eating the *halva* and that he was guilty of murder by an illegal omission.

I would uphold the finding of acquittal of the lower Court and dismiss the appeal.

BENSON, J.—As we differ in our opinions as to the guilt of the accused, the case will be laid before another Judge of this Court, with our opinions under section 429, Criminal Procedure Code.

This appeal coming on for hearing on Thursday, the 23rd of November 1911, under the provisions of section 429 of the Code of Criminal Procedure, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.—The question for decision is whether the accused Suryanarayanamurti is guilty of an offence under section 302, Indian Penal Code, in the following circumstances. He wanted to kill one Appala Narasimhulu on whose life he had effected rather large insurances and for that purpose gave him some *halva* (a sort of sweetmeat), in which he had mixed arsenic and mercury in a soluble form, to eat. This was at the house of the accused's brother-in-law, where Appala Narasimhulu had called by appointment. The man ate a portion of the *halva*, but not liking its taste threw away the remainder on the spot. Then, according to the view of the evidence, accepted by my learned brothers Benson and Sundra Aiyar, J J., as well as by the Sessions Judge, a girl of 8 or 9 years, named Rajalakshmi, the daughter of the accused's brother-in law, picked up the poisoned *halva*, ate a portion of it herself, and gave some to another child of the house, Both the children died of the effects of the poison, but Appala Narasimhulu, the intended victim, survived, though after considerable suffering. It is also found as a fact, and I agree with the finding, that Rajalakshmi and the other girl ate the *halva* without the knowledge of the accused, who did not intend to cause their deaths. Upon these facts Benson, J., would find the accused guilty of murder of Rajalakshmi, while Sundra Aiyar, J., agreeing with the Sessions Judge, holds a contrary view.

The question depends upon the provisions of the Indian Penal Code on the subject as

(4) 9 Car. & P. 356; 2 M. C. C. 120.
(5) 32 C. 73; 8 C. W. N. 645; 1 Cr. L. J. 634.
(6) 3 C. 623; 2 C. L. R. 304.

contained in sections 299 to 301. The first point for inquiry is whether the definition of culpable homicide, as given in section 299, requires that the accused's intention to cause death or his knowledge that death is likely to be caused by his act in question must be found to exist with reference to the particular person whose death has actually been caused by such act, or it is sufficient for purposes of the section, if criminal intention or knowledge on part of the accused existed with reference to any human being, though the death of the person who actually fell a victim to the accused's act was never compassed by him. I find nothing in the words of the section which would justify the limited construction. Section 299 says: "whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide." The language is perfectly general; all that it requires is that there should be an intention to cause death or a knowledge that death is likely to be the result, and there is nothing in reason which, in my opinion, would warrant us in saying that the homicidal intention or knowledge must be with reference to the life of the person whose death is actually caused. The law affords protection equally to the lives of all persons, and once the criminal intention, that is, an intention to destroy human life, is found, I do not see why it should make any difference whether the act done with such intention causes the death of the person aimed at or of some one else. Illustration *d*. to section 299 makes it quite clear that the Legislature deliberately employed general and unqualified language in order to cover cases where the person whose death is caused by the act of the accused was not the person intended to be killed by him but some other person. Section 301 also supports this construction, as it assumes that the accused in such cases would be guilty of culpable homicide; and I may here point out that the object of this section is to lay down that the nature of culpable homicide of which the accused in these cases would be guilty, namely, whether murder or not, would be the same as he would have been guilty of, if the person whose death was intended to be brought about had been killed. Now, the first paragraph of section 300 declares that culpable homicide shall be deemed to be murder if the act by which death is caused is done with the intention of causing death, using so far the very words of section 299. In the 2nd and 3rd paragraphs of section 300 the language is not quite identical with that of the corresponding provisions in section 299, and questions may possibly arise whether, where the fatal act was done not with the intention of causing death but with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that the accused is likely, by such act, to cause death, the offence would be one of murder or culpable homicide not amounting to murder. But it is not necessary for me to express any opinion on these matters as in the present case the prisoner undoubtedly intended to cause death.

The next point for consideration is whether the death of Rajalakshmi was caused by the accused's act within the meaning of section 299. The question is really one of fact or of proper inference to be drawn from the facts. The girl's death was caused by eating the sweetmeat in which the accused had mixed poison and which he brought to the house where the girl lived in order to give it to the man for whom it was intended. It was given to him, but he, not relishing the taste of it, threw it down. The deceased girl soon afterwards picked it up and ate it. But the accused was not present when Rajalakshmi ate it, and we may even take it that if the accused had been present, he would have prevented the girl from eating the sweetmeat. These being the facts, there can be, however, no doubt that the act of the accused in mixing arsenic in the *halwa* and giving it to Appla Narasimhulu in Rajalakshmi's house was one cause in the chain of causes which brought about the girl's death. The question then is whether this act of the accused was such a cause of Rajalakshmi's death as to justify us in imputing it to such act. In my opinion it was. Obviously, it is not possible to lay down any general test as to what should be regarded in criminal law as the responsible cause of a certain result when that result, as it often happens, is due to a series of causes. We have to consider in each case the relative value and efficiency of the different causes in

producing the effect and then to say whether responsibility should be assigned to a particular act or not as the proximate and efficient cause. But it may be observed that it cannot be a sufficient criterion in this connection whether the effect could have been produced in the case in question without a particular cause, for it is involved in the very idea of a cause that the result could not have been produced without it. Nor would it be correct to lay down generally that the intervention of the act of a voluntary agent must necessarily absolve the person between whose act and result it intervenes. For instance, if *A.* mixes poison in the food of *B.* with the intention of killing *B.* and *B.* eats the food and is killed thereby, *A.* would be guilty of murder, even though the eating of the poisoned food, which was the voluntary act of *B.*, intervened between the act of *A.* and *B.*'s death. So here the throwing aside of the sweetmeat by Appala Narasimhulu and the picking and the eating of it by Rajalakshimi cannot absolve the accused from responsiblity for his act. No doubt, the intervening acts or events may sometime be such as to deprive the earlier act of the character of an efficient cause. Now, suppose in this case Appala Narasimhulu had discovered that the sweetmeat was poisoned and then gave it to Rajalakshmi to eat, it is to his act that Rajalakshmi's death would be imputed and not to the accused's. Or, suppose Appala Narasimhulu, either suspecting that the sweetmeat was poisoned or merely thinking that it was not fit to be eaten, threw it away in some unfrequented place so as to put it out of harm's way and Rajalakshmi happening afterwards to pass that way picked it up and ate it and was killed, the act of the accused in mixing the poison in the sweetmeat could in that case hardly be said to have caused her death within the meaning of section 299. On the other hand, suppose Appala Narasimhulu finding Rajalakshmi standing near him and without suspecting that there was anything wrong with the sweetmeat gave a portion of it to her and she ate it and was killed, could it be said that the accused who had given the poisoned sweetmeat to Appala Narasimhulu was not responsible for the death of Rajalakshmi? I think not. And there is really no difference between such a case and the present case. The ruling reported in *Letter No.* 151, *dated the 9th February* 1879 (1), also supports the view of the law which I have tried to express.

Reference has been made to the English law on the point, and, though the case must be decided solely upon the provisions of the Indian Penal Code, I may observe that there can be no doubt that under the English law as well the accused would be guilty of murder. In English law it is sufficient to show that the act by which death was caused was done with malice aforethought, and it is not necessary that malice should be towards the person whose death has been actually caused. This is well illustrated in the well-known case of *Agnes Gore* (77 Eng. Rep. 853) and in *Saunder's* case (1 Hale's Pleas of the Crown, page 436) and also in *Regina* v. *Michael* (4). No doubt, "malice aforethought," at least according to the old interpretation of it as including an intention to commit any felony, covers wider ground in the English law than the criminal intention or knowledge required by sections 299 and 300, Indian Penal Code, but the law in India on the point in question in this case is, undoubtedly, in my opinion, the same as in England.

Agreeing, therefore, with Benson, J., I set aside the order of the Sessions Judge acquitting the accused of the charge of murder and convict him of an offence under section 302, Indian Penal Code. I also agree with him that, in the circumstances of the case, it is not necessary to impose upon the accused the extreme penalty of the law, and I sentence the accused under section 302, Indian Penal Code, to transportation for life.

Appeal allowed.

ALIA RAI v. JHINGUR TEWARI.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 1383 OF 1911.
January 22, 1912.
Present:—Mr. Justice Holmwood and Mr. Justice Sharf-ud-din.
ALIA RAI AND OTHERS—ACCUSED—PETITIONERS
versus
JHINGUR TEWARI—COMPLAINANT—OPPOSITE PARTY.

Local inspection—Criminal case—Omission to place on record results of inspection, if fatal—Irregularity—Prejudice—Local inspection, several kinds of—Criminal Procedure Code (Act V of 1898), s. 293—Mere local observation, if can override necessity of evidence—Note of inspection to be placed on record—Omission, effect of.

It cannot be said that in all cases, an omission to place on record the results of a local inspection is a fatal error of jurisdiction apart from any prejudice which it may cause to the accused.

Joy Coomar v. *Bundhoo Lal*, 9 C. 353; 12 C. L. R. 430, relied upon.

Where a Magistrate made no note at the time of his local inspection, as he should have done, but embodied the result of his inspection in his judgment delivered four days later and when what he saw must have been fresh in his memory:

Held, that his omission to make a note at the time, though irregular, could not be said to have caused any failure of justice.

There are three kinds of local inspections: (1) those authorized or directed by the Criminal Procedure Code and which are governed by the rules and limitations imposed by that Code, (2) those which are in the nature of a view by the Jury laid down in section 293 of the Code, and the Magistrates, having the functions of both Judge and Jury in cases decided by them, may view the place in any case to follow or understand the evidence, and (3) those held by the Magistrates to satisfy themselves on certain disputed points.

Mere local observation cannot be allowed to override the necessity for evidence and a case cannot be decided merely on an observation made by the Court locally.

It is not a positive rule of law that a note must be placed on the record on the spot at the time of the local inspection, and if the omission has not prejudiced any party, the irregularity cannot exclude the relevant and important matter—the Magistrate's local inspection.

A Magistrate cannot import into his judgment matters of opinion and inference based on circumstances not on the record.

Babbon Sheikh v. *Emperor*, 37 C. 340; 5 Ind Cas. 365; 14 C. W. N. 422; 11 C. L. J. 335, 11 Cr. L. J. 121, referred to.

Rule against the order of the Sub-Divisional Magistrate of Bhabua, dated July 27th 1911, convicting the petitioners under sections 147, 323/149 of the Indian Penal Code, and sentencing the petitioners Nos. 1 to 6 to six months' rigorous imprisonment under each section, (the sentences to run concurrently), and sentencing the petitioners Nos. 7 and 8 to pay Rs. 25 as fine under section 323, Indian Penal Code, in default six months' rigorous imprisonment, and directing further that all the petitioners should execute bonds under section 106, Criminal Procedure Code, for Rs. 150 each to keep the peace for two years, which order was confirmed on appeal by the Sessions Judge of Shahabad, on September 23rd, 1911.

Babus *Dwarka Nath Mitter* and *Manindra Nath Beneriee*, for the Petitioners.

Babu *Srish Chandra Chaudhuri*, Junior Government Pleader, for the Opposite Party.

JUDGMENT.—This was a Rule calling upon the District Magistrate of Shahabad to show cause why the conviction of the petitioners should not be set aside on the ground that the lower Court inspected the place where the offence is said to have been committed and did not record a note of what he saw.

Now, what happened in this case was this: the defence urged that the sides of the *kote* or mound on which the assault took place are unscaleable and this space was not sufficient to hold so many persons. This being a point on which the Magistrate says he could satisfy himself, he visited the place on the 23rd of July and found, as he puts it, that his trouble for the defence had been wasted; there was no question of the place being inaccessible, it was merely a slight slope on the south and on the north it was practically on a level with the village, while as for the place of assault it was sufficient to hold twice the number of persons.

The learned Judge in appeal in dealing with this point briefly recapitulated the above finding and says that the Magistrate visited the spot as these were points that could be verified by a local inquiry. Before the Judge it was urged that the Magistrate had made no note at the time of his local inspection. This the Judge says he certainly should have done. However, he had embodied the result of his inspection in his judgment which was delivered only four days later and when what he saw must have been fresh in his memory. Thus, in the Judge's opinion his omission to make a note at the time, though irregular, cannot be said to have caused any failure of justice.

In this we fully agree, and the only question we have to consider is whether in all cases the omission to place on the record the results of a local inspection is a fatal error of jurisdiction apart from any prejudice which it may cause to the accused. We do not find any authority for such a proposition. The case relied on by the learned Vakil, who obtained the Rule, is that of *Babbon Sheikh* v. *Emperor* (1). But none of the judgments delivered in that case consider or deal with the ruling in the case of *Joy Coomar* v *Bundhco Lal* (2), though that case was cited in argument for another reason.

That ruling imports a reason for giving evidentiary value to local inspections which seems to have been overlooked in subsequent decisions. What those reasons are we shall deal with later on.

But what we desire to point out here is that there are in effect three different kinds of local inspections:

(1) Those that are authorised or directed by the Code of Criminal Procedure and which are governed by the rules and limitations imposed by the Code itself;

(2) Those which are in the nature of the view by the Jury laid down in section 293 of the Code. Magistrates having the functions of both Judge and Jury in cases decided by them may, in our opinion, view the place in any case in order, as the rulings on the points say, to follow or understand the evidence. We are fortified in this opinion by the ruling *In re Lallji* (3). It is, as the Judges there say, not only not objectionable, but in many cases highly advisable, that a Magistrate trying a criminal case should himself inspect the scene of the occurrence in order to understand fully the bearing of the evidence given in Court. But if he does so he should be careful not to allow any one on either side to say anything to him which might prejudice his mind one way or the other.

This is the same rule which is applied in the Code itself to the inspection by the Jury. But there is a third clause of local inspection under which, we think, the present and very many other cases fall and that is the class referred to in the ruling in *Joy Coomar's* case (2) above mentioned.

There is express provision for these local investigations in the Code of Civil Procedure, but there is nothing that can be deemed to prevent them in the Code of Criminal Procedure and, in so far as they conform to the provisions of the law of evidence, it is obvious they cannot be excluded.

Now, we desire to draw particular attention to what the Judges say as to the evidentiary value of such local inspections. They say: "The Judge also appears to have been of opinion that the results of the inquiry conducted by the Munsif in this case could not be considered by him, because it was not evidence according to the definition of that word in the Evidence Act. He is, perhaps, right in this view. The definition of the word "evidence" as given in the Evidence Act means and includes (1) all statements which the Court permits or requires to be made before it by witnesses in relations to matters of fact under inquiry: such statements are called oral evidence; (2) all documents produced for the inspection of the Court: such documents are called documentray evidence. The result of a local inquiry by a presiding judicial officer does not come under either of these two heads; but the District Judge has not taken into consideration the definition of the word "proved" which comes immediately after. It is to this effect: ; 'A fact is said to be proved when after considering the matter before it the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.' It would appear, therefore, that the Legislature intentionally refrained from using the word evidence in this definition, but used instead the words "matter before it." The Judges then proceed to hold that the Appellate Court cannot exclude the personal observations of the lower Court from its consideration. Whether there are good grounds for accepting the results of the local investigation as correct, or rejecting it as incorrect are matters with which the High Court in second appeal (and we may add also in revision) has nothing to do. It is for the Appellate Court to decide these questions.

(1) 37 C. 340; 5 Ind. Cas. 365; 14 C. W. N. 422; 11 C. L. J. 335; 11 Cr. L. J. 121.
(2) 9 C. 363; 12 C. L. R. 490.
(3) 19 A. 302.

ALIA RAI v. JHINGUR TEWARI.

In this very case the Judges for the first time emphasise the importance of putting upon paper the result of the investigation when completed. "It is very desirable," they say, "that judicial officers conducting local investigations should place upon record the result of their investigations as soon as they are completed, so that the parties may have an opportunity of seeing what the facts are which the judicial officers consider to be established by the local investigations." But where none of those facts are impugned as incorrect the Appellate Court cannot exclude them from his consideration. It would seem to follow that if they are so impugned and there is no contemporaneous record of them the Judge would not be able to act upon them, but it is certainly not a positive rule of law that a note must be placed on the record on the spot. In this case none of the objections that have been taken in the various cases cited in this Court apply. The defence practically said: "The mound itself is our witness. Go and look at it." The Magistrate went and saw that it was a witness against them. His finding was not impugned before the Judge but it was sought to exclude this most relevant and important matter before the Court on the mere technical ground that the observation was not made matter of record on the spot. The Judge considered the point and rightly considered it from only two points of view:

First, whether the fact observed was correct.

Second, whether the defence had been in any way prejudiced, and he found that the correctness of the finding was not impugned and that there was no prejudice in the irregularity in omitting to record a note at the time. The present case is clearly not touched by the decision in *Ecllon Sheik* v. *Emperor* (1). There are, no doubt, passages in the judgment of Woodroffe, J., which might seem to imply that the observation of a fact by the Magistrate could not be admitted. But a careful perusal of the judgment as a whole shows that what is meant is that mere observation cannot be allowed to override the necessity of evidence and a case cannot be decided merely on an observation made by the Court locally. If, in looking at a place in order to understand the evidence, the Magistrate thereby understands that the description of the place given in the evidence is erroneous or false he is certainly not precluded by the laws of evidence from holding that the facts, as stated by the witnesses who gave that erroneous or false description, are not proven and in so holding he does not make himself a witness but acts as a Judge deciding on matters before him. We have shown that the judicial system in this country, of which the Evidence Act is a most important factor, gives the Court power to adjudge the existence of facts on matters before it as well as according as they are deposed to on the evidence. To hold otherwise would be in direct conflict with *Joy Coomar's* case (2) in 9 Calcutta which, as far as we know, has never been dissented from. Woodroffe, J., clearly shows that the danger to be guarded against is the supersession of all evidence by mere observation, and the head-note of the case appears to us to go too far in saying that the Magistrate cannot import into the case matters or facts which he has himself observed, if that is what is intended. But the use of the word 'import' and the words 'other matters' leave it doubtful what is intended. No such words occur in either of the concurrent judgments which govern the decision and the words that do occur are those cited in the next paragraph of the head-note, with which we fully agree, that a Magistrate cannot import into his judgment matters of opinion and inference based on circumstances not on the record.

The case of *Girish Chunder Ghose* v. *Queen-Empress* (4) is one which, we may observe, has nothing to do with local investigations, made after hearing evidence by a trying Magistrate. Upon it is based a contention in this and similar cases that a Magistrate constitutes himself a witness by holding a local inspection in a case in which he is the presiding Judge. The facts of that case clearly show that the District Magistrate who had seen the occurrence and was the best witness for the prosecution constituted himself the Judge for the trial of the case, and the decision was that a witness could not be Judge in the case, inasmuch as it is impossible that a Magistrate can be a witness in a case in which he is the sole Judge of law and fact. In other words, a man who is *a priori* a witness to an occurrence cannot assume jurisdiction which he might otherwise have to decide on the

(4) 20 C. 857.

facts of that occurrence as a Judge. But as local inspections are recognised by the law and as the Magistrate must make observations of fact in such an inspection and cannot, as Chatterjee, J., points out, fail to believe the testimony of his own senses, it is clear that by making such observations he cannot constitute himself a witness in the case. As long as he is a witness, he cannot be a Judge and as long as he is a Judge he cannot be a witness. If he is a witness he ousts his own jurisdiction. If he is a Judge he may adjudicate on all matters before him which require proof, and in doing so he may use his eyes as well as his ears. We do not for one moment desire to minimise the importance of making a note of what is observed at a local inspection nor to, in any way, appear to condone the introduction either into the report or the judgment of matters of opinion and inference depending on the facts observed. But if the facts observed support or rebut the evidence adduced by either side and cause the Court to understand that that evidence is true or false, inaccurate or exaggerated, then the statement that the facts observed negative or support any of the evidence in the case, is not a matter of opinion or inference but a matter of observation and it is, in our opinion, the duty of the Judge, as laid down in *Joy Coomar's* case (2), to consider the results of such observation and state them in his judgment. Here the case is clearly one where direct observation explained and cleared up a doubt which had been thrown on the prosecution evidence by the allegations of the defence and there was clearly no impropriety in the course of the inspection nor in the way in which its results were used.

The Rule must, therefore, be discharged

Rule disscharged.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 791 OF 1911.

January 20, 1912.

Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.

MUSAI AND OTHERS—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 302, 304—Intention.

Where four persons attacked one man, who, in consequence of the attack, died subsequently: *Held*, that the assailants are guilty under section 302, Indian Penal Code, if the common intention of the assailants was to cause death or bodily injury likely to cause death or sufficient in the ordinary course of nature to cause death; and under section 304, if their common intention was to make a violent assault upon the deceased and they knew that they were likely to cause his death. Their intention must be gathered from what they said and what they did at the time of the attack.

Appeal against the judgment of the Sessions Judge of Mirzapore.

Mr. *Ryves* (with him Messrs. *Satya Chandra Mukerjee* and *Sital Proshad Ghose*), for the Appellants.

Mr. *R. Malcomson*, Assistant Government Advocate, for the Crown.

JUDGMENT.— The appellants Bhageru, Musai and Chekuri *Ahirs* have been convicted by the Sessions Judge of Mirzapore of having been members of an unlawful assembly whose object was to beat Raghu *Ahir* and in prosecution of which one or more of them struck blows at Raghu with the intention of causing injuries which he or they knew to be likely to cause his death and did in fact cause his death.

It appears that Raghu took a widow into his keeping and that his relations and caste-follows resented his action and put him out of caste. On the day of the Holi (March 15th, 1911) Budhai, uncle of Bhageru, had a quarrel with Raghu and threatened to beat him. Bhageru and two men, named Bhagwan and Ajudhia, were standing close by with *lathis* in their hands. The witnesses Jaimangal, Jarbandhan and others intervened and induced Budhai to go home. This was about 3 P. M. According to the evidence of Debi Prasad, son of Raghu, Musai and Chekuri went to Raghu's house about 4 hours later. Chekuri had some words with Raghu accusing him of having quarrelled with him (Chekuri's *Ustad.*) He also demanded payment from Sukhdeo, who was living in the same house, of a small debt. The money was paid and Chekuri and Musai went away, the former saying to Raghu that he would go and fetch Bhageru, Bhagwan, Ajudhia and Chekuri. About an hour later Bhageru, Bhagwan and Ajudhia, according to Debi Prasad, went to the house of Musai and Chekuri and said they would beat Raghu to death, and Musai and Chekuri said, "we are coming with you,"

and all five went armed with *lathis* to Raghu's house. Some of the villagers persuaded them to return but just then Chekuri appeared and urged them to beat Raghu. Bhageru struck the first blow, then Bhagwan and then Ajudhia and Bhageru struck him again. None of the witnesses say that Musai and Chekuri took part in the beating Sukhdeo, already mentioned, says that Musai and Chekuri came up with the others who did beat Raghu, so also does Parbatia, widow of Raghu. But, on the other hand, Jaimangal and Jarbandhan, who were admittedly there, say that they did not see Musai or Chekuri with the men who beat Raghu. Nor did Raghu in his report to the Police made the same day or in that statement which he made to a Magistrate on the following day say that he had seen Musai and Chekuri with the men who beat him. Debi Prasad, Sukhdeo, and Parbatia are all interested in securing the conviction of Musai and Chekuri. Jaimangal and Jarbandhan are not. We do not think that it is safe to hold upon the evidence of Debi Prasad, Sukhdeo and Parbatia that Musai and Chekuri brought the other men to beat Raghu.

There remains the question what offence was committed by the appellant Bhageru. If, as we hold, Musai and Chekuri cannot be regarded as members of the unlawful assembly, four men only joined in the attack upon Raghu and, therefore, no unlawful assembly has been proved to have taken place. The evidence makes it quite clear that Bhageru struck deceased on the head but that it was not the wound inflicted by Bhageru that caused Raghu's death. Bhageru must, at least, be convicted of having caused grevious hurt. He can, in the circumstances, be convicted under section 302 only if there was a common intention on the part of Bhageru and his companions to cause death or bodily injury which was likely to cause death or which was sufficient in the ordinary course of nature to cause death. He may be convicted under section 304 if their common intention was to make a violent assault upon Raghu and they knew that they were likely to cause his death. Their intention must be gathered from what they said and what they did. If Debi Prasad is to be believed, three of them said that they would beat Raghu to death, but this statement is not supported by any other evidence; but several witnesses say that when Raghu had been knocked down Chekuri said; "don't beat him any more or he will die." In the face of this evidence it is difficult to hold that Raghu's assailants intended to cause his death or bodily injury which was likely or sufficient in the ordinary course of nature to cause death. But one of the four men who joined in the attack struck Raghu a violent blow on the head which knocked him down and another or others struck him in the stomach with such force as to rupture his intestines. Men who attack another in this savage manner must be taken to have intended to cause serious bodily injury and to have known that they were likely to cause death. All are liable to conviction under section 304, Indian Penal Code, with reference to the provisions of section 34, Indian Penal Code. But, putting aside section 34, we find that the Civil Surgeon states that the blow on the head caused congestion of the membrane of the brain and extravasation of blood on the surface of the brain and might have caused death independently of the injuries to the abdomen. Bhageru must be taken to have known that by striking Raghu with such force on the head he was likely to cause his death. He must, therefore, be convicted under section 304.

For the above reasons, we allow the appeal of Musai and Chekuri, set aside their conviction and direct that they be released. We set aside the conviction of Bhageru under sections 302 and 149, Indian Penal Code, and convicting him under section 304, Indian Penal Code, sentence him to seven years' rigorous imprisonment to count from the date of his conviction in the Court of Session.

Appeal allowed.

GOVIND BABA GUJAR v. SHRIMANT JIJIBAI SAHEB.

(S. C. 14 Bom. L. R. 9.)

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 191 OF 1908.

September 14, 1911.

Present:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

GOVIND BABA GUJAR—APPELLANT

versus

SHRIMANT JIJIBAI SAHEB—RESPONDENT.

Res judicata—*Pledge by unauthorised person—Joint tort-feasors—Cause of action in both suits to be same—Subsequent assignment in respect of tort*—Lis pendens, *inapplicable to moveable property—First suit against pledgor—Moveable property pawned during the pendency of suit—Second suit against pledgee—Pledgor basing title on adoption—Adoption held not proved in first suit—Right of pledgee to raise issue of adoption in second suit—Privity between pledgor and pledgee.*

In order that a judgment in a previous suit should operate to bar proceedings in a second suit, the cause of action in the second suit must be precisely the same as the cause of action in the first suit.

Wegg Prosser v. *Evans*, (1895) 1 Q. B. 108, followed.

A fresh assignment in respect of a tort subsequent to that originally sued upon will not come within the scope of the first judgment so as to bar the fresh assignment.

Brinsmead v. *Harrison*, (1872) L. R. 7 C. P. 547; 41 L. J. C. P. 19; 27 L. T. 99; 20 W. R. 784; *Brinsmead* v. *Harrison*, (1871) L. R. 6 C. P. 584; 40 L. J. C. P. 28; 24 L. T. 793; 19 W. R. 956, referred to.

The doctrine of *lis pendens* does not apply to moveable property.

Wigram v. *Buckley*, (1894) 3 Ch. 483; 63 L. J. Ch. 689; 71 L. T. 469; 43 W. R. 147, followed.

A., claiming as the adopted son of *B*, took possession of certain ornaments left by *B* and pawned some of them to *C*. *D.*, the heir of *B*, sued *A.* for possession of the ornaments and recovered judgment which, however, was not satisfied. The question of the adoption of *A.* was decided against him in this suit. During the pendency of this suit, most of the ornaments were pledged by *A* to *C*. Subsequently, *D* sued *C.* for detention of the ornaments. *C.* pleaded that, as *A.* and *C.* were joint tort-feasors, the second suit was barred by the judgment in the first suit. *C* further sought to raise an issue as to the adoption of *A.*:

Held, (1) that the second suit was not barred by the principle of *res judicata*.

(2) That as the doctrine of *lis pendens* did not apply to moveable property, the fact that the first suit was pending at the time of the pledge of a large portion of the ornaments sought to be recovered in the subsequent suit, could not prejudice *C.* on the issue of *res judicata*.

(3) That *C*, not being a privy of the person who was defendant in the first suit, was not bound by that judgment.

(4) That the judgment in the previous suit was no bar to the issue sought to be raised by *C.* as to the adoption of *A.* as the judgment was subsequent to the pledge and *C.* did not claim under a person against whom the issue of adoption had been finally heard and determined at the time of the pledge.

Doedem Fosler v. *The Earl of Derby*, (1834) Ad. & E. 783 at p. 790; 3 N. & M. 782; 3 L. J. (N. S.) K. B. 191; 40 R. R. 423; *Hodson* v. *Walker*, (1872) L. R. 7 Ex. 55; 41 L. J. Ex. 51; 25 L. T. 937; 20 W. R. 480; *Niaz ul lah Khan* v. *Nazir Begam*, 15 A. 108, relied upon.

First appeal from the decision of the First Class Subordinate Judge at Thana in Suit No. 56 of 1908.

Mr. *Jayakar*, with him Mr. *G. S. Rao*, for the Appellant.

Messrs. *Weldon* and *Rangnekar*, with him Mr. *R. H. Kelkar*, for the Respondent.

JUGDMENT.—The plaintiff sues the defendant as pledgee of certain ornaments from an unauthorised pledgor for detention of those ornaments after demand made on or about the 11th of August 1907. That claim was preferred after the plaintiff had recovered judgment in a former action, No. 159 of 1897, against the pledgor, but the judgment so recovered has not been satisfied.

It has been pleaded that the judgment in the suit of 1897 is a bar to this suit on the ground that the pledgor and the pledgee were joint tort-feasors and that upon the authority of *Brinsmead* v. *Harrison* (1) the matter has passed into *res judicata* and cannot be again agitated.

It has, however, been pointed out by Mr. Justice Willes in the judgment of the lower Court in *Brinsmead* v. *Harrison* (2), that a fresh assignment in respect of a tort subsequent to that originally sued upon will not come within the scope of the first judgment so as to bar the fresh assignment. We may also refer to the case of *Wegg Prosser* v. *Evans* (3), which shows that the cause of action in the second suit must be precisely the same as the cause of action in the first suit in order to make the judgment in the first suit a bar to proceedings in the second suit.

For these reasons, we are of opinion that the plea of *res judicata* must fail in so far as it is based upon *Brinsmead* v. *Harrison* (1).

The next question is whether the defendant was precluded from contending that the plaintiff was not entitled to the property of the person under whom she claimed. The defendant set up that his pawnor was a

(1) (1872) L. R. 7 C. P. 547; 41 L. J. C. P. 190; 27 L. T. 99; 20 W. R. 784.

(2) (1871) L. R. 6 C. P. 584; 40 L. J. C. P. 281; 24 L. T. 798; 19 W. R. 956.

(3) (1895) 1 Q. B. 103; 63 L. J. Q. B. 1.

SARKHARA v. NAWAB.

validly adopted son of that person. But it was argued on behalf of the plaintiff that the question of his adoption had already been settled in Suit No. 159 of 1897 adversely to the pawnor and that, therefore, as the defendant claimed through the pawnor, he was bound by the judgment in that suit.

The defendant wished to raise an issue as to whether the pawnor was not the validly adopted son, but the learned Judge of the lower Court disallowed the issue and admitted in evidence the judgment in Suit No. 159 of 1897 on the ground that the defendant was a privy to that judgment.

We are of opinion that in so doing he was in error. The judgment in Suit No. 159 of 1897 was no bar to the issue sought to be raised by the defendant as it was subsequent to the pledge and the defendant did not claim under a person against whom the issue of adoption had been, at the time of the pledge, finally heard and determined, see *Lozden Foster* v. *The Earl of Derby* (4), *Hodson* v. *Walker* (5) and *Nizamullah Khan* v. *Nazir Begum* (6). The fact that the Suit No. 159 of 1897 was pending at the time of the pledge of a large portion of the ornaments sought to be recovered in this suit cannot prejudice the defendant on the issue of *res judicata*, for, the doctrine of *lis pendens* does not apply to moveable property, see *Wigram* v. *Buckley* (7). The defendant, therefore, was not a privy of the person who was defendant in Suit No. 159 of 1897 and is not bound by that judgment.

We must, therefore, set aside the decree of the lower Court and remand the case for re-trial upon the second issue propounded by the defendant and disallowed by the Subordinate Judge. On the remand, the Subordinate Judge should, if required so to do by the defendant, compel the production of the books held by or on behalf of the plaintiff which were not produced at the first hearing.

For the reasons which we have already given for holding that the judgment in Suit No. 159 of 1897 did not operate as *res judicata* on the question of adoption, we hold that it was also irrelevant on the question whether the pawnor got the pledged property by means of fraud. That is a question which, if the plaintiff wishes to establish it, must be proved by evidence in this suit.

The issues to be determined on remand will be the issues of adoption and fraud, and the lower Court must pass a fresh decree after going into those issues.

We express no opinion on any other issues except those that we have dealt with in our judgment.

Costs of this appeal must be dealt with by the trying Judge on remand.

Case remanded.

(4) (1834) 1 Ad. & E. 783 at p. 790; 3 N. & M. 782; 3 L. J. (N. S.) K. B. 19; 40 R. R. 423.

(5) (1872) L. R. 7 Ex. 55, 41 L. J. Ex. 51; 25 L. T. 937; 20 W. R. 489.

(6) 15 A. 108.

(7) (1894) 3 Ch. 483; 63 L. J. Ch. 689; 7 R. 469, 71 L. T. 287; 43 W. R. 147.

(S. C. 11 P. W. R. 1912.)

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 3513 OF 1910.

October 26, 1911.

Present:—Mr. Justice Rattigan.

SARKHARA AND OTHERS—DEFENDANTS—PETITIONERS

versus

NAWAB AND OTHERS—PLAINTIFFS—RESPONDENTS

Limitation—Appeal—Time spent in obtaining copies—Sufficient cause—Duty of the Copying Department—Limitation Act (IX of 1908), ss. 5, 12—Rules and Orders of the Chief Court, Vol. I, r. XXIII (1) and (2).

It is the duty of the Copying Department, under rule XXIII (1) and (2) of the Chief Court Rules and Orders, Vol. I, to inform the applicant of the date on which the copy is ready for delivery, and if necessary, to call the applicant on three successive days.

Where it is not shown that the applicant was aware of this date, the date of actual delivery is to be reckoned as the date on which the copy was ready.

The omission of the Copying Department to inform the applicant of the date on which the copy is ready or to call him for delivery of copy, is a reasonable cause for delay in filing an appeal.

Petition under section 70 (*b*) of Act XVIII of 1884, as amended by Act XXV of 1899, for revision of the order of the Divisional Judge, Attock Division, at Campbellpur, dated the 15th August 1910, rejecting appeal as barred by time.

Mr. *Nand Lal*, for the Petitioners.

Mr. *Nanak Chand*, for the Respondents.

JUDGMENT.—I do not think that the Divisional Judge was justified in assuming

that the entry on the copy of the decree-sheet to the effect that comparison was made on the 18th May was obviously incorrect. But, be that as it may, there is nothing on the record to show that any intimation was given to the applicant that the copies were ready on the 10th May. Had such intimation been given and had he not applied for delivery of the copies within three days, his application of the 4th May would have been filed and he would have had to file a fresh application [see Rules and Orders of the Chief Court, Volume I, Rule XXIII (1) and (2)]. In the absence of any such fresh application, I must assume that appellant was not in default in applying for delivery of the copies and that he was not informed (as under the Rule he should have been) that the copies were ready. The Officer entrusted with the duty of receiving applications for copies is bound when the copies are ready for delivery to call the applicants, if necessary, on three successive days. Here there is nothing to show that the appellant was called and in view of this omission on the part of the Officer, I think the lower Appellate Court ought to have held that there was reasonable cause for the delay in filing the appeal.

I accordingly accept this petition and remand the case to the Divisional Judge for determination of the appeal in accordance with law. Costs to be costs in the cause.

Revision allowed.

(S. C. 14 Bom. L. R. 14.)

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 809 OF 1910.

September 21, 1911.

Present:—Mr. Justice Russell and Sir N. G. Chandavarkar, Kt., Judge.

GOPAL GHELA—APPELLANT

versus

RAJARAM AMTHA—RESPONDENT.

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 10A - Processual law - Retrospective effect - Applicable to pending appeal or second appeal - Appeal, whether a continuation of suit or a fresh proceeding - Evidence Act (I of 1872), s. 92 - Oral evidence to prove ostensible sale-deed as a deed of mortgage - Admissibility.

The law embodied in section 10 *A* of the Dekkhan Agriculturists' Relief Act is one of procedure and being retrospective in its effect, applies to pending proceedings.

If the section comes in force when a first appeal or a second appeal is pending, the Court has power to act upon its terms in deciding the appeal.

Quære - Whether an appeal is a stage of a suit or is a fresh proceeding?

Chinto Joshi v. *Krishnaji Narayan*, 3 B. 214; *Rustomji Barjorji* v. *Kessowji Naick*, 8 B. 287; *Hood Barrs* v. *Heriot*, 1897 A. C. 177; 66 L. J. Q. B. 354; 76 L. T. 299; 45 W. R. 507; *Nunn & Co.* v. *Tyson*; (1901) 2 K. B. 487; 70 L. J. K. B. 854; 85 L. T. 122; 50 W. R. 16; 17 T. L. R. 674, referred to.

Obiter dictum - Where section 10A of the Dekkhan Agriculturists' Relief Act does not apply, oral evidence to prove that what purports to be a deed of sale is really a transaction of mortgage is admissible, under proviso 1 to section 92 of the Evidence Act, only when the element of fraud or other similar element mentioned in the proviso exists to invalidate the deed.

Sangira v. *Ramappa*, 34 B. 59; 4 Ind. Cas. 257; 11 Bom. L. R. 1130, referred to.

Second appeal from the decision of the First Class Subordinate Judge, at Broach, in Appeal No. 53 of 1909, confirming the decree passed by the Subordinate Judge at Wagra, in Civil Suit No. 476 of 1908.

Mr. *G. N. Thakore*, for the Appellant.

Mr. *L. A. Shah*, for the Respondent.

JUDGMENT.—Both the lower Courts have misunderstood the decisions of this Court on the question whether and when oral evidence is admissible to prove that what purports to be a deed of sale represents, according to the true intention of the parties, a transaction of mortgage. The effect of those decisions is that, where section 10A of the Dekkhan Agriculturists' Relief Act does not apply, such evidence is admissible, under proviso 1 to section 92 of the Indian Evidence Act, only when the element of fraud or other similar element mentioned in the proviso exists to invalidate the deed. The Subordinate Judge, First Class, who decided this case on appeal, has relied, in support of his view, on some *dicta* in one of the judgments in *Sangira* v. *Ramappa* (1) without carefully noticing their context; and the result of the Subordinate Judge's decision is that he has treated the deed of sale as one of mortgage on the evidence of a contemporaneous agreement between the parties contradicting the terms of the deed. That is not the law laid down in *Sangira* v. *Ramappa* (1).

The decree, therefore, would have to be reversed and the suit for redemption brought by the respondent dismissed, unless we allow the contention of his Pleader that he

(1) 34 B. 59; 4 Ind. Cas. 257; 11 Bom. L. R. 1130.

that this stage entitled to rely on and invoke the aid of section 10A of the Dekkhan Agriculturists' Relief Act. That section was not in force in the District from which this case comes, either when the suit was filed or when the appeal to the District Court was heard and decided. It has been applied to the District since the disposal of the appeal; and we are asked to confirm the decree on the ground of the section.

The question is, whether in second appeal we have jurisdiction to give effect to the section, which in now part of the law of the District but which was not the law when the case was pending in either of the Courts below.

The section provides that the Court shall have power to admit evidence of the kind mentioned in it, "whenever it is alleged at any stage of any suit or proceeding to which an agriculturist is a party that any transaction in issue is in reality other than what it is ostensibly." Is an appeal or a second appeal a stage of a suit or proceeding within the meaning of the section?

In *Chinto Joshi* v. *Krishnaji Narayan* (2), followed by Sargent, C. J., and Nanabai Haridas, J., in *Hirjimji Burjorji* v. *Kessowji Naik* (3), West, J., said:—

"When judicial inquiry has reached its intended close in an adjudication, requiring thereforward in theory only a ministerial or coercive exercise of authority to give it practical effect, the party who strives by an appeal to unsettle again the legal relation, which in itself has by the act of the Court become settled, may fairly be regarded as instituting a new proceeding. Such has been the view of some eminent authorities. But even on that point there have been opinions to the contrary, which are supported by the consideration that the legal pursuit of a remedy, suit, appeal, and second appeal, are really but steps in a series of proceedings connected by an intrinsic unity."

This latter view has the sanction of some of the latest decisions of the Courts in England. In *Hoot Barrs* v. *Heriot* (4), explained by Ridley, J., in *Nunn & Co.* v. *Tyson* (5), the House of Lords held that "an appeal was nothing but a step in an action or proceeding already instituted, and was not the institution of fresh proceedings." And Davey, L. J., in his judgment in the former case in the Court of Appeal, explained that "an appeal is in reality in the nature of a defence by the person against whom an order has been made." See *Hoot Barrs* v. *Oathcart* (6).

Whichever view we adopt, whether an appeal or second appeal is regarded as a fresh proceeding, not a continuation of the suit, or whether we treat it as a step in or stage of the suit itself, the result is the same for the purposes of section 10A of the Dekkhan Agriculturists' Relief Act. It is either a stage of a suit or it is a fresh proceeding; and if the section is in force when the appeal or second appeal is pending, the Court has power to act upon its terms in deciding the appeal. The law embodied in the section is one of procedure, and, being retrospective in effect, applies to pending proceedings.

On these grounds, accepting the finding of fact of the Court below that the transaction in dispute, ostensibly a sale, represented a mortgage according to the true intention of the parties, we must confirm the decree with costs.

Decree confirmed.

(2) 3 B. 24.

(3) 8 B. 287.

(4) (1897) A. C. 177, 66 L. J. Q. B. 356; 76 L. T. 239, 45 W. R. 507.

(5) (1901) 2 K. B. 487; 70 L. J. K. B. 854; 85 L. T. 123; 50 W. R. 16; 17 T. L. R. 624.

(6) (1894) 3 Ch. 376 at P. 380; 63 L. J. Ch. 793.

(S. C. 9 P. W. R. 1912).

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 1326 OF 1910.

February 1, 1911.

Present:—Mr. Justice Johnstone.

LEHNA SINGH AND OTHERS—PLAINTIFFS—PETITIONERS

versus

SANTA SINGH—DEFENDANT—RESPONDENT.

Mortgage—Adverse possession—Mutation as owner, effect of—Sale of equity of redemption—Registration—Limitation Act IX of 1908, Sch. I, Art. 144—Registration Act III of 1877, s. 17.

A person entering into possession of land as a mortgagee is not at liberty to set up adverse possession against the mortgagor by merely obtaining in his favour mutation of names as owner until he succeeds in proving that he actually purchased the equity of redemption.

Nabib Mir Sayid Alam Khan v. *Yasin Khan*, 17 B. 755, followed.

A deed of sale of immoveable property, which is subject to mortgage, is not compulsorily registrable under section 17 of the Registration Act if the sale

VELCHAND CHHAGANLAL v. LIEUT. A. FLAGG.

consideration excluding the mortgage-money is less than Rs. 100.

Pir Bakhsh v. *Mangal*, 16 P. R. 1892 (F. B.), followed.

Petition, under section 70 (1) (*b*) of Act XVIII of 1884 as amended by Act XXV of 1899, for revision of the order of the Divisional Judge, Amritsar Division, dated the 24th July 1909, reversing that of the Munsif, 3rd Class, Amritsar, dated the 26th May 1909, decreeing plaintiffs' claim.

Messrs. *Duni Chand* and *Miran Bakhsh*, for the Petitioners.

Messrs. *Harris* and *M. C. Mukerjee*, for the Respondent.

JUDGMENT.—In this case the plaintiffs claimed to redeem a mortgage of certain land from defendant on payment of Rs. 75. The defendant resisted the claim on the ground that though there was a mortgage executed thirty years ago for Rs. 77, yet, some seventeen years ago, the mortgagor or one of the mortgagors sold the property to him for Rs. 100, Rs. 23 being taken in cash.

The first Court refused to allow the defendant to prove this sale on the ground that the deed, which is in a half burnt state, required registration. That Court proceeded under section 17 of the Registration Act and section 91 of the Indian Evidence Act, and, in the end, gave plaintiffs a decree for redemption on payment of Rs. 77. Defendant appealed to the Divisional Court. That Court agreed with the first Court in holding that the document aforesaid required registration, and that oral evidence as to the contents of the document could not be given; but it went on to hold that inasmuch as the mutation proceedings of 1894 show that defendant has been in possession of the land in suit *as owner* for over 12 years, therefore, the suit is barred by time, inasmuch as the defendant has, by adverse possession, if in no no other way, acquired a proprietary title in the land. Plaintiffs now ask this Court to revise the decision of the Divisional Judge. In my opinion, that decision is incorrect.

Defendant entered into possession of the land as a mortgagee, and I do not think that he can be allowed to claim that a mere mutation of names in his favour as owner enables him to set up adverse possession against the plaintiffs. *Nabab Mir Sayad Alam Khan* v. *Yasin Khan* (1) is an analogous case. In my opinion, plaintiffs are entitled to consider their mortgage as still subsisting until the defendant succeeds in proving an actual sale in his favour. I must, therefore, accept this revision and set aside the decision of the learned Divisional Judge and remand the appeal to him for re trial. In connection with that re trial, I may observe that I am not by any means certain that this document really did require registration. *Pir Bakhsh* v. *Mangal* (2) is an authority to the contrary. The learned Divisional Judge should pay particular attention to that ruling. Here, too, if the defendant's story is correct, the sale was really a sale of an equity of redemption for Rs. 23 and this would certainly not require registration The point cannot be decided finally here, because no evidence has been taken as to the contents of the deed of sale. Probably, therefore, the learned Divisional Judge should remand the case to the first Court in order that evidence may be taken as to the contents of the deed of sale. Oral evidence for this purpose will apparently be admissible. Upon that evidence the learned Divisional Judge will be able to decide whether, in view of the Full Bench ruling aforesaid, the deed of sale required registration or not. If it did not, and if its execution is proved, then apparently the plaintiffs' suit would have to be dismissed.

Costs of this revision will be costs in the case.

Petition allowed.

(1) 17 B. 755.
(2) 16 P. R. 1892 (F. B.)

(S. C. 14 Bom. L. R. 18.)

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 187 OF 1910.

September 26, 1911.

Present:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

VELCHAND CHHAGANLAL—APPELLANTS

versus

LIEUT. A. FLAGG AND ANOTHER—RESPONDENTS.

Contract Act IX of 1872, s. 74—Penalty—Interest—Addition of interest in advance—Interest at enhanced rate in case of default—Reasonable compensation.

A bond was executed for Rs. 5,500. The money actually advanced was Rs. 2,440, the balance

VELCHAND CHHAGANLAL v. LIEUT. A. FLAGG.

of Rs. 5,500 being made up of interest calculated upon the sum of Rs 6,000 for 39 months at the rate of ½ per cent. per mensem added in advance. The debt was agreed to be paid in monthly instalments of Rs 50 for the first twelve months and after that of Rs 100 for another twenty-six months and the balance at the end of the thirty-ninth month. In case of default in the payment of any one instalment on the due date, the whole amount of the bond was recoverable at once on demand. But if the creditor waited longer, the debtor agreed to pay interest at the rate of 5 per cent per mensem till payment in full. A default occurred in the payment of instalments and the creditor sued for the recovery of the whole amount of the bond as well as interest at the rate of 5 per cent. per month:

Held, that the stipulation for the addition of interest in advance and the stipulation for payment of enhanced interest at the rate of 5 per cent. per mensem were both penal and unenforceable by reason of section 74 of the Contract Act and that it was a reasonable compensation to allow the amount actually advanced with interest at 18 per cent. per annum.

First appeal from the decision of the First Class Subordinate Judge, at Ahmedabad, in Suit No. 235 of 1910.

Mr. *Coyaji*, with him Mr. *Ratanlal Ranchhoddas*, for the Appellants.

JUDGMENT.—The appellants are a firm of money-lenders who, through the agency of a firm of Commission Agents in Bombay, advanced to the first respondent a sum of Rs. 2,440 on or about the 14th of October 1908. Prior to that payment an agreement upon a stamped paper of Rs. 30 was signed by the first respondent for whose benefit the payment was made. By that agreement he stated that he had received from the appellants Rs. 5,500 which he and the second defendant, who was then intended to sign as a surety, agreed to repay in Ahmedabad or at the option of the appellants in Nasirabad or elsewhere in monthly instalments of Rs. 50 for the first twelve months and after that of Rs. 100 for another twenty-six months and the balance at the end of the thirty-ninth month, the instalments to begin from 5th November 1908. And it was stipulated in two subsequent clauses as follows:—"If we fail to pay any instalment on due date as agreed above, we jointly or severally promise to pay the whole amount of the bond at once on demand. But if the firm waits longer, we agree to pay interest at 5 per cent. per month till payment in full".

The second respondent signed the agreement as surety on the 14th of October 1908, the date upon which the payment of Rs. 2,440 was made.

In is noted by the learned Subordinate Judge that the balance of the Rs. 5,500 is made up of interest calculated upon the sum of Rs. 6,000 for 39 months at rate of 1½ per cent. per mensem added in advance. That would make a rate of interest exceeding three per cent. per mensem upon the original advance. At the time of the suit, the 39 months' period had not expired, for the suit was filed upon the 13th of April 1910. But the plaintiffs alleged a cause of action by reason of the failure of the respondents to pay due instalments after demand made. That cause of action arises under the first stipulation which we have referred to. The plaintiffs base a claim for interest at 5 per cent. per month upon the second of the stipulations referred to.

The learned Subordinate Judge has come to the conclusion that both these stipulations upon which the claim in the suit is based are penal and, therefore, not enforceable in full by reason of the provisions of section 74 of the Indian Contract Act, and he refers to illustration (*g*) to that section as showing that this is a case to which section 74 is directly applicable. That illustration runs as follows: "A borrows Rs. 100 from *B*, and gives him a bond for Rs. 200 payable by five yearly instalments of Rs. 40, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty." Again, the stipulation whereby interest at 5 per cent. per month is payable upon the sum due is a stipulation for increased interest from the date of default which, as the explanation of the section shows, may be a stipulation by way of penalty. In the present case, it is a stipulation to pay 60 per cent. interest upon a sum which is originally made up very largely of interest at an exorbitant rate. We have, therefore, no hesitation in holding that the second stipulation also is one by way of penalty.

Various money lenders' cases have been cited to us decided by the Indian Courts and one decided by Mr. Justice Darling in the King's Bench Division in England. The English case appears of considerable similarity to the present one and the plaintiffs were in both cases suing upon agreements in very much the same form. It is to be observed, however, that the provisions of section 74 and its illustration (*g*) were not brought to the notice of the learned Judge. Similarly,

in the Indian cases, section 74, as amended by Act VI of 1899, does not seem to have been brought to the notice of the Courts in argument.

We are of opinion that the learned Subordinate Judge has rightly decided this case. He has allowed one and a half per cent. per mensem, that is, interest at 18 per cent. upon the amount actually due in respect of sums advanced. This we have no doubt is reasonable compensation.

We affirm the decree and dismiss the appeal.

Appeal dismissed.

(s. c. 10 P. W. R. 1912.)

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 1256 OF 1910.

November 27, 1911.

Present:—Mr. Justice Robertson.

RAMJI DAS—DEFENDANT—PETITIONER

versus

SHANKAR DAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Revision—Civil Procedure Code (Act V of 1908), O. XLI, r. 23—Order not appealable.

An order of remand under rule 23 of Order XLI which is not appealable, cannot be interfered in revision.

Faiz Ahmad v. *Badar Din*, 50 P. R. 1911; 137 P. W. R. 191; 21 P. L. R. 1911; 11 Ind. Cas. 315; *Ali Bakhsh* v. *Chuhar Singh*, 101 P. R. 1910; 8 Ind. Cas. 1157; 41 P. L. R. 1911; *Hira Singh* v. *Bhima*, 9 P. R. 1894, *Hayat Khan* v. *Mehtab Singh*, C. R. No. 897 of 1910, followed.

Petition, under section 70 (*a*) of Act XVIII of 1884, as amended by Act XXV of 1899, for revision of the order of the Divisional Judge, Amritsar, dated the 14th January 1910, reversing that of the Munsif, 1st Cales, Batala, dated the 24th July 1909, dismissing plaintiffs' claim and remanding case for re decision.

Pandit *Rambhaj Datta*, for the Petitioner.

Mr. *Nand Lal*, for the Respondents.

JUDGMENT.—I do not think it possible to interfere on revision in this case at this stage. The final decision has not been given yet in the lower Courts. [*Faiz Ahmad* v. *Badar Din* (1); *Ali Bakhsh* v. *Chuhar Singh* (2); *Hira Singh* v. *Bhima* (3); *Hayat Khan* v. *Mehtab Singh* (C. R. No. 897 of 1910), Revision unpublished].

Petition dismissed with costs.

Petition dismissed.

(1) 11 Ind. Cas. 315; 137 P. W. R. 1911; 50 P. R. 1911; 210 P. L. R. 1911.

(2) 8 Ind. Cas. 1157; 41 P. L. R. 1911; 101 P. R. 1910.

(3) 9 P. R. 1894.

(s. c. 14 Bom. L. R. 22.)

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No 94 OF 1910.

October 4, 1911.

Present:—Mr. Justice Russell and Sir N. G. Chandavarkar, Kt., Judge.

PANDURANG BHIWAJI—APPELLANT

versus

GANGA RAM GANU AND OTHERS—RESPONDENTS.

Bombay City Improvement Act (Bom. Act IV of 1898), s. 48—Validating Act (XIV of 1904)—Tribunal of Appeal—Jurisdiction—Power to determine and apportion compensation—Power to decide question of title.

The Tribunal of Appeal, constituted under the provisions of the Bombay City Improvement Act, has power to deal with and decide questions relating to the apportionment of the money directed by it to be paid in respect of compensation. It has also the power to decide the questions of title raised by the claimants *inter se*, if that is necessary for the exercise of the power to determine the amount of compensation and apportion it.

First appeal from the decision of the Tribunal of Appeal, Bombay, in Reference No. 44 of 1909.

Mr. *Jayakar*, with him Mr. *M. W. Pradhan*, for the Appellant.

Mr. *Rangnekar*, with him Mr. *I. J. Samson*, for Respondent No. 1.

Mr. *T. A. Gandhi*, for Respondent No. 3.

Mr. *V. S. Khanlarkar*, with him Mr. *Y. V. Bhandarkar*, for the added respondents.

JUDGMENT.—This was a reference for the apportionment of the sum of Rs. 7,142-14-6, awarded as compensation by the Special Collector in respect of a house acquired by the Bombay Improvement Trust.

The facts, so far as they are material for this judgment, are that one Ganu had three sons, Bhiva, Gangaram and Narayan. Gangaram was the step brother to Bhiva and Narayan. The house in question was bought in 1869 for Rs. 700, the conveyance (Exhibit No. 1) being in the name of Bhiva who was then about 19 years old and was working as a printer for about 30 rupees a month. Gangaram was about two years the junior to Bhiva and two years senior to Narayan; and Narayan at the time of the purchase was about fifteen years of age working in a liquor shop.]

PANDURANG BHIWAJI v. GANGA RAM GANU.

The Tribunal of Appeal held that the purchase-money must have come from the father Ganu and (after making some necessary deductions immaterial for this case) that the balance available for apportionment amongst these three persons was Rs 5,017-10-6, and they apportioned that sum between Gangaram and the descendants of Bhiva and Narayan in three equal parts respectively.

After the case had been argued by the appellant's Counsel Mr. Jayakar at length, the question was raised whether this apportionment by the Tribunal of Appeal would oust the jurisdiction of the High Court in the matter. The point was raised by ground No. 18 of the grounds of appeal which is: "The Tribunal ought to have directed the parties to a regular suit, having regard to all the circumstances." This point involves a consideration of the position of the Tribunal of Appeal in such cases But, as has been said, the point was not touched upon till the argument for the appellant was nearly concluded.

The Court or Tribunal of Appeal is appointed under section 48, clause (3) of the City of Bombay Improvement Act, IV of 1898. We read clauses 1, 2, 3 and 10 of that section. In the Act there is no definition of "Court." By section 47 of the said Act, certain portions of the Land Acquisition Act, I of 1894, are made to apply to the acquisition of land under Bombay Act IV of 1898. And Schedule A of the City of Bombay Improvement Act sets out the portions of the Land Acquisition Act of 1894, regulating the acquisition of land under the former Act.

In section 3 of the Land Acquisition Act, clause (*d*), "Court" is defined as meaning a principal Civil Court of original jurisdiction, unless the Local Government has appointed (as it is hereby empowered to do) a special judicial officer within any specified local limits to perform the functions of the Court under this Act. This clause expressly does not apply to the City of Bombay Improvement Act.

From this we infer that a "Special Judicial Officer" having been appointed by the Bombay Improvement Act, he is vested with the power of "the Court" under the Land Acquisition Act, *i.e.*, a principal Court of Civil Jurisdiction. This mode of legislation is, in our opinion, very much to be deprecated. References to other Acts and the inclusion of them in subsequent Acts only lead to unnecessary confusion.

By Schedule A of the Bombay Improvement Act, Part IV of the Land Acquisition Act, which deals with the apportionment of compensation, does apply to the City of Bombay Improvement Act. The material section of Part IV in the Land Acquisition Act is section 30 which is as follows:—

"When the amount of compensation has been settled under section 11, if any dispute arises as to the apportionment of the same or any part thereof, or as to the persons to whom the same or any part thereof is payable, the Collector may refer such dispute to the decision of the Court."

In consequence of the decision of Sir Lawrence Jenkins in *Hari Pandurang* v. *The Secretary of State for India* (1), that the Tribunal of Appeal was not a Court of Justice and that the limited right of appeal under the City of Bombay Improvement Act did not come within either the extraordinary original, or the appellate and revisional Civil Jurisdiction of the High Court, because the local Legislature had no power to control or affect by their Acts the jurisdiction or procedure of the High Court, as that power rested with the Imperial Parliament and with the Legislative Council of the Governor General (see Statute 24 & 25 Vict., c 104), Act XV of 1904 was passed by the Governor-General in Council, it having been considered advisable to legalize sub section 11 of section 48 of the Bombay Improvement Act by means of a short validating Act on the model of Act XI of 1888. Sections 1 and 2 of that Act enact as follows:—

1. The City of Bombay Improvement Act, 1898, shall, so far as regards the appellate jurisdiction conferred upon the High Court by section 48, sub-section (11) thereof, be as valid as if it had been passed by the Governor-General of India in Council at a meeting for the purpose of making Laws and Regulations.

2. Subject to the provisions of section 43, sub-section (11) of the said Act, the provisions of the Code of Civil Procedure with respect to appeals from original decrees

(1) 27 B. 424.

shall, so far as they can be made applicable, apply to appeals under the sub section, and orders passed therein by the High Court may, on application to the Chief Judge of the Small Cause Court, be executed by him as if they were decrees made by himself.

Section 3 prescribes a period of limitation for such appeals.

It will, of course, be observed that this legislation does not get over the objection raised by Sir Lawrence Jenkins that the power to create Courts in India rests with the Imperial Parliament and with the Legislative Council of the Governor-General (see Statute 24 & 25 Vict., c. 104). But for the purposes of this case, it appears to us that sufficient jurisdiction has been conferred upon the Bombay Tribunal of Appeal to confer upon it the power to deal with and decide questions relating to the apportionment of the moneys directed by them to be paid in respect of compensation. Consequently, in our opinion, this objection fails. Whether any of the claimants in this case would be entitled to sue the other in the High Court and whether the latter would be entitled to plead *res judicata* in consequence of the decision of the Tribunal of Appeal on the question of title among the claimants, is a question which it is unnecessary for us to consider because it does not arise now. At present we are concerned with the bare question whether, for the purposes of apportionment, the Tribunal had power to go into and decide the question of title raised by the claimants *inter se*. That power it has, because without deciding it, it cannot apportion the amount of compensation.

That it has power to determine the amount of compensation and apportion it, is not denied. If it has the power so far, it follows it has the power to decide the question of title also if that is necessary for the exercise of that power, for the two powers are in that case interdependent, and if the latter is denied, the former becomes ineffective and the Act unworkable. Whether the Legislature has taken away by the Act the remedy by way of a suit is another question not arising now.

But, in our opinion, it would be highly desirable that these claims to apportionment involving question of title should be decided by the High Court and not the Tribunal of Appeal, as it is obvious that very complicated questions may arise of law and fact upon which it would be more desirable to have the judgment of the High Court.

This appeal will accordingly be heard further.

(s. c. 8 P. W. R. 1912)

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 719 OF 1910.

November 30, 1911.

Present:—Mr. Justice Kensington.

DUNI—DEFENDANT—APPELLANT

versus

ALI MOHAMMAD AND OTHERS—PLAINTIFFS

NUR MUHAMMAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Co-sharers - Joint holding—Co-sharer in possession for cultivation - Creating occupancy-tenure in joint holding—Remedy of other co sharers.

Before actual partition, no co-sharer can create an occupancy-tenure in any particular field against the wishes of the other co-sharers, although he is holding it separately for the purposes of cultivation. His other co-sharers may treat the lessor as a trespasser and can maintain a Civil suit to eject him from the joint holding.

Further appeal from the order of the Divisional Judge, Hissar, dated the 21st February 1910, reversing that of the Honorary Munsif of the 3rd class, Sirsa, dated the 7th January 1910, decreeing the claim in part.

Chaudhri *Ram Bhaj Datta*, for the Appellant.

Mr. *Nand Lal*, for the Respondents.

JUDGMENT.—The short facts of this very peculiar case are as follows:—After correction of the parties under the first Court's order of 6th November 1909, the plaintiffs represent about a $\frac{7}{8}$ths share of the proprietary rights in the land in suit. The defendants Nos. 1 to 3 represent a $\frac{1}{8}$th share and the defendant No. 4, Duni, now appellant, asserts occupancy right in the whole of the land.

The land in dispute is a portion of a large joint holding. For cultivation purposes, the proprietors seem to have been in possession of separate fields, but it has yet to be determined whether that possession will be upheld or not in the event of a partition by the proprietors. The particular fields claimed were, till 1907, in the possession of the plaintiff, Ali Mohammad, as to one-half and the defendants Nos. 1 to 3 as to the remaining half.

ABDUL KAYAM v. BAHADUR VITHOBA.

In 1907, the defendants Nos. 1 to 3, entirely disregarding the rights of Ali Mahammad, and of all the remaining proprietors in the joint holding, granted occupancy-rights in the land in suit to Dani, *arora* of the village, on payment of a *nazrana* of Rs. 130. The matter came up in mutation proceedings and on the 15th of June 1907, the *Naib Tahsildar* sanctioned the mutation in Dani's favour. It is impossible to understand upon what principle the *Naib Tahsildar* considered himself entitled to pass any order of the kind, and it is not surprising that the validity of his order has been practically called in question by the present suit. As matters now stand, the proprietors of about a $\frac{7}{8}$ ths share of the land decline to recognize Dani's occupancy-right and treat him as a trespasser. The lower Appellate Court quite correctly saw that the claim was well-founded, but has perhaps gone too far in giving the plaintiffs a decree for possession of the entire land claimed. This decree might possibly have been contested by the defendants Nos. 1 to 3 on the ground that even if the occupancy-tenures of Dani be disallowed, they are still entitled to retain possession as before 1907 in respect of either half the land or at any rate their $\frac{1}{8}$th share.

The defendants Nos. 1 to 3 have, however, not appealed against the decree of the lower Appellate Court, and it is not open to me to consider the question from their point of view. They have accepted the decree giving possession of the whole to the plaintiffs. The only appellant is Dani and I am quite clear that, under no circumstances, can he be allowed to retain possession of any part of the land. If the defendants Nos. 1 to 3 desire to make over a portion of their land to Dani in occupancy-tenure, they must first get the joint holding partitioned so as to become the sole owners of particular fields. Having done so, they can then make what arrangements they like about occupancy-tenure. At present the entire holding is joint and nothing in the shape of an alienation of individual fields can be recognized against the wishes of the proprietors of the great majority of the holding. It is on this ground that the arrangement of 1907 is bound to fall through. The defendants Nos. 1 to 3 had no right to create an occupancy-tenure in any particular fields and the tenant Dani cannot retain possession of these fields against the plaintiffs' wishes.

So far as the appellant Dani is concerned, there is absolutely no ground for interference under section 70 (1) (*b*) of the Punjab Courts Act. He has no valid title as against the plaintiffs and their suit for possession must succeed against him. The appeal is accordingly dismissed with costs to the plaintiffs.

Appeal dismissed.

(S. C. 14 Bom. L. R. 26.)

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 769 OF 1910.

November 13, 1911.

Present:—Mr. Justice Russell and Sir N. G. Chandavarkar, Kt., Judge.

ABDUL KAYAM AMADAJIBHAI—APPELLANT

versus

BAHADUR VITHOBA—RESPONDENTS.

Contract Act (IX of 1872), s. 62—Novation of contract—Mortgage-deed executed in consideration of previous bonds—Deed not registered—Merger—Waiver—Right to sue on previous bonds—Registration Act (XVI of 1908), s. 42.

Where a mortgage-deed requiring compulsory registration is executed in consideration of previous bonds but the deed is not registered, there is no *novation* of contract, as the mortgage deed being unenforceable in law does not constitute a new contract.

As the Court cannot look at an unregistered mortgage-deed which requires compulsory registration, there can be no merger of the previous bonds in the mortgage-deed.

The promisee is, therefore, entitled to sue on the previous bonds in spite of the unregistered deed of mortgage.

Nando Kishore v. *Musammat Ramsookee*, 5 C. 215, referred to.

Second appeal from the decision of the District Judge of Khandesh, in Appeal No. 199 of 1909, confirming the decree passed by the Subordinate Judge at Dhulia, in Civil Suit No. 273 of 1908.

Mr. *P. B. Shingne*, for the Appellant.

Mr. *G. A. Rele*, for the Respondents.

JUDGMENT.—This case raises a novel point. The present suit was brought on two money bonds for Rs. 200 each said to have been passed by the defendants to the plaintiff on the 7th April 1905. Later, however, a mortgage-bond, dated the 3rd July 1905, was executed for Rs. 2,500 by

NIHAL CHAND v. CHANDA SINGH.

which it appears arrangements were made to extinguish the bonds now sued on and for other considerations mentioned. It appears, however, that the plaintiff did not register the mortgage-deed, and the question put shortly, which has been raised, is: Can the plaintiff rely upon these two antecedent promissory-notes having regard to this subsequent deed of mortgage?

Both the lower Courts have held that he cannot. But it appears to us that they have overlooked what is the real point in the case.

Mr. Rele for the respondents first of all relied upon the doctrine of *novation*. '*Novation*' is defined in section 62 of the Contract Act, which, of course, binds us, as follows:—"If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed".

Now what is the definition of 'contract'? 'Contract' is defined in section 2 of the Contract Act, clause (*h*), thus:—"An agreement enforceable by law is a contract." We read that as meaning "enforceable by law" for all the purposes contained therein. Therefore, an agreement only partly enforceable does not come within this. That being so, the question arises: Is this mortgage-deed a contract within the meaning of section 2 of the Contract Act? In our opinion, it is not, because it does not come within the definition. It is not a contract enforceable by law. It is a document, having regard to the terms of the Registration Act, section 49, which the Court cannot look at so as to charge the property comprised in it. This is the view taken in *Nundo Kishore* v. *Musammat Ramsoo'hee* (1). It is true that the mortgage-deed includes an express waiver of the old debt, but that was on the assumption that the contract in the mortgage-deed would be one which was enforceable in law in all respects. Further, there would be no consideration for the waiver of the plaintiff's rights under the former notes if he did not obtain a contract fully enforceable by law. The plaintiff cannot be said to be taking advantage of his own wrong by not having registered the deed as it was really within the power of the defendant to have done so.

(1) 5 C. 215.

If, however, the case does not depend upon the doctrine of *novation*, it depends, it is contended, upon the doctrine of "merger". But it appears that the respondents' contention on the point also cannot be upheld. 'Merger' is thus defined in the Encyclopædia of the Laws of England, p. 193, Vol. 9: "Merger is the destruction or 'drowning' by operation of law of the less in the greater of two estates coming together and vesting without any intervening estate in one and the same person in the same right." Then it cites (2 Black. Com. 177):—"Whenever a greater estate and a less coincide and meet in one and the same person without any intermediate estate, the less is immediately annihilated, or in the law phrase is said to be *merged*, that is, sunk or drowned in the greater".

But here, as we have endeavoured to point out, there is no "greater estate," because the only document we have by which the greater estate could be said to be created is the document which this Court is not for all purposes entitled to look at. Therefore, no *novation* or merger applies.

For these reasons, the decree of the Courts below must be reversed and the case remanded for trial on the merits.

Costs to be costs in the cause.

Decree reversed.

(S. C. 3 P. W. R. 1912)

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No 3402 OF 1910.

November 10, 1911.

Present:—Mr. Justice Robertson.

NIHAL CHAND—PLAINTIFF—PETITIONER

versus

CHANDA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Execution of decree—Dismissal of execution proceedings in default—Restoration—Civil Procedure Code (Act V of 1908), s. 141, O. IX, rr. 8, 9—Civil Procedure Code (Act XIV of 1882), s. 647.

Section 141 of Act V of 1908 does apply to proceedings in execution of decree. An application for execution dismissed in default can be restored. *Sajdar Ali* v. *Kishan Lal*, 7 Ind. Cas. 241; 12 C. L. J. 6, followed.

Petition under section 70 (*a*) of Act XVIII of 1884 as ameded by Act XXV of 1899, for revision of the order of the District Judge,

SREENIVASIER v. BALAKRISHNA DEVAI.

Gurdaspur, dated the 8th April 1910, rejecting plaintiff's application for review of the order dismissing claim for default.

FACTS.—In this case, execution proceedings were dismissed in consequence of the default of the decree-holder; the judgment-debtor was present and the property attached was released. The execution Court refused to entertain an application for restoration of the execution proceedings.

Khawaja *Kamal Din*, for the Petitioner.

Mr. *Nihal Chand Mehra*, for the Respondents.

JUDGMENT.—It appears to me quite clear that section 141 does apply to proceedings under execution. The explanation to section 647 of the old Code was cut out apparently with the express object of making it applicable to execution proceedings and this is held by the Calcutta High Court in a case reported in *Safdar Ali* v *Kishun Lal* (1).

As regards *Musammat Jasodha Devi* v. *Lachman Das* (2), I do not think that there is any force in the contention that as the suit was commenced under the old Act, section 647 applies.

I accept the petition and return the petition to be dealt with on its merits. Costs to be costs in the proceedings

Petition accepted.

(1) 7 Ind Cas 24'; 12 C. L. J. 6.
(2) 37 P. R. 1892.

[s. c. (1912) 1 M. W. N. 150; 11 M. L. T. 150]

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 2056 OF 1911.

December 15, 1911.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

SREENIVASIER—DEFENDANT

versus

BALAKRISHNA DEVAI—PLAINTIFF—RESPONDENT.

Letters Patent, s 13—Application for transfer of suit from Presidency Small Cause Court to High Court to be made to a Judge on the Original Side.

An application for the transfer of a suit from the Presidency Court of Small Causes to the High Court is governed by section 13 of the Letters Patent and must be made to a Judge sitting on the Original Side of the High Court.

Thomas Robert Doucett v. *Josiah Patrick Wise*, 4 W. R. Mis p. 7, referred to.

Radambini Baiji v. *Madan Mohan*, 3 C. W. N. 217, distinguished.

Petition praying that, in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to order the transfer of Small Cause Suit No. 12151 of 1911 from the file of the Presidency Court of Small Causes, Madras, to the file of the High Court.

Mr. *M. Subramania Aiyer*, for the Petitioner.

Mr. *T. Ethiraja Mudaliar*, for the Respondent.

ORDER.—This is an application for the transfer of a suit from the Presidency Court of Small Causes to this Court, and the application has come on before us as a Bench sitting on the Appellate Side of the Court.

A preliminary objection is taken by the counter-petitioner that we have no jurisdiction to hear it, as the application should be made to a Judge sitting on the Original Side. We are of opinion that this objection must be upheld.

Section 13 of the Letters Patent gives power to the High Court as a Court of Extraordinary Original Civil Jurisdiction to withdraw a suit pending in any other Court and to try and dispose of it itself. According to that section, the power of transfer is to be exercised by the High Court as a Court of Extraordinary Original Jurisdiction. It is contended that this does not show that this Court has not also got the power to direct a transfer in the exercise of its appellate jurisdiction. Reliance is placed in support of this contention on section 24 of the Code of Civil Procedure and on Appellate Side Rules of Practice, Rule No. 2, clause 4. So far as the former provision of law is concerned, it merely gives power to the High Court to withdraw a suit pending in any Court subordinate to it and to try and dispose of the same, and has nothing to do with the question whether the High Court should exercise the power as a Court of original or appellate jurisdiction. It does not, therefore, help the petitioner's contention in any way.

With regard to rule 2, clause 4 (*i*) of the Appellate Side Rules, that provision is equally useless to the petitioner. The object of that rule is only to lay down by how many Judges of the Court the matter referred to therein is to be disposed of,

KHANU v. FATEH KHAN.

The rule applies only to the appellate jurisdiction of the Court and is of no use in deciding whether an order of transfer in any particular class of cases falls within its appellate jurisdiction or not. That question must be decided apart from the rule. It has nothing to do with the question whether the Court has the power, in the exercise of its appellate jurisdiction, to make a transfer from the Small Cause Court to the High Court.

The question, therefore, is, is the order of transfer in this case one to be made in the exercise of original or appellate jurisdiction of the Court? Whatever may be the view to be held in the absence of clear legislative provision on the subject, it appears to us that under section 13 of the Letters Patent, we are bound to hold that such an order should be made by the Court as a Court of Extraordinary Original Jurisdiction. The terms 'original' and 'appellate' jurisdiction are used in contradistinction to each other, and it would be extremely inconvenient, if not absolutely illegal, to hold that the same function can come within the purview of both Original and Appellate Jurisdiction. The jurisdiction of the Court is broadly divided into three classes mutually exclusive of each other, *viz.*, Ordinary Original, Extraordinary Original and Appellate Jurisdiction. Our view is in accordance with the order of the Chief Justice in C. S. No 2[illegible]4 of 1911, although the point was not expressly decided there, the application having been made under section 13 of the Letters Patent. The same view was held in *Thomas Robert Doucett* v. *Josiah Patrick Wise* (1), where also an application appears to have been made under section 13 of the Letters Patent.

Our attention has been drawn to a case in *Kadambini Baijee* v. *Madan Mohan Basack* (2). That case merely decided that an order of transfer from the Presidency Court of Small Causes to a Mofussil Court of Original Jurisdiction could be properly made in the exercise of the High Court's Appellate Jurisdiction. That is a case to which section [illegible]3 of the Letters Patent would not be applicable. There is no doubt that the Presidency Court of Small Causes is subject to the superintendence of the High Court. That is expressly declared by section 6 of the Presidency Small Cause Courts Act. But that fact does not decide in what manner the High Court is to exercise any of the powers which it has with respect to proceedings in the Small Cause Court. The question of transfer of suits from that Court to the High Court is regulated by section 13 of the Letters Patent.

We must, therefore, uphold the objection and we direct that the application be returned to the petitoner to be moved before a Judge or Judges of this Court sitting on the Original Side.

Petition dismissed.

(1) 4 W. R. Mis. 7.
(2) 3. C. W. N. 247.

(S. C. 5 P. W. R. 1912).

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 643 OF 1910.

November 16, 1911.

Present:—Mr Justice Kensington.

KHANU AND OTHERS—DEFENDANTS—APPELLANTS

versus

FATEH KHAN AND OTHERS—PLAINTIFFS—RESPONDENTS

Custom—Alienation—Sale of waste land—Absence of proof of actual necessity and of reckless waste—Objection by sons.

A *bona fide* sale of waste land of little use by a *Jat* some 20 miles away from his village, where he owns his culturable land, apparently for family expenses, indicating no extravagance, imprudence or reckless waste on the part of the vendor, is binding on his sons and they cannot contest its validity on the ground of there being no proof of actual necessity.

Second appeal from the order of the Divisional Judge, Jhelum Division, dated 1st March 1910, modifying that of the Munsif, 1st Class, Gujrat, dated 27th January 1908, decreeing plaintiffs' claim.

Mr *Nand Lal*, for the Appellants.

JUDGMENT.—The learned Divisional Judge appears to me to have made out a very good case for dismissal of plaintiffs' suit, and to have unnecessarily interfered with the sale transaction though he did so to a less extent than the first Court.

The sale in question executed in 1902 was of an outlying area of waste land situated some 20 miles from the village in which the vendor owns a large holding. These facts are admitted by the plaintiffs-respondents. It is now attacked by the vendor's four sons of

BHAOSINGH v. HAZARI.

whom two at least were adults at the time of sale. The vendor, being in want of ready money, sold this outlying tract which was of little value to him. The transaction was genuine enough and does not indicate extravagance or even imprudence. It was probably arranged by the father and sons with due regard to family needs at the time, and I can see no good reason for now picking holes in the details of consideration.

Plaintiffs admit that the family land in their own village (500 to 600 *bighas)* is practically all free of encumbrance, so there can have been no question of reckless waste by the father. The vendees bought in good faith and their title is not now open to any sort of reasonable attack.

The appeal is accepted. The decrees of both the lower Courts are set aside, and plaintiffs' suit is dismissed with costs to the defendants-vendees throughout. Counsel's fee (in this Court) Rs. 16.

Appeal accepted.

(F. C. 7 N. L. R. 179.)

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No 165 OF 1911.

September 23, 1911.

Present:—Mr. Batten, A. J. C.

BHAOSINGH—APPELLANT

versus

HAZARI—RESPONDENTS.

Specific Relief Act (I of 1877), ss. 52, 54—Injunction—Person building on other's land in spite of protest—Pecuniary compensation—Adequate relief.

Where a person builds on another person's property against his will and in spite of his protest, pecuniary compensation cannot be regarded as adequate relief for the invasion. In such a case, the owner is entitled to an injunction.

Jethalal Hirachand v. *Lalbhai Dalpatbhai*, 6 Bom. L. R. 86; 28 B. 248, followed.

Goodson v *Richardson*, L. R. 9 Ch. 221; 43 L. J. Ch. 790; 30 L. T. 142; 22 W. R. 337, relied upon.

Tituram Mukerjee v. *Cohen*, L. R. 32 I. A. 185; 33 C. 203; 2 C. L. J. 408; 9 C. W. N. 1073; 15 M. L. J. 379; 7 Bom. L. R. 920. 3 A. L. J. 59 and *Behari Lal* v. *Sheo Lal*, 3 N. L. R. 114, distinguished.

Appeal against the decree of the District Judge, Jubbulpore, dated 9th January 1911, confirming the decree of the Subordinate Judge, Jubbulpore, dated the 9th August 1910.

Mr. *J. C. Ghose*, for the Appellants.

The Hon'ble Mr. *M. B. Dadabhai* and Mr. *M. R. Dixit*, for the Respondents.

JUDGMENT.—Most of the grounds of appeal and the arguments in this Court are ingenious attempts to argue as questions of law what are plaintly questions of fact. After listening to the arguments, there is only one ground to which, as a Court of second appeal, I can pay any attention. It is the argument that it is a case for pecuniary compensation rather than for an injunction. But here the defendants built on plaintiffs' land against their will and in spite of their protests. The case is one similar to *Jethalal Hirachand* v. *Lalbhai Dalpatbhai* (1) and is absolutely dissimilar to the case in *Tituram Mukerjee* v. *Cohen* (2), and to the case in *Behari Lal* v. *Sheo Lal* (3). The principle on which the appellants wish the Court to act is, in the words of Batty, J., [in *Jethalal Hirachand* v. *Lalbhai Dalpatbhai* (1)], applicable either when mere rights of easement, ancient lights or the like, are invaded, or when the act complained of is done by a man on his own land, or when the act, if done on the land of the person complaining of it, has been encouraged by that person standing by during its accomplishment. In such cases, no doubt, injunction should not be granted where they inflict more injury on the person sought to be injuncted than advantage on the applicant, and the Courts, as pointed out by their Lordships of the Privy Council, in *Tituram Mukerjee* v. *Cohen* (2), will best use their discretion under section 52 of the Specific Relief Act by refusing an injunction. But when, as here, a man builds on another man's property against his will, the invasion is one, as pointed out by Chandavarkar, J., [*Jethalal Hirachand* v. *Lalbhai Dalpatbhai* (1)], who refers to the opinion expressed by Lord Selborne in the similar case of *Goodson* v. *Richardson* (4), where pecuniary compensation cannot be regarded as adequate relief. "Relief by way of compensation in such a case is tantamount to allowing a trespasser to purchase another man's property against that man's will." These considerations are peculiarly applicable in the present case where the parties are neighbours in a large town, and where it has been found that the defendants have deliberately extend-

(1) 6 Bom. L. R. 86; 28 B. 248.

(2) 32 I. A. 185; 33 C. 203; 2 C. L. J. 408; 9 C. W. N. 1073; 15 M. L. J. 379; 7 Bom. L. R. 920, 3 A. L. J. 59.

(3) 3 N. L. R. 114.

(4) L. R. 9 Ch. 221; 43 L. J. Ch. 790; 30 L. T. 142; 22 W. R. 337.

ed their building operations on to the plaintiffs' land, so as to reduce the area at the disposal of the plaintiffs for building or for use as courtyard.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(s. c. 2 P. W. R. 1912.)

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 183 OF 1911.

November 25, 1911.

Present:—Mr. Justice Kensington.

SUNDAR SINGH AND OTHERS—DEFENDANTS—PETITIONERS

versus

DEVA SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Succession—Owner dying without heir in a thulla *or* patti *of a village—Other owners entitled to succeed—Waiver of claim.*

Where a proprietor dies leaving land in a *thulla* or *patti* of a village, and leaves no heir, the land should pass to the various branches of the owners in the *thulla* or *patti*.

The mere fact that members of one branch did not formally join in an appeal connected with mutation proceedings does not show that they have given up their claim.

Petition, under section 70 (*a*) and (*b*) of Act XVIII of 1884 as amended by Act XXV of 1899, for revision of the order of the Divisional Judge, Ludhiana, dated the 3rd November 1910, affirming that of the Munsif, 1st class, Ludhiana, dated the 13th June, 1910, decreeing plaintiffs' claim.

Rai Sahib Pandit *Sheo Narain*, for the Petitioners.

Mr. *N. O. Mehra*, for the Respondents.

JUDGMENT.—The two Revisions Nos. 183 and 229 may be disposed of by one order. They are brought by two sets of defendants against the plaintiffs, to whom the lower Courts have given a decree. The judgments of the lower Courts are not as clear as they might be, but after going into the facts at some length, I have no difficulty in finding that the decree in plaintiffs' favour should stand.

The land in dispute is about 90 *bighas*, last owned by one *Musammat* Kahno who died on the 30th July 1908. The plaintiffs have been given a decree for one-fourth of the holding subject to the liability for one-fourth of an outstanding mortgage. *Musammat* Kahno represented the stock of Baghela.

On the death of *Musammat* Kahno, claims were put forward by various persons to succeed to her land. These were investigated in prolonged mutation proceedings and eventually the Settlement Officer on the 25th March, 1909, decided that the holding should pass to certain branches of *Sindhu Jats* within the *Thulla* Diwan Singh in three shares. He observed that there was a fourth branch representing the stock of one Tatariya, which he understood to be making no claim. The plaintiffs represent Tatariya's branch and they came into Court with a claim for their one-fourth as against all the persons to whom the Settlement Officers granted mutation in three shares.

Various other points have been raised in the course of the suit with the object of showing that certain of the defendants are entitled to succeed *Musammat* Kahno as heirs by relationship, but it has been rightly held that no such relationship has been established. In default of heirs by relationship, the conclusion seems to me quite correct that the land should pass to the various branches of the *Sindhu Jats* within the *Thulla*.

Looking to the pedigree table of the village, I cannot find that there is any real reason why Tatariya's branch, represented by plaintiffs, should be excluded from their share. There is nothing to show why the Settlement Officer thought that this branch made no claim, unless it was that they did not formally join in the appeal to him on mutation proceedings, and I can find nothing wrong in the decree of the lower Courts. The revisions are accordingly dismissed, whether they be treated under clause (*a*) or clause (*b*) of section 70 (1) of the Punjab Courts Act. The plaintiffs' claim appears to me unanswerable and the defendants will pay the costs of the plaintiffs in this Court.

Revision dismissed.

DEVIDAS v. RAMLAL.

(s. c. 7 N. L. R. 190.)

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 16-B OF 1911.

October 26, 1911.

Present:—Mr. Batten A. J. C.

DEVIDAS—APPLICANT

versus

RAMLAL—OPPOSITE PARTY.

Valuation of suit—Suit for declaration of invalidity of mortgage-deed—Consequential prayer for cancellation of deed and injunction—Amount of liability under deed—Court-fee—Jurisdiction—Court Fees Act (VII of 1870), s. 7 IV (c) and (d)—Suits Valuation Act (VII of 1887), s. 8.

Where a minor sues for a declaration that a mortgage deed executed in his name by his guardian is invalid against him and further prays for cancellation of the deed and for a permanent injunction to restrain the defendant from enforcing the terms of the deed, the value of the suit for purposes of Court-fees and jurisdiction is the amount of liability under the deed, as stated in the plaint. The plaintiff cannot, in such a case, be allowed to fix a lower and arbitrary value for purposes of Court-fee computation and jurisdiction.

Musammat Bibi Umatul Batul v. *Musammat Nanji Koer*, 11 C. W. N. 705; 6 C. L. J. 427, followed.

Revision against the order of the Additional District Judge, West Berar, Akola, dated the 30th September 1910, affirming that of the Junior Munsif, Akola, dated the 2nd March 1910.

Mr. *Ramdas Chobildas*, for the Applicants.

Mr. *G. L. Subhedar*, for the Non-applicant.

JUDGMENT.—The only point for decision is whether the Munsif was right in considering that he had no jurisdiction to entertain the suit and in returning the plaint for presentation to the proper Court. The Munsif's view was upheld in appeal by the District Judge. The plaintiffs apply in revision. The plaintiffs, minors, through their next friend allege in the plaint that in a suit filed against them by the defendant in which they were represented by their mother as guardian *ad litem*, their mother compromised the case by executing a mortgage-deed for Rs. 4,950 encumbering the plaintiffs' estate. Three reliefs are asked for in the plaint—

(1) a declaration that the deed is invalid as against the minors,

(2) cancellation of the deed,

(3) a permanent injunction to restrain the defendant from enforcing the terms of the deed.

In the plaint, the first two reliefs are grouped together and valued at Rs. 5 for purposes both of Court-fee and jurisdiction and the third relief is valued at Rs. 5 for both purposes. The total value for both purposes is given as Rs. 10 and the plaint bears a Court-fee stamp of 12 annas, *ad valorem* on Rs. 10 according to Article 1, Schedule I of the Court Fees Act.

The suit as brought is covered by section 7 IV (*c*) and (*d*) of the Court Fees Act and under section 8 of the Suits Valuation Act, the value for the purposes of jurisdiction is the same as for the computation of Court-fees.

The question whether, if the deed is declared inoperative as against the plaintiffs, it is necessary to cancel it, need not be gone into, since, if it is not so cancelled, the consequential relief of a permanent injunction which is asked for is a proper relief to ask for, and in either case there is a prayer for consequential relief. The sole question is whether the consequential relief asked for, whether it takes the form of a cancellation of the deed or a permanent injunction against its being put in force, has been properly valued at Rs. 5. It is contended for the applicants that under section 7 IV of the Court Fees Act the plaintiff is entitled to state the amount at which he values the relief sought. So, no doubt, he is; but when, as here, the plaint itself contains, and necessarily contains, a statement of the real value of the relief sought, the question is whether the plaintiff can substitute for that real value an arbitrary value for purposes of Court-fee and jurisdiction. The plaintiffs' object, as stated by themselves, is to obtain freedom from liability to pay Rs. 4,950 on a mortgage-deed. They have, in my opinion, within the real meaning of section 7 IV, stated the amount at which they value the relief sought, and they cannot go on and state a lower and arbitrary value for purposes of Court-fee and jurisdiction. The whole question has been fully discussed in *Musammat Bibi Umatul Batul* v. *Musammat Nanji Koer* (1), in which the views of the Bombay, Allahabad and Madras High Courts have been considered and criticized. In that case, the plaintiff asked for an injunction to restrain the defendant from executing a mortgage decree for Rs. 10,000 under which the property

(1) 11 C. W. N. 705; 6 C. L. J. 427.

valued in the sale proclamation at Rs. 80,000 had been directed to be sold. The plaintiff valued the relief by way of injunction at Rs. 100. If the injunction was granted, the plaintiff escaped the liability to pay Rs. 10,000 which the defendant was entitled to recover under the decree. It was held that the value of the relief sought was the sum sought to be realized under the decree. In the present case, there is no decree, but there is nothing in the plaint to show that the liability under the mortgage-deed would, if the deed were valid against the plaintiffs, be less than Rs. 4,950, the sum named in the deed, and I am unable to distinguish in principle between a mortgage liability under a mortgage and one under a mortgage-decree. In the case cited, it was also held that in the circumstances the Court should determine the real value of the relief sought. I would rather say that when the real value of the relief sought has been actually stated by a plaintiff, he cannot state a lower value for purposes of Court-fee computation and of jurisdiction. I am of opinion that the view taken by the Munsif and by the District Judge was correct, and the application is dismissed with costs.

Application dismissed.

(s. c. 2 P. W. R. 1912 Rev.)

COURT OF THE FINANCIAL COMMISSIONER, PUNJAB.

REVENUE REVISION No. 112 OF 1910-11.

August 3, 1911.

Present:—The Hon'ble Mr. Maynard, Financial Commissioner.

LAHRI AND ANOTHER—DEFENDANTS—APPLICANTS.

versus

SHIV NATH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Kudhi Kamini *cess*—Biswadar's *liability to pay*—*Burden of proof*—*Custom*—*Revision.*

In the Rohtak District, a *biswadar*, whatever his caste, is not liable to pay the *Kudhi Kamini* cess.

There is no presumption of a custom in that District that a man becomes exempt from payment of the cess *only* when he has become the owner of the plot of ground on which his house stands.

Where a Collector assumes without proof the existence of such a custom the Financial Commissioner will interfere on the revision side.

Where certain *Sunars* became *biswadars* by purchase:

Held, that they were not liable to pay *Kudhi Kamini* cess.

The burden of proving that a *biswadar* should pay *Kudhi Kamini* lies on the *Lambardars.*

Petition for revision of the order of the Collector of Rohtak, dated 1st June 1910, upholding that of the Assistant Collector of the 1st Class, Rohtak, dated 5th April 1910, decreeing plaintiffs' claim.

FACTS.—The claim of the plaintiffs, *Lambardars* of *Mauza* Maina, in this case was for recovery of Rs. 5 on account of *Kudhi Kamini* cess for *rabbi* 1907 to *kharif* 1907. The defendants were *Sunars* who had purchased *biswadari* rights in 1906.

On 5th April 1910, the Revenue Court of 1st instance decreed plaintiffs' claim with costs against the defendants, notwithstanding their having obtained a declaratory decree from the Civil Court that they (defendants) were not liable to pay the cess *Kudhi Kamini.*

On 1st June 1910, the Collector dismissed the defendants' appeal.

On 12th April 1911, on application for revision by the defendants, the Commissioner of Delhi submitted the case to the Financial Commissioner under section 84 (3) of the Punjab Tenancy Act, XVI of 1887.

ORDER.—Raj Rup, plaintiff, is dead. No other *Lambardar* has been appointed in his place, and the right to sue survives only to the surviving plaintiffs. The case, therefore, proceeds.

I have heard Lala Dwarka Parshad for the applicants and also Shiv Nath and Lalji, respondents.

In 1906, applicants purchased certain *biswadari* rights in the village. One deed is on the file, and the sale includes the vendors' rights in *shamilat.* The present claim refers to harvests subsequent to this purchase. The applicants have obtained from the District Judge a decree declaring that they are not liable to pay *Kudhi Kamini.* The entry in the *wajib-ul-arz* declares that the impost is due from "*Kamian Wa-ahl-Hirfa*". The general practice of the District, as gathered from the Settlement reports, appears to be that "*biswadars*" do not pay *Kudhi Kamini.* There is no trace of any distinction according to the caste of the *biswadar* or according to the date of his purchase or the amount of it.

The original Court put the burden of proof upon the applicants-defendants. This was

GADIYAM NARAYUDU *v.* MALLAVARAPU VENKAMMA.

wrong. The burden of proving that a *biswadar* should pay *Kudhi Kamini* rested upon the *lambardars*. The Collector in dealing with the appeal laid down, from his own knowledge, the custom that a man becomes exempt only when he has become the owner of the plot of ground on which his house stands. There is no other record, so far as I am aware, of a custom in this form, and, with all deference to Mr. Joseph's knowledge of the Rohtak District, I must hold that the plaintiffs ought to have been called upon to prove the existence and applicability of the custom described, and that the assumption of it, without proof, justifies interference upon the revision side.

Following the decision of the District Judge that the applicants-defendants are not liable to pay *Kudhi Kamini* since the date of their purchase of *biswadari* rights, I revise the orders of the Courts below, and dismiss the claim of the plaintiffs-respondents. The respondents will pay costs throughout.

Revision allowed.

(s. c. 11 M. L. T. 121.)

MADRAS HIGH COURT.

CIVIL APPEAL No. 37 OF 1888.

August 26, 1890.

Present:—Mr. Justice Muthusami Aiyar and Mr. Justice Best.

GADIYAM NARAYUDU—PLAINTIFF—APPELLANT

versus

MALLAVARAPU VENKAMMA—DEFENDANT—RESPONDENT.

Illatom, *what constitutes.*

It is not sufficient to constitute a person an *Illatom* that he lives in his father-in-law's house, assists his widow after her husband's death and is employed by her to pay the *sircar kist.*

To constitute a person an *Illatom*, a specific agreement is necessary.

Quære.—Whether a female could, after her husband's death, when her husband's daughter was already married, constitute that daughter's husband an *Illatom* son-in-law.

Appeal against the decree of the District Court of Nellore, in Original Suit No. 29 of 1886.

FACTS.—The suit, out which the appeal arose, was a suit for partition in which the plaintiff claimed a half share of the family properties on two grounds, one of which was that the defendant's daughter was given in marriage to the plaintiff in 1875, that the plaintiff was, since then, an *Illatom* in the defendant's family and had been and was managing the family affairs.

The plaintiff was the adopted son of one Jali Reddy. His natural mother and the defendant's husband were the children of one Kothandarami Reddy, a Pantakaru Reddy of Karumanchi in the Ongole Taluk. The plaintiff's adoptive father, Jali Reddy, had two sisters, one of whom was married to the said Kothandarami Reddy. The plaintiff's case was that after the death of Kothandarami Reddy's wife, when his son was still young, he asked the plaintiff's adoptive father's father, Papireddy, to join the family with all his property on the understanding that each family was to be entitled to a half share in the joint properties and that since then, the plaintiff's grandfather and father were living in his family and the plaintiff's and the defendant's families were enjoying the joint properties of both. The plaintiff was managing the family properties, paying the *sircar kist* and assisting the defendant generally in all the family affairs, but owing to quarrels having arisen since the plaintiff's wife's death, the plaintiff desired to have his share separated from that of the defendant. In the eighth para. of the plaint, it was said that, "in the Pantakapu caste, to which the plaintiff and the defendant belong, there is a custom that if two families united their property for whatever cause and remained joint for sometime and then desired division, the two families would be entitled to equal rights in all the moveable and immoveable properties existing at the time of division."

The defendant denied the arrangement referred to in the plaint as also the *Illatom* of the plaintiff and contended that the custom set up in the eighth para. of the plaint was false.

The District Judge found that the *Illatom* was proved but that under the *Illtom* custom, the *Illatom* son-in-law had no right to enforce a partition during life-time either of his father-in-law or his mother-in-law and he doubted whether an *Illatom* son-in-law who has had no children could claim such a share.

The District Judge said as follows:—

"*Illtom* was once defined by Reddy wit-

nesses before this Court to consist in *marrying a man to a daughter and keeping him in the house.* In this instance, it is not clear what the father-in-law of plaintiff did. He seems to have died within a year of the marriage of plaintiff and there is nothing to show that he associated plaintiff with himself in the management of property. But the evidence and the admission of defendant, as to her using plaintiff, seem to make it clear that plaintiff was kept in the house afterwards.

"It appears, therefore, that if the position of an *Illatom* had not been conceded to plaintiff definitely by the husband of defendant, it had been pratically allowed by the defendant herself. But the girl has died, and plaintiff, as appears from the evidence, demands her sister in marriage and, as her hand is refused him, demands half of his father-in-law's property. Now it has never been settled that an *Illatom* can demand a partition. Certainly, there is no sort of proof that an *Illatom* has ever done so successfully from his father-in-law or mother-in-law except under an agreement, oral or written. I consider this fact fatal to the claim of plaintiff. But there is a further point.

"The position of *Illatom* has its duties and obligations. He is not like an adopted son taken into the family completely; for he does not forfeit his right to share in the property of his own faimly. He is simply taken in, in order that the property of the family which receives him may be kept in the family and go to the children of its daughter either alone or in conjunction with sons. In all the cases adduced in which *Illatoms* have, apart from special agreement, been allowed shares, they have had children.

"Here plaintiff's wife has died and he has no children. Can he claim to be allowed to go out of the family and take a portion of its property with him? There must have been cases like his before, but not a witness can speak to a case in which such claim was allowed. On the other hand, plaintiff's 3rd witness mentions a case in his village where an *Illatom*, whose wife died, was turned out of his father-in-law's house without a share.

"The contention that there was a custom in the Pantakapu caste of two families living together sharing the properties equally, was also found against, and as would be seen from their Lordships' judgment was not put forward in the appeal."

The District Judge dismissed the suit and the plaintiff appealed.

Mr. *M. O. Parthasarathy Iyengar*, for the Appellant.

Mr. *N. Subramaniam*, for the Respondent.

JUDGMENT.

BEST, J.—The point taken by Mr. Parthasarathy Aiyengar, on behalf of the appellant at the hearing of the appeal, is that as the District Judge has found the issue as to *Illatom* in favour of plaintiff, he ought to have decreed to plaintiff the moiety of the property claimed by him, notwithstanding the findings adverse to plaintiff on the other issues.

The Judge's finding as to *Illatom* is that "if the postion of an *Illatom* had not been conceded to plaintiff definitely by the husband of defendant, it had been practically allowed by defendant herself." The reason given for this finding is that the evidence and the admission of the defendant as to her using plaintiff seem to make it clear that plaintiff was kept in the house after the defendant's husband's death, which took place in the year in which plaintiff married her daughter. Defendant's admission as to her usage of the plaintiff is that as she "did not come out being a female", she sent" for her son-in-law (who, she says, lived in her own father's house) and was paying money to the Sircar through him."

Even assuming that plaintiff did live in defendant's house and assisted the defendant after her husband's death, this circumstance would not, I think, be sufficient to constitute him an *Illatom.* There must have been some specific agreement as to his being made an *Illatom* son-in-law, and plaintiff has tried to prove such agreement, but I concur with the District Judge in disblieving the witnesses who deposed thereto for the reasons given by the Judge, which need not be repeated here. The District Judge has found it not proved that plaintiff's father-in-law "associated plaintiff with himself in the management of the property," and it is extremely doubtful if defendant (a female) could, after her husband's death and when plaintiff had already been married to that husband's daughter (defendant's step-daughter), constitute plaintiff an *Illatom* son in-law. But be this as it may, I am unable to agree with the District Judge in thinking that the mere fact of plaintiff being allowed to live in his father-

in-law's house (where it appears plaintiff's adoptive father Jali Reddy was also living at the time) and defendant's employing plaintiff to pay the *kist* after her husband's death are sufficient to constitute the plaintiff an *Illatom* son-in-law. Further, from the plaint it is seen that it was not as an *Illatom* son-in-law that plaintiff claimed a moiety of the plaint property. Had such been the case, there was no reason why he should have confined his claim to a moiety merely instead of the whole, for even according to his own witnesses the agreement at the time of the plaintiff's marriage to defendant's husband's daughter was that in the absence of male issue of the father-in-law, plaintiff was to have the whole property. Plaintiff has, it is true, also stated in the plaint that from the time of his marriage he had *Illatom* rights in the defendant's family. But that was not the case on which he rested his claim. The case was an alleged union between the family of plaintiff's adoptive father Jali Reddy, and defendant's husband's father Kodandarama Reddy. It is stated in para . 1 of the plaint that Kodandarama Reddy being then a "single man" (*i. e.*, I presume a widower as he had a son Venkatasami to whom defendant was subsequently married) and "as the defendant's husband Venkatasami was young, he was not able to manage the cultivation work, etc., he, therefore, asked the plaintiff's adoptive father and the latter's father Papireddy to come and join his family, and settled that the moveable and immoveable property of both should be united and remain joint, and that, as each had a son, they should divide the property equally in the event of division taking place at any future time." It is then stated that the two families accordingly became united and joined their property in one common stock. This is in fact the basis on which the plaintiff brought the present suit and confined his claim to a moiety of the property. It is, however, seen from the evidence of some of plaintiff's own witnesses that Papireddy did not at any time live in defendant's husband's house, and that it was only after Papireddy's death that plaintiff's adoptive father, Jali Reddy, went to live with his relation Kodandarama Reddy, and as to the alleged mixture of the properties of the two families, the fact proved by the Karnams (one examined as plaintiff's 4th witness and another as defendant's 9th witness) that the *patta* for Jali Reddi's land stood in his name and on his death was transferred to the name of his widow and subsequently to that of plaintiff, is inconsistent with the alleged union of the two families and mixture of their properties.

I agree with the lower Court in finding that there was no such union as alleged in the plaint, and I also find that plaintiff has failed to prove that he has any *Illatom* right in the property belonging to defendant's husband.

Defendant has in her written statement admitted plaintiff's right to the lands Nos. 3 and 4 of Schedule A, and defendant's witnesses Nos. 1, 2 and 4 deposed to the silver girdle and gold earring, items 54 and 58 of Schedule D, being the property of the plaintiff. He appears to be entitled to none other of the plaint property.

The lower Court's decree will be modified by declaring plaintiff entitled to the items mentioned in the last para. and as to the rest of the property claimed, the lower Court's decree must be affirmed and this appeal dismissed with costs.

MUTHUSAMAY AIYAR J.—I concur.

Appeal dismissed.

(s. c. 16 C. W. N. 289.)

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL SUIT No. 1129 OF 1911.

December 6, 1911.

Present:—Mr. Justice Chitty.

N. C. SIRCAR AND SONS—PLAINTIFFS—PETITIONERS

versus

THE BARABONI COAL CONCERN, LD. —DEFENDANTS—OPPOSITE PARTY.

Specific Relief Act (I of 1877), ss. 21, 56, 57—Contract of service as managing agent to Limited Company—Enforcement of contract—Indirectly obtaining relief—Injunction not to dispense with services of managing agents—Master and servant—Contract of service—Specific performance.

A servant cannot enforce a positive contract of service. Nor can he obtain an injunction to restrain the master from dispensing with his services except in a given manner or until after a stated period.

Therfore, where the Managing Agents of a Limited Company prayed for an injunction upon the Company to restrain them from passing, at any meeting to be held under a certain notice issued by the Company, any resolution purporting to dispense with the services of the petitioners as Managing Agents of the

Company, and from interfering with the conduct of the business of the Company by the Managing Agents, on the ground that their services could not be dispensed with otherwise than by a certain special resolution as mentioned in the contract between the parties:

Held, that such an injunction could not be granted, for the result would be to continue their services, and so in effect to specifically enforce the contract, that the Company could dismiss the Managing Agents who were the Company's servants whom they had appointed, and if they dismissed the Managing Agents wrongfully, the latter would be entitled to sue for damages.

Original suit and application for temporary injunction by the plaintiffs against the defendants. A Rule was issued to show cause why the injunction should not issue.

Messrs. *J. E. Bagram* and *H. Knight*, instructed by Messrs. *Pugh & Co.*, Solicitors, for the Plaintiff, appeared in support of the Rule.

Mr. *L. P. E. Pugh*, instructed by Messrs. *Orr, Dignam & Co.*, Solicitors, for the Defendant Company, appeared to show cause.

JUDGMENT.—This suit was filed on the 22nd November by the firm of N. C. Sircar & Sons against the Baraboni Coal Concern Ld. for (1) a declaration that the services of the plaintiff firm as Managing Agents of the defendant Company cannot be dispensed with otherwise than by a special resolution passed at an extraordinary general meeting of the Company specially convened for that purpose of which meeting not less than 12 calendar months' notice shall be given and at which persons holding not less than five-sixths of the issued capital for the time being of the Company shall be present personally or by proxy or attorney; (2) for a declaration that it is not competent to the defendant Company to dispense with the services of the plaintiff firm as Managing Agents by any resolution passed at any meeting held under or in pursuance of the notice above referred to and dated the 17th day of November 1911, and (3) for an injunction that the defendant Company be restrained by injunction from passing at any meeting to be held under or in pursuance of the said notice of the 17th day of November 1911, any resolution purporting to dispense with the services of the plaintiff firm as Managing Agents of the defendant Company, and from interfering with the conduct of the business of the Company by the plaintiff firm as its Managing Agents, otherwise than in accordance with the provisions contained in the Articles of Association of the Company and the said agreement of the 29th day of May 1911. On the same day, Counsel for the plaintiffs applied for and obtained a Rule for a temporary injunction in much the same terms. I suggested, when the matter came on for argument, that the Rule might by arrangement stand over till the hearing, and the proposed meeting of the Company be adjourned, the hearing being expedited. This suggestion, however, was not accepted and I must give my decision on the Rule. The matter has been argued at great length on either side, but I propose to deal with it as briefly as possible. I do not wish to enter into the merits of the case itself, but it is impossible to altogether avoid doing so from the close connection of the Rule with the suit and the similarity of the reliefs claimed. The only question now before me is whether the Company should be restrained pending the disposal of the suit from passing a resolution purporting to dispense with the services of the plaintiffs' firm or from interfering with the conduct of the business of the Company by the plaintiffs' firm otherwise than in accordance with the Articles of Association and the agreement of the 29th May 1907. A large number of authorities were referred to, which deal with the removal of a Director by a Company, where the Articles of Association do not contain any provision for such removal. It was pointed out by the petitioners' Counsel that although in the case of the defendant Company, Article 99 provides for the appointment of Managing Agents, neither it nor any other Article provides for their removal. This is, no doubt, the case, but I must not be taken to accept as correct the proposition put forward at the Bar that the Company could not, therefore, dismiss any Managing Agents whom they had appointed. I am of opinion that the cases cited have little or no bearing on the present case. The position of a Director is very different from that of Managing Agents, who are merely servants of the Company. Further, in this case the plaintiffs' claim is based on the agreement of 29th May 1907, and by that they must stand or fall. It is true that the Company entered into that agreement purporting to act under the authority of Article 99, but so far as the plaintiffs are concerned, their contract is contained in the agreement alone. If the learned Counsel's

argument as to the Articles of Association was sound, it would follow that the Company had no power to make the stipulation as to the removal contained in the agreement, or to act upon it. The plaintiffs, however, cannot, of course, plead that. It was conceded that if it were a simple case of wrongful dismissal, the plaintiffs would have no case on their present plaint as framed. Their only remedy would be by an action for damages for wrongful dismissal. It was argued, however, that the threatened resolution would not amount to a dismissal. I am unable to fully appreciate the learned Counsel's argument on this point. At one time he said it would not be a dismissal because it would not be the act of the Company. If that were so, the Company would not be the appropriate defendants in this suit. The plainiffs ought to sue the individual or individuals by whose act they would suffer or had suffered damage. The Company clearly can only be sued in respect of an act done or purporting to be done by itself. If the act threatend the passing of the resolution did not operate as a dismissal, the plaintiffs would have no cause of action against the Company for wrongful dismissal. If it caused damage to the plaintiffs in some other way, the correct course would be for them to sue the Company on that cause of action, if any were so created. It was perhaps necessary for Counsel to frame his argument in some such way as this, because if the case be one of a contract for service, the plaintiffs are met by the combined effect of section 21 and 56 of the Specific Relief Act. They could not enforce the contract of service against the Company, nor could they by injunction indirectly obtain the relief prescribed by section 21. I cannot accede to the argument of their Counsel that section 57 would help them. If they could not enforce the positive contract of service, they clearly could not obtain an injunction to restrain the Company from dispensing with their services, except in a given manner, or until after a stated period; for the result of this would be to continue their services, and so in effect to specifically enforce the contract. It would be a very strong measure to restrain the body of share-holders from expressing their opinion at a meeting duly convened. It is the only way they have of interfering in the matters of the Company. On this point, the remarks of the Lords Justices in *Isle of Wight Railway Co.* v. *Tahourdin* (1) are very pertinent, though the question in that case was as to the removal of Directors, not the dismissal of servants. It is by no means certain that the resolution, of which the plaintiffs are so apprehensive, will be passed. It is not certain what will be its effect. I do not desire to go into the merits of the case. It is conceded on both sides that there is considerable friction with regard to the management of the Company, and in the minds of some of the share-holders, considerable dissatisfaction with the conduct of the plaintiffs as Managing Agents. It is expedient that the matter should be ventilated, and it cannot be better ventilated than at a meeting of the share-holders. If the proposed resolution be not passed, the plaintiffs will have no cause of complaint against the Company. If it be passed, it remains to be seen what will be its effect. If the plaintiffs are thereby dismissed, they will have their remedy. If they are not, but they thereby suffer some other damage, they will also have their remedy. It was said by their Counsel that in this last case the damages would be too remote to support a claim in a suit for damages. If that be so, it is clear that I ought not to restrain by injunction an act which would have such a shadowy result.

For these reasons, I am of opinion that the present application must fail. The Rule is accordingly discharged with costs.

Rule discharged.

(1) 25 Ch. D. 320; 53 L. J. Ch. 353; 50 L. T. 132; 32 W. R. 297.

[S. C. 11 M. L. T. 124 (1921) 1 M. W. N. 178]

MADRAS HIGH COURT.

CIVIL APPEAL No. 179 OF 1887.

September 13, 1889.

Present:—Sir Arthur J. H. Collins, KT., Chief Justice, and Mr. Justice Parker.

ALLAREDDI SUBBAMMA—PLAINTIFF—APPELLANT

versus

NALLAPAREDDI ADI LAKSHAMMA AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Joint family—Two families living together without Illatom *or other family arrangement, rights of—Equal rights claimed by custom—Validity of custom—Admissions, effect of, when made in ignorance of legal rights.*

There is no custom in the District of Nellore that when two families live together and there are inter-

ALLAREDDI SUBBAMMA *v.* NALLAPAREDDI.

marriages amongst the members thereof, the two families have equal rights in the properties which they hold and enjoy.

Such a custom may be legal if it originated in an arrangement of the parties concerned or is otherwise dependent on family arrangements.

A custom to be effective must be a territorial custom and isolated cases are of little value unless it be proved that the two families living together have been united together on equal terms.

An admission of the defendant in favour of the plaintiff in ignorance of her legal rights will not bind her if, as a matter of fact, the plaintiff has no legal claim.

Appeal against the decree of the District Court of Nellore in Original Suit No. 6 of 1886.

FACTS.—The suit out of which this appeal arose was brought by the plaintiff, Allareddi Subbamma, for partition and separate possession of a half share of the family properties in the possession of the first defendant. The plaint alleged that the Allareddi family, to which the plaintiff belonged, and the Nallappareddi family, of which the first defendant was a representative, had been living together from time immemorial, that each family had equal rights in the joint family properties of both, that the debt bonds and other securities belonging to the family stood in the name of the first defendant's husband, Venkatarami Reddi, who was the manager of the joint family, that after his death in 1875, a certificate of heirship was granted to his widow and the plaintiff's son who were then jointly entitled to the family properties, that subsequent to the certificate, documents to the extent of Rs. 10,000 were renewed in plaintiff's son's name but that he died shortly thereafter in September 1879 and that subsequent to his death, a certificate of heirship was applied for in the joint names of the plaintiff and the first defendant but the certificats was granted to the first defendant alone without opposition, she being the senior member of the two families, that since then quarrels having arisen between the parties, the first defendant was dealing with the properties as if they were her own and had mortgaged portions of them with the other defendants and that the plaintiff was, therefore, entitled to a partition of her half share.

The defendants resisted the suit on the ground that the whole of the family properties belonged to the Nallapareddi family of which the first defendant was a member and that the Allareddi family had no rights thereto. Referring to the succession certificate, the 1st defendant explained the plaintiff's son having joined her in obtaining it on the ground that she had a daughter whom she intended to give in marriage to the plaintiff's son.

Under the directions of the Court, the plaintiff filed a genealogical tree showing the relationship between the plaintiff's family and the defendant's family and the various intermarriages which had taken place between the respective members thereof. As to the two families having lived together and as to the share that the plaintiff claimed in consequence of such joint living, her case was in her reply statement set forth as follows:—

"There are cases among Hindus, and more especially in the Pantakapu caste to which the parties belong, where a rich person marrying a woman brought into his family his wife's brothers, if they happen to be poor, entrusted them with the management of his household and his cultivation and thus for a few generations they live joint with intermarriages in the two families but that when they separated, they separated dividing their property into two equal halves. Those cases, though not judicially noticed, are not few in number and the practice can be established by evidence. When two families jointly lived and worked for some generations throwing their gains and labour into the joint stock, it may be fairly presumed, in the absence of any express agreement to the contrary, that they intended to live in joint tenancy and to share equally the family property when a separation was needed."

Amongst the issues raised, the most important was the first issue,—

"Whether the family of the plaintiff and the first defendant, *viz.*, the Allareddi and the Nallapareddi families, have been from time immemorial living together in joint enjoyment of the property in suit and if so, whether the plaintiff, as the admitted present representative of the Allareddi family, is entitled to claim partition of one-half or other share of such property."

The District Judge found that the first defendant's family was the original family and that the Allareddi family subsequently joined this family. He also held that the

Allareddi family brought little or no property into the defendant's family, but that the two familes lived together and jointly enjoyed all the properties. He found that the plaintiff's son was associated with the first defendant in the succession certificate because the latter's daughter was to be given in marriage to the former and he was intended to be taken as *Illatom* into the Nallapareddi family but that the *Illatom* not having been perfected by marriage, no rights to the properties vested in the plaintiff's son or his representatives.

Speaking of the custom set up of two families living together and each family thereby acquiring equal rights in the family properties, the District Judge said:—

"Numerous witnesses of the Pantakapu class were examined for the plaintiff in the endeavour to establish a sort of general custom among them that when two families live together, each is entitled to a half share in the property. In every case there had been *Illatom* or special arrangement or it could not be said that each family had not contributed something to the general stock."

The District Judge dismissed the suit and the plaintiff appealed.

The Hon'ble Sir *V. Bashyam Iyengar* and *C. Ramachandra Rao*, for the Appellant.

Messrs. *H. G. Wedderburn*, *K. P. Sankara Menon* and Mr. *N. Subramaniam*, for the Respondents.

JUDGMENT.—The plaintiff's claim is based upon an allegation that her husband's family, the Allareddi family, has for a long time been joint with the family of the 1st defendant's husband, the Nallapareddi family, having equal rights in all their property.

The evidence shows that there have been no less than three intermarriages between the Allareddi and Nallapareddi families. It is admitted that whatever landed property there is in suit stands in the name of the Nallapareddi family, and the appellant's Pleader is not able to show that any property stands in the name of the Allareddi family. When Venkatramareddi, No. 8 in the pedigree, died in 1875, the male members of the Nallapareddi family became extinct, and it was not unnatural that plaintiff's son, Subbareddy, who was to be married to the only daughter of Venkataramareddi, should, by arrangement, be allowed to take out the heirship certificate. In the petition, he is described as the undivided nephew and son of Venkataramareddi's senior uncle's daughter, which might fairly enough represent the relationship though it was not co-parcenership according to Hindu Law. That Subbareddi prosecuted and defended suits after getting the heirship certificate proves nothing, as it was most probably with that object (he being the only male left in the house) that the arrangement was made.

Subbareddi died in 1879 unmarried and when he died, the two widow ladies, undoubtedly, represented themselves as joint in the petition which they put in asking for an heirship certificate. The certificate was, as a matter of fact, given to the 1st defendant only without opposition, she representing the Nallapareddi family in whose name the landed property stood. Had there been any co-parcenership and had Subbareddi (plaintiff's son) represented the last male holder, it seems to us very improbable that the plaintiff would have agreed to the certificate of heirship being issued in the name of the 1st defendant only.

Turning to the oral evidence, a good many witnesses were called to prove that a custom similar to that under which the plaintiff claimed prevails in the Pantakapu caste in the Nellore District. It was admitted that the evidence is not sufficient to establish a territorial custom, but it is urged that the facts of the case and the history of the two families and the conduct of the parties are sufficient to show that these families are in a similar position as those other families with regard to which evidence was called, and it is contended that from this state of facts it is right to infer an arrangement and trace it to a legal origin by virtue of which the plaintiff would be entitled to half the property. From the evidence which has been brought, it seems clear that all the witnesses, in cases where a similar custom has been spoken of, have traced that custom to an arrangement of the parties, and that similar customs, where dependent upon family arrangements, may be held legal as may be inferred from the decisions in *Challa Papi Reddi* v. *Challa Koti Reddi* (1) and *Kanumantamma* v. *Rami Reddi* (2). In

(1) 7 M. H. C. R. 125.
(2) 4 M. 272.

our opinion, however, isolated cases are of little value unless it be proved that these two families have been united together on equal terms. There is nothing to show that any member of the Allareddi family has ever managed any of the lands which stand in the name of the Nallapareddi family except Subbareddi, and he only after the death of the last male owner in the Nallapareddi family. There is, however, evidence on record to show why it was that Subbareddi, the father of the plaintiff's husband, did join the Nallapareddi family and that is given by the evidence of the plaintiff's 1st witness and of the 1st defendant's 5th witness both of whom stated that he was taken into the Nallapareddi family on account of his poverty. This was not unnatural as the Nallapareddi family was wealthy. Subbareddi's mother had been a member of that family and his two children had both married into it, his son having married the daughter of Gangireddi and his daughter having married Venkataramareddi. The arrangement, if regarded as a union, was, therefore, unequal and though plaintiff's son, if he had lived to marry Venkataramareddi's daughter, would virtually have got the whole estate, he had no legal right to claim the half. There is nothing really, therefore, to prove the plaintiff's claim except the fact that these two ladies stated they were joint when making their applications for certificate of heirship to Subbareddy in 1879. They were at that time living together and undoubtedly had always done so. But an admission of the 1st defendant in ignorance of her legal rights will not bind her, if, as a matter of fact, the plaintiff had no legal claim. The same remark will apply to the admission made by the 1st defendant in Exhibit A XXIV, the deed executed on the 20th September 1882.

Being of opinion that the plaintiff has failed to prove the basis of her claim, we must dismiss the appeal with costs. The costs of the respondents other than the 1st will be proportionate to their interest. Memo. of objections is not pressed.

Appeal dismissed.

(S. C. 3 P. R. 1912.)

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 591 OF 1910.

June 6, 1911.

Present:—Mr. Justice Rattigan and Mr. Justice Chevis.

BADRI DAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SANTA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Right to sue—Hindu family trading firm—Contract with managing members—Right of managing members to sue alone on contract—Parties—Other members of firm not necessary parties to suit.

The managing members of a Hindu family trading firm, with whom a contract is made, are entitled to sue to recover damages or compensation for breach of such contract. It is not necessary for all the partners in the trade business to join in the suit. The suit by the managing members is maintainable despite the non-joinder of a member of the firm who, though interested in the result of the suit, has no part in the management of the business and is not one of the partners with whom the contract was made.

Kishen Prasad v. *Har Narain Singh*, 15 C. W. N. 321 (P. C.); 8 A. L. J. 256; 9 M. L. T. 343; 13 C. L. J. 345; 21 M. L. J. 378; 13 Bom. L. R. 359; 33 A. 272; (1911); 2. M. W. N. 395; 9 Ind. Cas. 739, followed.

Second appeal from the order of the Divisional Judge, Ferozepore Division, dated 11th April 1910.

Lala *Dwarka Das*, for the Appellants.

Rai Sahib Pundit *Sheo Narain*, for the Respondents.

JUDGMENT.—One Saudagar Mal had three sons—Behari Lal, Badri Das and Jagan Nath, and the latter carried on an ancestral business under the name of Saudagar Mal-Behari Lal. Saudagar Mal died some time ago and Behari Lal also died some time prior to the institution of the present suit.

On the 14th January 1909, a suit was instituted in the names of Badri Das, Jagan Nath and *Musammat* Jarao (the widow of Behari Lal) for recovery of the sum of Rs. 1,766-7-6 from defendant.

In the plaint *Musammat* Jarao was described as a minor with Badri Das as her next friend.

On the 9th February 1909, defendant objected that *Musammat* Jarao was of full age and Badri Das admitted that the objection was correct. Badri Das thereupon obtained a power-of-attorney from *Musammat* Jarao, and the latter was made a co-plaintiff in her own right on the 19th February 1909. The first Court held that the suit was within time and decreed the claim, but the learned

NGA PAW E v. NGA SIN.

Divisional Judge, upon defendant's appeal, was of opinion that *Musammat* Jarao, who was a necessary party to the suit, could not be regarded as a plaintiff until the 19th February 1909 when she was brought on the record as a co plaintiff in her own right, and that as the suit was barred as regards any claim by her on the latter date, it must be taken to be barred as regards all the co-promisees and proprietors of the firm. He accordingly dismissed the suit *in toto*, but as the case was a hard one for plaintiffs, he left the parties to bear their own costs.

Plaintiffs have preferred a further appeal to this Court.

Since the decision of the case in the lower Appellate Court, their Lordships of the Privy Council have, in *Kishen Parshad* v. *Har Narain Singh* (1), held that in cases like the present, it is not necessary for all the partners in a trade business to join in a suit, and that it is sufficient if the managing members, with whom the contract was made, sue to recover damages or compensation for breach of such contract.

In the present case, it is clear from a perusal of plaint that the claim is in substance and in fact for recovery of a sum of money due to the firm of Saudagar Mal-Behari Lal upon a balance struck by defendant in favour of Badri Das-Jagan Nath on the 25th January 1903. It is also obvious that plaintiffs were suing to recover the said sum on behalf of the firm and as the balance was struck in their favour, it was not necessary for them to implead as co-plaintiff the widow of their deceased brother, Behari Lal.

Mr. Sheo Narain admits that *Musammat* Jarao is, as representative of her husband, a member of the firm but contends that Badri Das and Jagan Nath were not in express terms suing as managing members for recovery of the present debt. It is true that they do not in express terms so describe themselves, but they were unquestionably suing to recover money on behalf of the firm. *Musammat* Jarao is, in a sense, a member of the firm, but it is highly unlikely that she was regarded as an active member, a fact which appears very clearly from the terms of the very balance upon which this suit is based. As we have pointed out, it is ostensibly in favour of Badri Das and Jagan Nath alone though all parties admit that *Musammat* Jarao is entitled to a share in the debt. *Musammat* Jarao, though interested in the claim, was therefore not a necessary party to the suit inasmuch as the contract upon which the claim is based (*i. e.*, the balance struck by defendant), was made with Badri Das and Jagan Nath. In the circumstances, the ruling of their Lordships to which we have referred is directly in point, and is authority for holding that the suit instituted by Badri Das and Jagan Nath is maintainable despite the non-joinder of *Musammat* Jarao, the other member of the firm, who, though interested in the result of the suit, had no part in the management of the business and was not one of the partners with whom the contract was made, even upon the assumption that *Musammat* Jarao was no party to the suit when instituted: it follows, therefore, that the claim by Badri Das and Jagan Nath was maintainable and as a result the mere fact that *Musammat* Jarao was not properly brought on the record until after the expiry of the period of limitation, cannot affect the right of the two managing brothers to sue for recovery of the debt.

Upon this ground alone the decree of the Divisional Judge must be set aside and we need, therefore, say nothing as to the other points urged before us by Mr. Dwarka Das in support of the appeal (*e.g.*, the effect of Order XXX, rule 1, Civil Procedure Code). We accordingly accept the appeal and remand the case under Order XLI, rule 23, to the Divisional Judge for determination of the appeal upon the merits. Court-fee to be refunded. Costs to abide the event.

Case remanded.

(1) 15 C. W. N. 321; 8 A. L. J. 256; 9 M. L. T. 343; 13 C. L. J. 345; 21 M. L. J. 378; 13 Bom. L. R. 359; 33 A. 272; (1911) 2 M. W. N. 395: 9 Ind. Cas. 739.

[s. c. U. B. R. (1911) I, 92.]

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL APPEAL No. 30 OF 1911.

June 21, 1911.

Present:—Mr. Eales, J. C.

NGA PAW E—APPELLANT

versus

NGA SIN—RESPONDENT.

Mortgage suit—Mortgagor only made defendant—Property sold previously to another person—Parties—Failure to implead—Purchaser—Mortgage-decree inoperative

NGA PAW E *v.* NGA SIN.

against purchaser—Purchaser appearing as witness in suit—Condonation—Estoppel.

Where a mortgagee is aware or has reason to believe, at the time of instituting a suit on his mortgage, that the property has already been sold to another person, and in spite of this knowledge or belief, fails to implead the purchaser as a party to the suit, the mortgage decree obtained against the mortgagor is inoperative as against the purchaser of the mortgaged property. The purchaser has a right to a declaration that the decree is inoperative against him.

The mere fact that the purchaser appeared as a witness in the mortgage suit, when he was not aware of the true nature of the suit, does not constitute a condonation by the purchaser of the omission to implead.

Mr. *H. M. Lutter*, for the Appellant.

Mr. *J. N. Basu*, for the Respondent.

JUDGMENT.—This is an appeal from the judgment and decree of the District Judge, Mandalay, in which the respondent, Maung Sin, was the plaintiff and the appellant the defendant.

The facts of the case are very fully set out in the judgment of the learned Judge of Mandalay. The judgment is very full, and has dealt *seriatim* with every point that was raised before him. The case was very fully argued by the learned Counsel on both sides.

On going over the lengthy proceedings in this case, I found that there was one point of grave importance which had been entirely overlooked hitherto by every one. The crucial point in this case is—Can the judgment and decree passed by the District Judge in favour of Paw E be upheld as establishing a right to sell the property in question? If it can be shown that the judgment and order is bad, the case must perforce fail as against Maung Sin.

The learned Counsel for the appellant fully saw this. In the course of his argument before me, he said—

"He (Nga Sin) was in fact the representative of the deceased Ma Myit, whose right he had acquired by purchase. He it was who should have been defendant in the suit. Was he not bound to intervene? The rightful defendant who should have defended the suit was not Po Sa, nor Ma Myit nor Ma Myit's heirs but Maung Sin, if only we (*i.e.*, Paw E, his client) had known Nga Sin was the owner."

Under Order XXXIV, Rule 1 of the Civil Procedure Code, and section 85 of the Transfer of Property Act, Maung Sin ought, of course, to have been adjoined as a defendant.

Paw E says he did not adjoin him as a defendant because he was not aware of his having purchased the land and house. He stated on oath, in the lower Court, that he "did not know of Maung Sin's having purchased the property till about 3 months" before Maung Sin brought the present suit, *i.e.*, till about the end of 1909 or beginning of 1910.

It is true that he also admitted before the Lower Court—

"I gave them permission to sell but only on condition I was paid at once. I said they could sell to Maung Sin."

On examining the files and papers in this voluminous record, I found that Maung Paw E, when he filed the suit against Po Sa before the District Court, Mandalay, on 7th January 1909, filed in the list of exhibits in proof of his claim (1) the mortgage-deed between him and Ma Myit and Po Sa, (2) a certified copy of an extract from the Official Town Lands Register, dated 1st December 1908, showing that Maung Sin was the owner both of the land and of the house thereon, and (3) a plan of the land. In the face of this, I cannot understand why Paw Sa, if he was really acting *bona fide*, did not adjoin Maung Sin as a defendant as he is obviously bound to do both under the provisions of section 85 of the Transfer of Property Act, which, although it is not yet extended to Upper Burma, I am bound to take into consideration, and still more so under Rule 1, Order XXXIV. The error appears to me to be most material. Indeed, all that the learned Counsel for Maung Paw E has said on this point is obviously correct. How can the suit brought against Po Sa on the mortgage-deed affect the property when the rights of the purchaser, who obviously has at least the right of redemption, are ignored? It seems to me that Maung Sin is bound to succeed in his suit, and that the appellant-defendant has no right under the decree obtained by him in Suit No. 6 of 1909 to proceed against Maung Sin's right over the property and that that decree in no wise affects Maung Sin's rights over that property, simply because, on the face of it, Paw E has failed to comply with the plain and obviously necessary provisions of the law, in omitting to adjoin him as defendant in the suit. It is quite

clear that Maung Sin is entitled to the relief prayed for, unless the appellant-defendant can satisfactorily explain why he did not adjoin Maung Sin, or unless he can show that Maung Sin was well aware of it and condoned the omission.

I accordingly allowed the learned Advocate for the appellant the opportunity of meeting and explaining, if possible, this new and hitherto unnoticed piece of evidence which *prima facie* would seem to be fatal to his case.

The learned Advocate appeared at a further hearing, and he admitted that the document in question was filed by his client, but he urged (1) that his client was not aware that he, Maung Sin, mentioned in this document as owner, was the Maung Sin referred to by Ma Myit;

(2) that Maung Sin is a common Burmese name;

(3) that the register is a Government register which is notoriously inaccurate;

(4) that even if Paw E is held responsible for the omission, his omission was afterwards condoned by the action of Maung Sin, and that Maung Sin is still estopped by his not taking action to have himself adjoined as defendant.

Mr. Basu for the respondent frankly admitted that he had not noticed the document in question which had been filed in the previous suit. He urged that the idea, that Paw E did not know, or could not have ascertained the identity of Maung Sin with the man Ma Myit had mentioned as a probable purchaser, was absurd, and even if the identity was not established, still in law, appellant-defendant was bound to adjoin Maung Sin whoever Maung Sin was.

As regards the alleged inaccuracy of the extract, the best answer is, that it turns out to be accurate, and secondly, that as he Paw E himself filed it, is not for him now to throw doubt on its accuracy, at any rate it should have "put Maung Paw E on inquiry," as, whoever the Maung Sin was, the owner ought to have been adjoined as defendant to the suit under rule I, Order XXXIV.

Mr. Basu urged that in the circumstances his client knew nothing really of the case and how it was going on, as though he was called as a witness the case never came to trial, but was compromised, and instead of his claim for Rs. 800 being insisted on, Paw E was satisfied with a decree for Rs. 590. Hence Maung Sin had no chance of objecting till he heard the property was being sold.

I have heard the Counsel and perused the evidence and considered the matter.

It appears to me that Paw E must have known that Maung Sin had bought the property before he brought his suit. Difficult as it was to believe before this last fact came to light that he did not know of this sale, I think it cannot be accepted by any reasonable man that there is any real doubt in the matter now. If we compare the admission made by Paw E with his emphatic denial in paragraph 5 of his written statement of the truth of the allegations made in paragraph 6 of the plaint, we are bound to see that Paw E is a shifty, untruthful man. The lower Court has not believed him and has given good grounds for disbelieving him. Looking at his emphatic denial, in paragraph 5 aforesaid, of Rs. 500 principal, Rs. 60 costs and Rs 30 interest as payment in full for his mortgage for Rs. 800, I am bound to say I do not believe Paw E when he says he knew nothnig of the sale of the property to Maung Sin. Even if there were no other facts against him, *e.g.*, the re-building of the house by Maung Sin, he must have been "put on inquiry" by this very document which he himself filed. He at first emphatically denied he knew of the proposal to sell the property to Maung Sin, then he reluctantly admitted it but said he granted leave conditionally. Why did he not admit this in his statement of defence? No reasonable man can believe, in the face of this, that Paw E was not put on inquiry when he got the extract from the Register.

I hold, therefore, that the suit filed by Paw E was filed by him well knowing at the time, or having good reason to know, that he should have adjoined Maung Sin and hence by his own omission he is estopped from now denying that Maung Sin has a right to the relief prayed for.

But it is urged that this omission has been condoned by the failure of Maung Sin to ask to be adjoined as a defendant. Now, in the first place, there is nothing to show that Maung Sin knew the nature of the suit brought by Paw E against Po Sa. He might well have

thought that as he was not adjoined as a defendant, he could not be touched. Plaintiff presumably knew his own business, he would have to identify the property, the registers would show that he, Maung Sin, was the purchaser. Why should he trouble? True he was called as a witness, but he explains that he understood from Po Sa that plaintiff's case was a false one and if the case came to trial, he could as a witness indicate his position and force plaintiff to adjoin him. But the case was compromised. The proceedings show that for his Rs. 800, Paw E was willing to accept Rs. 500 as principal. Paw E must have had good reason to take Rs. 300 less than his original claim, for as I have pointed out the Rs. 90 is made up of costs and interest. I see no reason, therefore, to doubt the truth of Maung Sin's statement that he knew nothing of the danger he was in. He states that Po Sa told him that the mortgage had been redeemed, and I see no reason to think Maung Sin was lying, for if the mortgage against the property were in existence, the plaintiff, if he wished to proceed against Maung Sin, would have to adjoin him as a defendant. I hold, therefore, that there was no omission or condonation on the part of Maung Sin proven, and that he is, on these grounds alone, entitled to the relief prayed for.

But this is not all. After considering all that the learned Counsel for the appellant has said and giving full weight to all he has urged, and after perusing the authorities he quotes, I am satisfied, even without this preliminary matter of the non-joinder of Maung Sin, that on the facts before him the learned Judge of the lower Court has come to a right decision.

The only point whereon I differ from him is on his doubt whether Paw E did hand over the so-called title-deeds. The learned Judge doubted if the copy of the judgment which Maung Sin produced as a title-deed was the original and only one. Now, if we look at the endorsement on the back of this copy of the jndgment, we shall find that it was applied for the very next day after Mr. Arnold, the then Additional Judge of Mandalay, passed his order, and the copy was delivered 6 days afterwards. We may take it that it must have been the original copy. Now this being the original copy, if Paw E ever did get a copy, this in all probability was the copy, for copies of lengthy judgments are an expensive luxury. It is not as if the copy produced by Maung Sin was obtained some months afterwards, as it would have had to be obtained if Paw E had stuck to his original copy if he had got one. I think that this little fact does further strengthen the case for Maung Sin and does weaken the case of Paw E, for if there was a copy of the judgment in existence, there is far more probability that he did get it.

But it is needless to further discuss the evidence.

I have read and weighed the judgment of the lower Court and I can find no reason to dissent from the conclusions arrived at by it.

I accordingly uphold the decree passed by the lower Court and dismiss the appeal with costs. Appellant will pay respondent's costs.

Appeal dismissed.

(s. c. 31 P. W. R. 1912.)

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 533 OF 1909.

January 12, 1912.

Present:—Mr. Justice Johnstone and Mr. Justice Rattigan.

CHET SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

ALLAH DITTA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Custom—Alienation—Mortgage by way of conditional sale—Mortgagor selling equity of redemption without necessity—Land yielding little profit—Old debt.

The vaidity of a sale of equity of redemption of land mortgaged by way of conditional sale in consideration of an old mortgage-debt due from the mortgagor's father not shown to be of profligate habits, cannot be questioned by his sons on the ground of there being no necessity for such sale, where the land is of little use and brings very little profit to the mortgagor and he foresees that it would be impossible for him or his descendants to redeem it in foreclosure proceedings or thereafter.

Second appeal from the order of the Divisional Judge of the Sialkot Division, dated the 23rd day of February 1909, modifying that of the Sub-Judge of the 2nd class at Gujranwala, dated 31st March 1908, dismissing plaintiffs' claim.

Rai Bahadur Lala *Sukh Dial* and Bhai *Narain Singh*, for the Appellants.

Mr. *Sham Lal* and Lala *Lajpat Rai*, for the Respondents.

JUDGMENT.—The facts of this case are set forth in the judgment of the learned

CHET SINGH *v.* ALLAH DITTA.

Divisional Judge. Plaintiffs, Allah Ditta and Piran Ditta minors, sue through their guardian, Ghulam Kadir, for possession of some 975 *kanals* of land and the contesting defendant is one Chet Singh to whom the said land was sold by registered deed, dated the 15th May 1898, by plaintiff's father, Fateh Din. Plaintiffs allege that the said sale was without consideration and was in any case effected for no such necessary purpose as would be binding on them.

The Court of first instance found that the sale was valid and binding on the plaintiffs and dismissed their suit. They, therefore, appealed to the Divisional Judge who held that it had not been satisfactorily proved that the whole amount alleged to be due to the vendee was in fact due to him and that in consequence the sale to the latter must be set aside. The learned Judge found, however, that the sum of Rs. 2,048 had been actually paid by the vendee (out of the sum of Rs. 2,400 alleged to have been paid), and he accordingly granted plaintffs a decree for possession of the land on payment of that sum.

From this decree, the defendant-vendee has preferred a further appeal to this Court and he contends that the sale should be upheld. We have heard the case argued at some length and, as a result, we are satisfied that the decree of the Sub-Judge was correct.

The first two mortgage-deeds, dated respectively the 4th January 1892 and the 6th October 1892, were executed by Chaugatta, the plaintiff's grandfather It is admitted that plaintiffs have no right to contest the first mortgage, for which the consideration was Rs. 2,000, and it is, in our opinion, well established that the 2nd mortgage-deed was executed merely to rectify an error in the first deed. The mortgagor had intended to mortgage the whole of his holding in the first instance, but the writer of the deed, Mul Singh, was the occupancy-tenant of 115 *kanals* of land which were meant to be included in the first mortgage. When drafting the deed, he carefully omitted all reference to this area and subsequently the mortgagor appeared before the Revenue authorities and had the error rectified. It is now practically conceded, and we have no hesitation in holding, that no contention can arise as between the present parties with reference to those two deeds. The real point at issue is as to the deed of mortgage dated 12th February 1894, and the deed of sale dated 15th May, 1898. The former deed was for an alleged consideration of Rs. 4,120. The Divisional Judge finds that this consideration has not been proved except to the extent of Rs. 99 12. We are not prepared to accept this finding. This mortgage-deed was executed by Fateh Din and the consideration for it related entirely to debts incurred by his father, Chaugatta. Defendant supported the deed by production of two bonds and by his account-books and after reference to them, we are satisfied that the full amount was actually due from Chaugatta. It is, we think, proved that the latter borrowed various sums from time to time from defendant and we agree with the local commissioner that there is nothing suspicious in the account books produced by defendant. Plaintiffs had every opportunity to inspect these books and in fact they did so, and they are unable to discover anything in them which would support a plea of forgery or fraud. The only objection urged by the local commissioner to defendant's account-books was that the personal account of Fateh Din had not been produced. To this objection defendant replied, and with justice, that as the accounts related merely to the dealings of Chaugatta which were admitted by Fateh Din to be correct, the subsequent accounts of Fateh Din with defendant were irrelevant We are satisfied that full consideration for the mortgage-deed, dated the 12th February 1894, was paid and that Fateh Din was justified in executing that deed, which constituted three bonds executed by Chaugatta in favour of defendant, and also a book-debt of Rs. 82-4 due by the latter to the former. Defendant urges that plaintiffs' right to challenge the validity of this mortgage is barred under the law of limitation. There would appear to be some force in this contention, but as we have satisfied ourselves on the actual facts that no objection can be taken to the deed, we do not consider it necessary to express any opinion upon the law point.

The only remaining question is whether Fateh Din was justified in selling the equity of redemption of the land in suit to defendant for a sum of Rs. 90. Here, again, we agree with the Sub-Judge. At the time

when this sale took place (*i.e.*, in 1898), that land was practically of little value to the owner. A large portion of it was in the possession of occupancy-tenants and it yielded little or no profit to the landlord. It was heavily mortgaged, and Fateh Din (against whose character nothing has been urged) probably foresaw that it would be impossible for him or his descendants to redeem those mortgages. In the circumstances, he was, in our opinion, justified in selling the equity of redemption for a sum of Rs. 90. Had he not done so, the mortgagee would in due course have applied for foreclosure or for sale of the mortgaged property, with the result that the mortgagor would have had to part with his property without any further gain to him. In 1898 there would appear to have been no prospect of the land increasing in value and we think Fateh Din made the best bargain in his power for himself and his family. Having in view the facts that Fateh Din, when he executed the mortgage-deed of the 12th February 1894, was merely making provision for payment of his father's debts (which was found to be proved) and that when he executed the deed of sale of the equity of redemption, he must have been satisfied of the practical impossibility of the land ever being redeemed, we hold that the alienation now impugned is not contestable by plaintiffs. We accordingly accept this appeal with costs throughout against respondents, and we restore the decree of the Sub-Judge which dismissed their suit. Respondents' cross-objections must necessarily fail upon our findings.

Appeal accepted.

(s. c. 16 C. W. N. 247.)

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL No 221 OF 1909.

August 18, 1911.

Present:—Mr. Justice Coxe and Mr. Justice Teunon.

KEDAR NATH SAMANTA—DEFENDANT No. 2—APPELLANT

versus

MANU BIBI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 15—Specific performance—Contract to sell land—Contract signed by widow and husband's executor—Subsequent revocation of Probate—Whether contract is specifically enforceable against widow—Delay in bringing suit, whether material—No evidence of waiver, abandonment or acquiescence—Undue influence—Inadequate consideration—False allegation of payment of purchase-money.

A contract to sell certain property was executed by a widow. This widow was a semi-illiterate *pardanashin* woman, who was in the greatest straits when she made the contract. She had no competent advice in making the contract; the consideration for the sale was very inadequate and the transaction was altogether independent on the part of the widow. In a suit for specific performance of the contract, the vendee alleged that he had paid the bulk of the purchase-money, but this allegation was proved to be false:

Held, that the plaintiff was not entitled to enforce the contract.

Obiter dicta. (Per Coxe, J.)—Where a contract to sell was executed by *M.*'s executor who had obtained Probate and also by *M.*'s widow who executed it in exercise of the power given to her by the Will of her husband to assent to a conveyance by the executor but the Probate was subsequently revoked:

Held, that if the contract was one which ought otherwise to be specially performed, it could be enforced against the interest of the widow in the property.

Hoorocks v. *Rigby*, 9 Ch. D 180; 47 L. J. Ch. 800; 38 L. T. 782; 26 W. R. 714, referred to.

Where there has been nothing in the plaintiff's conduct that could possibly be regarded as evidence of waiver, abandonment or acquiescence, and where the defendant's position has in no way been altered by the delay on the part of the plaintiff in bringing a suit for specific performance of the contract:

Held, that the delay was immaterial.

Kissen Gopal v. *Kali Prosonno*, 33 C. 633, followed.

Appeal from the decree of the Additional Sub-Judge of Hugli, dated April 29th, 1909.

Dr. *Rash Behary Ghose*, Babus *Dwarka Nath Mitra* and *Bijoy Kumar Bhattacharyya*, for the Appellant.

Mr. *B. C. Mitter*, Babus *Joy Gopal Ghose* and *Provas Chandra Mitra*, for the Respondent.

JUDGMENT.

COXE, J.—This appeal arises out of a suit for the specific performance of a contract to sell certain land and buildings for Rs. 2,500. The contract was executed on the 19th February 1905, by the 1st and 2nd defendants. The 1st defendant is the widow of one Madhab Ghose and the 2nd defendant was named as executor in a Will said to have been made by Madhab Ghose, of which at the time of the contract the 2nd defendant had obtained Probate. The Probate, however, was subsequently revoked. It is said that on the 1st April the plaintiff paid Rs. 12 to have the document registered and Rs. 20 to a Pleader to identify the 1st defendant. The sum of Rs. 20, however, was returned and it was said that the document could not be registered on the 1st April for want of time; and before it

KEDAR NATH v. MANU BIBI.

could be registered, the 1st defendant on the 3rd April executed a registered conveyance of the property in favour of the 4th defendant, who is the servant and is said to be the *benamidar* of the 3rd defendant. The Subordinate Judge has accepted the plaintiff's evidence of payment of Rs. 1,551 and has given a decree directing that the 1st defendant shall execute a conveyance in his favour on his depositing Rs. 949, the balance of the purchase-money. The defendant No. 4 appeals. It is perfectly clear, however, that the 3rd defendant is really the contesting defendant and appellant in this case and that the 4th defendant is a mere name. The learned Vakil for the appellant also informs us that he does not urge that he had no notice of the plaintiff's contract. The only point, therefore, that has to be decided is whether the nature of the contract is such that it ought to be specifically enforced.

The first point taken is that as this contract was executed by both defendants, and was executed by the 1st defendant as exercising the power given to her by the Will to assent to a conveyance by the executor, it cannot be enforced against her as the widow of a Hindu intestate. But it seems to us perfectly clear that this contention cannot prevail and that if the contract ought to be specifically performed, it can be enforced against her to the extent of her interest. There is no case exactly in point, but that of *Horrocks* v. *Rigby* (1), quoted in Fry on Specific Performance, certainly lends support to this view, and reference may also be made to section 15 of the Specific Relief Act, 1877.

Next, it is argued that the plaintiff is disentitled to specific performance by reason of his delay. But it is quite evident that there has been nothing in his conduct that could possibly be regarded as evidence of waiver, abandonment or acquiescence and that the defendant's position has been in no way altered by the delay. That being so, we think that the delay is immaterial, following *Rissen Gopal Sadaney* v. *Kali Prosonno Sett* (2), cited by learned Counsel for the respondent. The decision in *Mokund Lal* v. *Chotay Lal* (3), on which reliance is placed for the appellant, is not, in our opinion, inconsistent with this view.

(1) 9 Ch. D. 180; 47 L. J. Ch. 800; 38 L. T. 782; 26 W. R. 714.
(2) 33 C. 633. (3) 10 C. 1061.

Next, it is urged that a certain alteration in the agreement was fraudulently interpolated and is fatal to the agreement. The alteration consists of the words 'or severally' in the covenant that the executants will jointly or severally execute a conveyance. The words have been added between the lines and do not appear in the draft of the agreement. The witness, Naresh Chander Mitra, a Pleader of the Alipur District Court, however, swears that these words were inserted before the execution of the document, and the learned Subordinate Judge evidently regards him as quite a trustworthy witness. This being so, we are not prepared to differ from the learned Subordinate Judge's view of the matter.

But with regard to the payment of the sum of Rs. 1,500 out of the consideration, we are not prepared to agree with the learned Subordinate Judge. This payment is not supported by the evidence of Naresh Mitra and it appears to us quite irreconcilable with the plaintiff's deposition in the criminal case, which followed after the execution of the defendant's *kobala*. It is not likely that the plaintiff would be willing to advance so large a sum before the execution of the conveyance and on the whole evidence, we feel no doubt that this money was never paid.

The only point that remains is whether the contract should be specifically enforced under the circumstances of the case. It was suggested at the close of the argument that the first defendant, being a *pardanashin* woman, was entitled to special protection. In my opinion, this point ought not to be allowed now.

It was never suggested in the pleadings, the issues or the grounds of appeal, nor was any argument upon it addressed to us in the course of the opening speech of the learned Vakil for the appellant. The first defendant has not appealed and the appellant's defence in the former suit was that she had plenty of well-wishers and advisers. Moreover, in the former suit the 1st defendant was financed and supported by the plaintiff. No doubt, this assistance was not disinterested, but when the 1st defendant accepted his assistance in her suit knowing that that assistance was given on the ground of her contract with him, she is hardly entitled now to plead that that contract was not explained to her. Nor, indeed, is there any reason to suppose that she desires to raise any such

plea. That being so, it seems to me unjust to allow the appellant to raise it at the eleventh hour for his own benefit.

At the same time, I am inclined, though with some hesitation, to agree with the view which is strongly held by my learned brother that the contract ought not to be specifically enforced. There can be no doubt that the 1st defendant was in the greatest straits when she made it and although the evidence of the value of the land seems to me too indefinite to justify a decided conclusion that the consideration was inadequate, yet it is difficult to believe that the sum of Rs. 2,500 is a fair price for 35 *bighas* of land with two houses in Howrah. And the false plea of the plaintiff that he had paid Rs. 1,500 disentitles him to any consideration. I agree, therefore, that the appeal should succeed and accordingly it will be decreed and the suit dismissed, the parties bearing their own costs throughout.

TEUNON, J.—In so far as the first four points taken in this appeal are concerned, it is unnecessary for me to add anything to the judgment delivered by my learned brother.

On the remaining question whether, in the circumstances of the case, the contract should be specifically enforced, it is to be observed that the plaintiff admits and indeed comes into Court with the assertion that the defendant No. 1 is a *pardanashin* lady. That being so, even in the absence of any specific issue, on the general issue now under consideration, it was, in my opinion, incumbent upon the plaintiff to give strict proof of good faith and to show that in the transaction he seeks to enforce, the widow had competent and independent advice, and that the terms of the bargain are fair and equitable. Now the husband of defendant No. 1 had died in May 1904 and on the 19th of Februay 1905 when the agreement on which the plaintiff relies was executed, all the properties left by the husband were under attachment in two suits brought against the widow. The claims in these two suits amounted to some Rs. 8,000. One, it appears, having been originally, disposed of *ex parte* has been revived and is still pending. The other was found to be false and vexatious and has been finally dismissed.

The agreement recites the difficulties in which the widow was placed, states that by reason of the suits no one can be found to purchase the properties or any portion thereof at a fair price, and that being thus helpess, she, in order to defray the expenses of the litigation and for the benefit of her husband's estate, agrees to sell the whole of it to the plaintiff for the sum of Rs. 2,500.

In such circumstances, it was, in my opinion, essential that any one dealing with this widow should satisfy himself and show that she had taken competent advice both as to the manner in which she should meet the suits and also as to the provident character of the arrangement she proposed to enter into. But the evidence shows that while the plaintiff had the advice and the assistance of a learned Pleader of the Alipur Bar, this illiterate or semi-illiterate *pardanashin* widow, then under the influence of defendant No. 2, was left to rely upon the advice of this layman who, it has been shown, was not a faithful or loyal guardian of her interests.

When we next proceed to inquire into the prudence of the arrangement she was making, we find that, while professedly seeking to save the estate of her husband, she sells the whole of it, and even the burden of defending the pending suits is not undertaken by the purchaser but is thrown upon the widow.

The estate proposed to be sold consists of some 35 *bighas* mainly garden or orchard land situate in Sulkea, a suburb of Howrah. On two of the plots stand *pucca* buildings and some 20 *bighas* constitute *lakheraj* or rent-free holdings. Defendant No. 4 swears that the land is worth Rs. 10,000 and that a portion has been sold for Rs. 3,000. There is no rebutting evidence and it is significant that plaintiff whose own garden adjoins one of the plots finds himself compelled to say that he knows nothing of the value of land in Sulkea or of this land in particular. He made, he says, no inquiries about the price obtainable for these properties in the open market and has not even now ascertained their true value. This evidence coupled with the recitals in the agreement leaves no doubt that the consideration offered by the plaintiff is grossly inadequate.

I am thus satisfied that in the transaction which he seeks to enforce the plaintiff-respondent was not acting in good faith and took improper and undue advantage of the difficulties of the 1st defendant.

MOHAMMAD HASHIM ALI KHAN *v.* SADIQ HUSAIN KHAN.

Moreover, he has come into Court with the false allegation that he has paid the bulk of the purchase-money.

For these reasons, I am of opinion that the contract set up by the plaintiff is not one which should be specifically enforced in his favour and further that he is not entitled to the refund of the Rs. 51 actually paid and I, therefore, agree in the order proposed by my learned brother.

Appeal allowed.

(s. c. 14 O. C. 356.)

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 8 OF 1910.

November 13, 1911.

Present:—Mr. Evans, J. C., and Mr. Lindsay, A. J. C.

MOHAMMAD HASHIM ALI KHAN AND ANOTHER—PLAINTIFFS

versus

SADIQ HUSAIN KHAN AND ANOTHER—DEFENDANTS.

Deed of trust, conduct of trustees after execution of—Oudh Laws Act (XVIII of 1876), s. 3 (b)—Trust, non-applicability of Muhammadan Law to—Gift does not include trust—Trusts Act (II of 1882), ss. 4, 6—Dower-debt, discharge of, not unlawful—Trust, creation of, requires no physical delivery—English rules not applicable to Indian cases—Shia Law fixes no minimum dower while Sunni Law does—Family settlements, construction of.

The conduct of trustees, as manifested after the execution of the deed of trust and misconduct on their part or neglect to perform their duties, cannot be put forward as a valid reason for holding that the author of the trust had no intention of acting seriously, or for determining his intention at the time when he executed the deed of trust.

Under section 3 (*b*) of the Oudh Laws Act, the Muhammadan Law does not apply to trusts. The term "gift" as used in the section cannot be interpreted so as to include trust.

The discharge of a dower debt, due from the settlor to his wife, and the prevention of future disputes and litigation between the members of the settlor's family, are not in any sense unlawful within the meaning of section 4 of the Trusts Act.

The physical delivery of the property, in addition to the execution of a registered instrument of transfer, is not necessary to effect a valid trust under section 6 of the Trusts Act.

In construing family settlements Courts are to ascertain the real meaning of the parties to the transaction; and when that meaning has been ascertained, if it appears that the whole plan cannot be carried out but that a part of it can, effect is to be given to that part.

The rules established in English Courts for construing English documents are not, as such, applicable to transactions between natives of this country.

Ram Lal Sett v. *Kanai Lal Sett*, 12 C. 663; *Rai Bishen Chand* v. *Asmaida Koer*, 6 A. 560; 11 I. A. 164, referred to.

In the case of Shias, there appears to be no fixed legal minimum for dower though in the case of Sunnis there is some authority for saying that the minimum amount is 10 *dirms*.

Sugra Bibi v. *Masuma Bibi*, 2 A. 573, referred to.

Appel against the decree of the Subordinate Judge, Lucknow, dated 25th October 1909.

The Hon'ble Pandit *Sundar Lal*, Messrs. *S. I. J. Hyam*, *Mohammad Arabi*, *Zahur Ahmad* and *Jagmohan Nath Ohak*, for the Appellants.

Messrs. *Sami Ullah Beg* and *Wazir Hasan*, for the Respondents.

JUDGMENT.—The suits out of which these appeals have arisen have sprung out of certain transactions affecting property which once belonged to Nawab Zaigham-ud-daula now deceased.

Zaigham-ud-daula was a son of Ali Naki, who was the Prime Minister to the last King of Oudh. It is admitted that he was twice married, first to a lady belonging to the family of the Nawab Nazim of Bengal by whom he had several children, and afterwards to a Lucknow lady named Ummat-ul-Fatima who is still alive. By this last marriage, Zaigham-ud-daula had two sons, Hashim Ali Khan and Qasim Ali Khan. One of the matters in dispute in these suits is whether Zaigham-ud-daula between the dates of his marriages with these two ladies contracted another marriage in the *Muta* form with an Abyssinian slave girl named Zohra Khanam and whether by this marriage he had a son called Sultan Hasan Mirza.

Zaigham-ud-daula was the owner of immoveable property situated in Oudh and also in Calcutta. The former property consisted of shares in certain *Zemindari* villages in the Lucknow district and in the districts of Fyzabad and Sitapur as also of certain house property in the City of Lucknow. The Calcutta property consisting of a dwelling-house, No 13, Russell Street Calcutta, belonged exclusively to him.

On the 5th February 1895, Zaigham-ud-daula executed at Calcutta a deed of trust by which he conveyed the immoveable property just mentioned to two trustees, one of them being his wife Ummat-ul-Fatima and the other his father-in-law, Mehdi Ali Khan. The purpose of the trust as describ-

ed in the deed was to settle his property so as to prevent disputes after his death between the family of his first wife and that of his second wife. It was also declared that the settlement was made with a view to discharging Ummat-ul-Fatima's claim for dower. Subject to certain charges, an estate in trust was created in favour of Ummat-ul-Fatima and her children. The construction to be put on this document is another of the matters in dispute.

Zaigham-ud-daula died on the 1st August 1898, and in September 1898, his widow Ummat-ul-Fatima applied for and obained mutation in the Revenue Courts in respect of the *Zemindari* property situated in the Lucknow district. In her application for mutation, she made no mention of the fact that this property had been conveyed in trust to herself and to her father Mehdi Ali Khan. It is proved that at the time Ummat-ul-Fatima applied for mutation a similar application was put in by Mehdi Ali Khan in which he stated that the property had been conveyed to trustees and that Ummat-ul Fatima and the other persons named by her in her application had no right to have the property recorded in their names. It is admitted that neither the original trust-deed nor any copy of it was produced before the Revenue Authorities at this time. The result was that mutation was ordered to be made in the name of Ummat-ul-Fatima and the other persons whom she described as being the heirs of Zaigham-ud-daula. The names of these persons were Roshan Ara, who was a daughter of Zaigham-ud-daula by his first wife, Sultan Hasan Mirza, the man whose status is now in dispute, and Hashim Ali and Qasim Ali, the two minor sons of Zaigham-ud daula by Ummat-ul-Fatima.

In 1899, Ummat ul-Fatima, by application made in the Court of the District Judge of Lucknow, got herself appointed guardian of the persons and property of these two minor sons. It appears also that these proceedings were opposed by her father, Mehdi Ali Khan, who set up the deed of trust and who asked that he might be appointed guardian of the children instead of their mother. The certificate of guardianship was granted to Ummat-ul-Fatima and thereafter, that is, in 1900, she applied to the District Judge for permission to raise money by mortgage of the shares of her sons in order to discharge certain debts affecting the property. Purporting to act in accordance with the permission which was given to her by the District Judge, Ummat-ul-Fatima, on the 20th June 1900, for herself and on behalf of her two minor sons, borrowed a sum of Rs. 20,000 from one Mirza Sadiq Husain on a mortgage of her own share and of the shares of her two sons.

On the 3rd November 1900, Sultan Hasan Mirza, who, as aleady said, had been recorded as part owner of the property under the mutation proceedings referred to above, mortgaged his share to the same person, namely, Mirza Sadiq Husain, as security for a loan of Rs. 8,000. The mortgagee brought a suit on this mortgage and obtained a decree for sale on the 3rd June 1907—a decree which is still under execution and the validity of which is impeached in these proceedings. On the 30th April 1907, Mirza Sadiq Husain filed a suit (No. 76 of 1907 of the Court of the Subordinate Judge, Lucknow) on the mortgage executed in his favour by Ummat-ul-Fatima. In this suit, he impleaded Ummat-ul-Fatima and her two sons as defendants. The amount of the claim was Rs. 36,000 and a decree for sale of the mortgaged property was sought in the plaint. Ummat-ul-Fatima did not contest the claim. It was, however, resisted by her two sons who set up the deed of trust executed by their father and claimed that the mortgage was invalid inasmuch as their mother, Ummat-ul-Fatima, was not competent to make a valid mortgage of the property covered by the trust-deed. In February 1908, these sons Hashim Ali Khan and Qasim Ali Khan filed a suit against the mortgagee Mirza Sadiq Husain and his mortgagor Sultan Hasan Mirza. (Suit No. 51 of 1908 of the Court of the Subordinate Judge, Lucknow) on the basis of the trust-deed already referred to. The object of the suit was to obtain a declaration that the mortgage executed by Sultan Hasan Mirza in favour of Mirza Sadiq Husain was a nullity on the ground that Sultan Hasan Mirza was not in fact a son or an heir of Zaigham-ud-daula and that he had in consequence no interest whatever in the property. The plaintiffs, therefore, claimed that the decree for sale which Mirza Sadiq Husain had obtained against Sultan Hasan Mirza on the 3rd June 1907, was of no effect and could not be

executed against the property which had previously been conveyed in trust under the deed of the 5th February 1895. Mirza Sadiq Husain's suit against Ummat-ul-Fatima and her sons was decreed by the lower Court (Suit No. 76 of 1907). The declaratory suit brought by the sons against Mirza Sadiq Husain and Sultan Hasan Mirza was dismissed (Suit No. 51 of 1908).

The sons have now preferred appeals against both decrees. Appeal No. 7 of 1910 is an appeal against the decree in the mortgage suit brought by Mirza Sadiq Husain while Appeal No. 8 of 1910 is the sons' appeal against the decree dismissing their suit for declaration. This last is the principal appeal and may be conveniently disposed of first inasmuch as the decision of the second appeal depends largely upon the decision to be given in this case.

To take up first then Appeal No. 8 of 1910.

The memorandum of appeal contains forty-seven grounds on which the decree of the lower Court is attacked. It has, however, been conceded here that these grounds give rise to three points only for determination, namely,—

(1) Whether the deed of trust executed by Zaigham-ud-daula on the 5th February 1895, was intended to take effect according to its tenor or whether it was nothing more than a paper transfer which was never meant to be acted upon; in other words, whether the execution of this deed was a real or a sham transaction;

(2) Whether, if it be found that the deed was executed *bona fide* with a genuine intention to dispose of the property in trust, the deed is valid in law; and

(3) Whether or not the respondent Sultan Hasan Mirza is proved to be the legitimate son of Zaigham-ud-daula.

To begin with the first point. It has been established and it is no longer disputed that the trust-deed was drawn for Zaigham-ud-daula by a firm of Attorneys in Calcutta, that it was executed by Zaigham-ud-daula on the 5th February 1895, and that it was duly stamped and registered. Being a document executed in solemn form and having been duly registered, the presumption is that it was intended to take effect as a disposition of the property in trust and it was, therefore, for the defendants-respondents to make out their case that the deed evidenced a sham and not a real transaction. We shall deal first with the ground disclosed in the written statements of the defendants upon which they based their plea that the document did not represent a real transaction. In paragraph 10 of Mirza Sadiq Husain's written statement filed on the 23rd March 1908, it was stated that the deed had never been acted upon, that it was never enforced and that it was never accepted by Ummat-ul-Fatima. It was also stated that the deed was executed for a fraudulent purpose but no such purpose was specified. Similar grounds were taken in the written statement filed by the second defendant, Sultan Hasan Mirza. These pleas were somewhat amplified in the proceedings taken before the Subordinate Judge just before the issues were struck. It was then stated that Zaigham-ud-daula had never really divested himself of his ownership of the property in dispute, but that he had in fact remained exclusive owner after the execution of the deed by appropriating the income of it. It was also stated that the purpose of the deed was to defeat the claims of Zaigham-ud-daula's creditors. So far as this last plea of an intent to defraud or delay creditors is concerned, the learned Counsel for the respondents has stated in the course of argument that it never was his case, and is not his case now, that the document in question is voidable under the provisions of section 53 of the Transfer of Property Act (IV of 1882) on the ground that it was executed with a view to defeat or delay the claims of creditors. He stated, however, that there was evidence to show that at the time when this deed was executed, there were certain suits pending against Zaigham-ud-daula and he relied upon this fact as well as upon other facts disclosed by the evidence in proof of his contention that the document was never intended to be, and was never in fact, acted upon and that the whole intention of Zaigham-ud-daula was, under the cloak of this transaction, to still retain the full control of the property in his own hands. The Subordinate Judge on this point came to the conclusion that there was no genuine disposal of the property under the trust-

deed. His judgment is not altogether clear and it would seem from its language either that the defendants were allowed in the course of the trial to put forward new grounds of attack upon the document or that the Subordinate Judge himself raised points on behalf of the defendants which were certainly not taken in the pleadings. Broadly speaking, the facts upon which the Subordinate Judge has relied in support of his conclusion that the transaction was a fictitious one, may be classed under three heads, namely:—

(1) Facts existing at or before the time when the deed was executed;

(2) The conduct of the Nawab and of the trustees subsequent to the execution of the deed; and

(3) Certain recitals contained in the deed itself which, according to the interpretation put upon them by the Subordinate Judge, went to show that there was no real intention on the part of the Nawab to part with the property.

With regard to the state of affairs obtaining just before the deed was executed, the Subordinate Judge has relied principally upon the fact that in the year 1894 four suits were filed in which Nawab Zaigham-ud-daula was impleaded as a defendant for the recovery of certain moneys alleged to be due on a deed of mortgage. In his judgment, the Subordinate Judge, referring to the institution of these suits and to the fact that they were still pending at the time when the trust-deed was executed, remarks that it is not at all improbable that the deed was executed in order to protect the property of the Nawab from the operation of the decrees which might be passed in those suits. We have not on the record complete evidence to show the nature of these suits and the circumstances in which they came to be brought. So far as we can gather from a copy of a judgment (Exhibit A29 filed in Suit No. 51 of 1908), the facts were these:—

Nawab Zaigham-ud-daula had two sisters, Gulshan Ara and Raunaq Ara *alias* Akhtar Mahal, the latter being the wife of Wajid Ali Shah, King of Oudh. Each of these ladies had a share in certain *Jagir* villages situated in the Lucknow district. In the year 1875, Akhtar Mahal mortgaged her share to her own sister Gulshan Ara to secure a loan of Rs. 20,000 Gulshan Ara died on the 1st February 1884, and on the 20th November 1890, Akhtar Mahal renewed the mortgage in favour of Gulshan Ara's heirs who were four in number. Akhtar Mahal herself died in the year 1891 leaving as her heirs her brother Zaigham-ud-daula and her sister Iffat Ara Begam who was married to Nawab Ali Qadar. In the year 1894, the four heirs of Gulshan Ara brought four separate suits against Zaigham-ud-daula and Iffat Ara, the legal representatives of Akhtar Mahal. It seems that each of the heirs of Gulshan Ara sued for his or her share of the mortgage-money, that is, Rs. 5,000 each for principal and Rs. 1,800 each for interest. The claims were sought to be enforced against the estate of the deceased Akhtar Mahal and also against the defendants personally on the ground that they had appropriated moneys belonging to Akhtar Mahal's estate. Iffat Ara died during the course of these proceedings and her heirs, namely, her brother Zaigham-ud-daula and her husband Ali Qadar were then impleaded as her representatives. Zaigham-ud-daula resisted the claims on a variety of grounds. The suits, however, were decreed against him in the Court of first instance but were afterwards reversed in appeal in this Court. According to the judgment of Mr. Rafique, the Additional Judge of Lucknow, by which he disposed of the suits of three of the heirs, a decree was passed against Zaigham-ud-daula personally on the ground that he had received Rs. 32,000 belonging to Akhtar Mahal for which he failed to account.

It seems clear enough from this statement of the facts that, so far at any rate as the mortgage-debt in suit was concerned, Zaigham-ud-daula had no reason to apprehend that his own property would be affected by any decrees which might be passed. He was liable only to have sold in execution any portion of the mortgaged property which had come to him as one of the heirs of his sister, Akhtar Mahal. He may, however, have been personally liable on the ground set out in the plaint, namely, that he had intermeddled with Akhtar Mahal's estate and had received sums over and above his share for which he had failed to account. It is not altogether clear

MOHAMMAD HASHIM ALI KHAN v. SADIQ HUSAIN KHAN.

that Zaigham-ud-daula did, as a matter of fact, realize moneys from Akhtar Mahal's estate in excess of the share to which he was entitled under Muhammadan Law, but the judgment at any rate does give the impression that he had received more money than he had a right to. Great stress has been laid upon the fact that personal decrees were being sought against Zaigham-ud-daula in these suits and it is contended that his principal motive in executing this deed of trust must have been a desire to save his property from being taken in execution of these claims. We are not at all satisfied that there is any substance in this contention. In the first place, it seems perfectly clear that the property affected by the deed of trust was worth a very considerable sum of money which far exceeded the amount of any debts which could be claimed from Zaigham-ud-daula in his capacity as legal representative of Akhtar Mahal. The total amount claimed in the four suits, so far as we can see, would come to about Rs. 27,000 odd and it is to be borne in mind that Zaigham-ud-daula was only one of two defendants in these suits. The house in Calcutta, which was one of the items of the property covered by the trust-deed, was worth well over a lakh of rupees and it does not appear to be probable that Zaigham-ud-daula would have divested himself of property of this great value merely in order to defeat a claim of a comparatively small amount. We may note here, however, that we have been referred to one document on record which would seem to show that it would have been futile for Zaigham-ud-daula, on the 5th February 1895, to transfer property in order to defeat the claims of these four plaintiffs; for there is reason to believe that in each of these suits the plaintiffs had already obtained attachment before judgment of certain property belonging to Zaigham-ud-daula. It has already been stated that in the year 1900, Ummat-ul-Fatima had applied to the District Judge of Lucknow for permission to raise money by mortgaging the shares of her sons in order to pay off claims against Zaigham-ud-daula's estate. In connection with this application, Ummat-ul-Fatima lodged two lists, one showing the amount of the claim against the estate and the other purporting to show the property left by Zaigham-ud-daula at the time of his death. In this last list, Ummat-ul-Fatima showed certain debts which were owing to Zaigham-ud-daula and in these are included sums which were due from the four plaintiffs just mentioned by reason of their suits having been dismissed in appeal in the Court of the Judicial Commissioner. From this statement, it would appear that these plaintiffs had realized the sums decreed to them in the first Court for it is stated that they had attached moneys in the hands of the Administrator-General, Calcutta, due to Zaigham-ud-daula before judgment. It cannot be said with certainty that these plaintiffs had attached property belonging to Zaigham-ud-daula to the full extent of their claims but, looking at the statement as it stands, it seems that they managed to attach close on Rs. 11,000 belonging to Zaigham-ud-daula. Taking these facts into consideration, we are not disposed to hold that there is any good ground for contending that the deed of trust executed by Zaigham-ud-daula was intended to defeat the claims of these four plaintiffs and we are unable to agree with the learned Subordinate Judge's conclusions on this point.

So much for the facts existing at the time of the execution of the deed of trust or immediately anterior to it. We come now to the conduct of Zaigham-ud-daula and of the trustees subsequent to the execution of the deed. The Subordinate Judge has dwelt at great length on this portion of the case and has referred to numerous incidents which in his opinion led to the conclusion that the trust-deed was a sham conveyance. The first point upon which he lays stress is that no steps were taken to obtain mutation of names in favour of the trustees immediately after the execution of the trust-deed. So far as this point is concerned, it is to be noticed that mutation proceedings could be taken only in respect of the *zemindari* property. It is quite true that no steps were taken by the trustees to obtain mutation in respect of the property at Lucknow. The first application for mutation was made by Ummat-ul-Fatima in September 1898, one month after the death of Zaigham-ud-daula. It has already been stated that when Ummat-ul-Fatima applied on this occasion for mutation of names, she made no mention of the fact that the property had been conveyed away in trust more than three years before. The Subordinate

Judge points out that no satisfactory explanation of the omission to obtain mutation has been given. Mehdi Ali Khan, one of the trustees, was examined as a witness in the case and he was unable to give any satisfactory account of the failure to take these steps. Mehdi Ali Khan is, according to his own statement, a very old man whose age at the present time would be about 75 years. He is on his own admission an opium-eater and after a perusal of his evidence, we do not think that he could be relied on to give any very coherent explanation of any of the dealings with this property. It is as likely as not that he never took any trouble to execute his duties as trustee. There is some evidence to show that he and his daughter Ummat-ul-Fatima who was joint trustee with him were upon bad terms and that after the death of Zaigham-ud-daula, each of them was accusing the other of attempting to waste the property. So far as Mehdi Ali is concerned, we do not think that much importance can be attached to his inability to give any explanation of his failure to apply for mutation. As for Ummat-ul-Fatima, the other trustee, she has not been examined in the case and as already said Zaigham-ud-daula died in the year 1898, so no explanation of this matter can be obtained from him. The learned Adovocate for the appellants has suggested two reasons for the default. He says, in the first place, that the Lucknow property was of small value as compared with the property in Calcutta and that it is probable that none of the trustees ever thought it worth while to take any trouble in the matter. Another explanation is that mutation could not be obtained at Lucknow because the original deed of trust was retained by the attorney, Mr. Farr, under a lien for costs due to him from Zaigham-ud-daula. As regards the first explanation, we think it may be said that whatever the value of the property in Lucknow was, it was small in amount as compared with the house property in Calcutta of which Zaigham-ud-daula was the exclusive owner. We have no very definite evidence as to the value of this Lucknow property, but here again we have been referred to the list of property which was filed by Ummat-ul-Fatima in the guardianship proceedings taken in 1900. From this statement, it would appear that the house property in Lucknow was very heavily incumbered while it would further appear that Zaigham-ud-daula's share in the *zemindari* property as also in some of the house property had all been let out on lease for a comparatively trifling sum. In 1900, at the time when Ummat-ul-Fatima's application to the District Judge was made, it would seem that this lease had still five years to run. It seems fairly certain, therefore, that the income of this Lucknow property must have been very trifling as compared with that derived from the letting of the dwelling-house in Calcutta, a house which in 1895 appears to have been let for Rs. 400 a month and now lets for a good deal more. As for the retention of the original deed of trust by Mr. Farr under a lien for the costs due to him by Zaigham-ud-daula, there can be no doubt that this deed was actually kept by Farr and was not surrendered till some years later when his costs were paid after a suit had been instituted by him for their recovery. We do not consider that this circumstance affords any satisfactory explanation of the omission of the trustees to apply for mutation. The deed was a registered document and a copy of it could have been obtained for use in the Revenue Courts had the trustees been so minded. However, when all has been said on both sides, we do not think that it can be argued that the omission to obtain mutation, unexplained as it may be, is good evidence to show that it was never intended that the trust-deed should take effect. After all, if any significance attaches to this omission, it may fairly be said that the fault lay with the trustees and it would be difficult to conclude that, because they were guilty of laches in the matter, Zaigham-ud-daula, when he executed the deed, did not really intend to pass the property to them. Neglect of trustees to perform their duties can scarcely be put forward as a reason for holding that the author of the trust had no intention of acting seriously.

The next point relied upon by the Subordinate Judge in this connection is the action of Ummat-ul-Fatima in applying for mutation in favour of herself and the other heirs of Zaigham-ud-daula in September 1898. Upon this point the Subordinate Judge remarks that Ummat-ul-Fatima's conduct both with respect to these mutation

proceedings and the guardianship proceedings which were taken a year later shows that she never recognized the trust. We do not think that there is any force whatever in this observation, particularly when it appears, as will be shown later, that Ummat-ul-Fatima did, as a matter of fact, admit her position as trustee almost immediately after the execution of the deed. It was the plaintiffs' case that Ummat-ul-Fatima had deliberately acted in breach of her duty as trustee by making this application in order to have the property recorded in her own name so as to enable her to deal with it as her own. It may very well be argued, as was argued by the learned Counsel for the appellants, that Ummat-ul-Fatima came to the conclusion that it would pay her better to ignore the trust than to abide by it. Under the trust, she was entitled only to a life-interest in the income of the property subject to certain charges created in favour of her two minor sons whereas by asserting her position as an heir she would become entitled to an absolute estate in a portion of the property which she could dispose of in any manner she thought fit. We are wholly unable to agree with the Subordinate Judge that Ummat-ul-Fatima's conduct, as manifested three or four years after the date of execution of the trust-deed, can be referred to as supplying any reliable evidence of the state of mind of Zaigham-ud-daula in February 1895.

Another circumstance to which the Subordinate Judge refers in support of his conclusion that the deed was never meant to take effect, is the manner in which the rent and profits of the Lucknow property were received after the execution of the deed. He refers to the evidence of Mehdi Ali Khan in this connection. It has already been pointed out that the Lucknow property was held in lease by one Hakim Safdar Husain and the only income derived from this property was, apparently, the rent which Safdar Husain was obliged to pay under the terms of his lease. Mehdi Ali Khan's evidence is certainly not very definite upon the point. We have already stated that Mehdi Ali Khan is a very old man and alluded to the fact that he is admittedly a confirmed opium-eater. He was subjected to a very long examination and cross-examination during the trial and from the record of his evidence which is before us, it is apparent that he was not in a condition to give any very clear account of his previous dealings with the property. He repeatedly complained of being unwell and at one place we find that he fell asleep during his cross-examination. However, he stated that during the life-time of Zaigham-ud-daula, he used to act as Zaigham-ud-daula's Mukhtar and receive the lease-money which he handed over to Zaigham-ud-daula. He states that after Zaigham-ud-daula's decease, he became the Mukhtar of Ummat-ul-Fatima and in that capacity received the rents from the *Thekadar*. He went on to qualify this by saying that these rents were received by Ummat-ul Fatima by means of Money Orders sent by the *Thekadar*, the reason being that he (witness) used to be away for considerable periods at Calcutta. Being asked whose shares of the profits he received from the *Thekadar*, he answered that he received the shares of Ummat-ul-Fatima and her two sons. This statement appears to have weighed very much with the learned Subordinate Judge who points out that under the terms of the settlement, the sons are not entitled to receive any shares in the mother's life-time. He, therefore, concludes, to use his own language, "that the deed of trust was abrogated by its author, by the trustees and by the beneficiaries." He also goes on to point out that there is evidence to show that Sultan Hasan Mirza, for whom no provision is made in the deed of trust, has also been receiving a share of these rents. It is, no doubt, possible that during his life-time and after the execution of this deed of settlement, Zaigham-ud-daula may have received the rents of this property from Mehdi Ali Khan, but we are unable to hold that this circumstance can be relied upon to show that Zaigham-ud-daula was receiving these rents on his own behalf and not on behalf of his wife who under the terms of the settlement was entitled to them. It would be nothing unusual for Zhigham-ud-daula who was living with his wife all this time to receive the money on behalf of his wife. We think it is more reasonable to assume that Zaigham-ud-daula received these moneys in this capacity rather than on his own behalf

and for his own enjoyment. As for what took place after his death, it may be that the trustees have failed to act as they ought to have done, but any misconduct on their part does not appear to us to be relevant for the purpose of determining what the intentions of Zaigham-ud-daula were when he executed the deed in 1895. With regard to the original deed of trust, it has already been stated that this was retained by the Attorney, Mr. Farr, under a lien for costs which were due to him by Zaigham-ud-daula. It is also to be noticed that the trust property previous to the deed of settlement had already been mortgaged to Farr for a sum of Rs. 25,000 in the year 1890. The reference to this mortgage is to be found in the second clause of the trust-deed and Farr's charge on the property for this amount is expressly declared. After Zaigham-ud-daula's decease, the debts due to Mr. Farr were discharged. The costs referred to were recovered in a suit instituted on behalf of Farr against the heirs of Zaigham-ud daula and the Subordinate Judge seems to treat this fact as showing that the deed of settlement was a fictitious transaction. He points out that Mehdi Ali Khan trustee was not impleaded as defendant in this suit and that the suit was not brought against the persons deriving title under the trust. It is quite clear, however, that the costs due by Zaigham-ud-daula to Farr constituted a debt which was personal to Zaigham-ud-daula and that it, therefore, follows that any suit brought to recover this debt was properly instituted against the persons who represented Zaigham-ud-daula's estate.

We come now to consider some other facts which the Subordinate Judge has deduced from the language of the document and which in his opinion supported the inference that the deed was a sham transaction. There was in evidence a diary duly kept by Mr. Farr in the course of his business as an Attorney from which it appears that Zaigham-ud-daula was for several weeks before the execution of this deed in constant consultation with Farr about the disposal of the property. This diary shows that Zaigham-ud-daula's original intention was to execute a deed of gift in his wife's favour by way of settlement of her dower debt. According to the Subordinate Judge, the document now under consideration "belies any such intention." We are unable to understand this remark for the diary also shows that acting on Farr's advice, Zaigham-ud-daula abandoned his original idea of executing a deed of gift and executed a deed of settlement instead and as for the matter of dower, this deed of settlement speaks for itself, for it states quite clearly that the arrangement proposed has been accepted by Ummat-ul Fatima as a discharge of her claim for dower. The Subordinate Judge also interpreted the deed as containing a provision for the reversion of the estate to Zaigham-ud-daula after his wife's decease and he points to this as an indication that there was no real intention on the part of Zaigham-ud-daula to divest himself of the property. The construction to be placed upon the language of the deed is a matter which we shall deal with more fully hereafter. For the present purpose, it is sufficient to say that we are unable to agree with the Subordinate Judge that there was any reservation by the settlor of an estate in reversion for himself. He then proceeds to remark that the arrangement proposed in the deed for the settlement of Ummat-ul-Fatima's dower debt was an inadequate one. We are wholly unable to follow the reasoning of the Subordinate Judge in this part of his judgment. There is nothing whatever in the terms of the document to suggest that the proposed arrangement was an inadequate provision for the discharge of a debt amounting to Rs. 85,000 having regard to the fact that Ummat-ul-Fatima was then a comparatively young woman and that she was to receive fairly handsome income for the period of her life. Again, the Subordinate Judge came to the conclusion that some of the recitals in the documents were proved to be untrue. He refers, first of all, to the statement that the dower debt agreed upon in the case of Zaigham-ud-daula's first marriage was only Rs. 105 whereas the dower debt in the case of his marriage with Ummat-ul-Fatima was a great deal more. He thinks that the statement that the dower in the first marriage was fixed at Rs. 105 must be false; first of all, because the lady whom he married on that occasion was of a very high social position, and, secondly, because the minimum under the Muhammadan Law is Rs. 107. The learned Subordinate Judge quotes the case reported in *Sugra Bibi* v. *Musuma Bibi* (1) as an author-

(1) 2 A. 573.

MOHAMMAD HASHIM ALI KHAN *v.* SADIQ HUSAIN KHAN.

ity for this latter statement. He is entirely mistaken in thinking that any such rule was laid down in that case. In the case of *Shias*, there appears to be no fixed legal minimum for dower. In the case of *Sunnis*, there is some authority for saying that the minimum amount is 10 *dirms*. There seems to be some difference of opinion as to what the value of this latter coin is. In some of the dictionaries, it is said to be worth about two pence sterling. Mr. Amir Ali in his work on Muhammadan Law describes it as being worth one shilling and eight pence. However that may be, there is no authority for the proposition that the minimum dower cannot be less than Rs. 107. The Subordinate Judge also tries to make out that whereas Ummat-ul-Fatima's dower is described in the trust-deed as being of the amount of a lakh of rupees, it was described in a pamphlet written by Zaigham-ud-daula in the year 1890, as amounting to two lakhs. The Subordinate Judge is altogether wrong in this statement. It is clearly stated in the deed of trust that Ummat-ul-Fatima's dower was fixed at one lakh of rupees *plus* a monthly allowance of Rs. 100. In the pamphlet referred to it was said that her dower was fixed at "about two lakhs of rupees" and we are unable to perceive that there is any substantial difference between these statements. Again, the Subordinate Judge, referring to the statement in the deed that Zaigham-ud-daula had already provided for his family by his first wife, came to the conclusion that this statement was untrue. We are unable to accept the reasons given by the Subordinate Judge for the opinion. There is nothing whatever to show that any claim against the estate of Zaigham-ud-daula has ever been made by any of his children by his first wife. We may remark here that these points referred to in the judgment were not pressed in appeal. We only refer to them in order to show that they possess no importance whatever.

Having considered all the points just referred to, the Subordinate Judge seems to have been of opinion that taken together they were sufficient to raise a presumption that the whole scheme outlined in the deed of settlement of February 1895, was merely a device by which Zaigham-ud-daula sought to place his property beyond the reach of his creditors while in fact it enabled him to maintain control over it during his life-time. The Subordinate Judge then went on to consider whether this presumption was in any way weakened or rebutted by the evidence tendered by the plaintiffs. It might very well be said that the above facts relied upon by the Subordinate Judge were by no means sufficient to support the inference which he drew from them and that in reality there was no case against the deed which the plaintiffs were called upon to rebut. However, assuming that there was any case for the plaintiffs to meet on this ground, we are satisfied that the evidence they produced completely overturned the presumption which the learned Subordinate Judge had raised. It has already been stated that the deed of settlement was executed on the 5th February 1895. On the 10th September 1895, a suit was filed in the Calcutta High Court (Suit No. 610 of 1895) in order to obtain the directions of the Court as to the conversion of some of the trust property into cash. That suit was filed by Zaigham-ud-daula. His minor sons were added as plaintiffs by order of the Court. The defendants were Ummat-ul-Fatima and Mehdi Ali Khan, the trustees. The history of the deed of trust was set out in the plaint as were also the provisions of the deed itself. On the 16th December 1895, both Mehdi Ali Khan and Ummat-ul-Fatima filed a written statement in which they admitted all the allegations in the plaint including allegations that they were the trustees and were in possession of the property. It is proved beyond all dispute that this written statement was signed both by Mehdi Ali Khan and by his daughter, Ummat-ul-Fatima. *Prima facie*, therefore, there would seem to be no doubt whatever that both Mehdi Ali Khan and Ummat-ul-Fatima accepted the position of trustees. It was argued before the lower Court, and the argument appears to have found favour with the learned Subordinate Judge, that this suit was purely a bogus transaction entered into in order still further to carry out the fraudulent purpose for which the deed of settlement is said to have been executed. The Subordinate Judge in his judgment seems to think that the suit was never prosecuted to a finish and he, therefore, concludes that there was no real intention to take any steps to have the trust property converted. In this he appears to be completely mistaken. There is no doubt what-

ever that eventually the High Court after making inquiries as to the value of the house in question did pass an order allowing it to be sold at a certain price. It is true that this order was never carried out and it is also true that there is no very clear explanation as to why advantage was not taken of it in order to sell the property. It was suggested that the offer for purchase of the property, which was made to one of the officers of the High Court at Calcutta, was afterwards withdrawn. Be that as it may, it is incorrect to say that the case was merely instituted and never carried to a finish. It has been argued here that no weight can be attached to these proceedings inasmuch as it has not been made clear that Ummat-ul-Fatima was in fact cognizant of the nature of the case. There is evidence to show that she was living at Lucknow at the time the suit was filed and it is contended that the plaintiffs have produced no proof to show that matters were explained to her and that the written statement to which her name was affixed was filed with full knowledge on her part of the facts of the case. Ummat-ul-Fatima was not called as a witness in this case. It appears that the plaintiffs applied to have her evidence taken but this application was refused by the Court on the ground that it was made too late. The defendants never made any attempt to obtain her evidence. They argued that it was not their duty but that of the plaintiffs to put Ummat-ul-Fatima in the witness-box. We are clearly of opinion that the duty of calling Ummat-ul-Fatima lay upon the defendants Mirza Sadiq Husain and Sultan Hasan Mirza. It was Ummat-ul-Fatima who made the mortgage in favour of Sadiq Husain; it was Ummat-ul Fatima's application for mutation of names which resulted in Sultan Hasan Mirza being recorded in 1899 as the owner of a portion of the property of the late Zaigham-ud-daula. On the other hand, the case set up by Ummat-ul-Fatima's sons was that their mother had committed a breach of trust and had given the go-by completely to the trust-deed which had been executed for their benefit. The defendants-respondents have given no satisfactory account of their failure to call Ummat-ul-Fatima. All that has been suggested is that the mortgagee Sadiq Husain had reason to suppose that Ummat-ul-Fatima would make common cause with her sons who are trying to avoid the mortgage. There is nothing whatever in the pleadings to suggest that such a thing was likely. Ummat-ul-Fatima never attempted to resist the claim brought by Sadiq Husain on his mortgage. It having been proved that Ummat-ul-Fatima put her name to this written statement which was lodged in Court, we think it lay upon the defendants-respondents to show that she was acting as they alleged in ignorance of the facts of the case; and as they failed to obtain Ummat-ul-Fatima's explanation of her conduct, we do not think it is open to them to raise the plea that this written statement was put in by Ummat-ul-Fatima without full knowledge of its purport. In our opinion, this circumstance seems to indicate clearly that Ummat-ul-Fatima very well knew that she had been appointed a trustee under the deed of settlement and that with full knowledge of the facts she was content to accept the position. It cannot avail the defendants to point out that some three years afterwards, Ummat-ul Fatima in mutation proceedings resiled from the position she had already adopted. Having once accepted the office of trustee, she could not repudiate it by any such proceedings as were taken by her in September 1898. The matter, however, does not end there. There is evidence on record to show that after 1895 both Ummat-ul-Fatima and Mehdi Ali Khan continued to deal with the Calcutta property as trustees. It was stated before us in argument that sometime in 1901, they leased the house to two persons. There is no copy of the lease on record but there are certain letters (Exhibits B 24 to B 51) which go to show that the rent of the Calcutta house was paid regularly into the Bank of Bengal at Calcutta and that advices of these payments were sent in due course by the Bank of Bengal at Lucknow to Ummat-ul-Fatima and Mehdi Ali Khan in which it was stated that payment would be made to them on production of a joint receipt. It is not suggested, nor does it appear possible, that these payments could have been made in respect of any other property than the house at 13, Russell Street, Calcutta. These advices were received during the years 1901 and 1902. In 1903 we find Ummat-ul-Fatima and her sons filing a suit in the Calcutta High Court

MOHAMMAD HASHIM ALI KHAN *v.* SADIQ HUSAIN KHAN.

against the trustee, Mehdi Ali Khan, for the purpose of obtaining permission to raise money by mortgage of the Calcutta property. By its order passed in August 1904, the High Court gave permission to the trustees to raise Rs. 20,000 on a mortgage of the property in order to cover costs of repair of the Calcutta house, and on the 8th September 1904 the trustees raised this money by executing a mortgage in favour of one Madho Lal Dhugar, a resident of Calcutta. Various other applications of a similar nature were filed thereafter and ultimately, on the 7th September 1907, a further mortgage was executed in favour of Madho Lal consolidating the previous debts, the amount of this mortgage being Rs. 80,000. Some of this money was applied in paying off the mortgage-debt due to Farr which is referred to in the deed of settlement. This mortgage is still in force. Having regard to all these facts, we are of opinion that it is clearly proved that the deed of settlement was duly given effect to and that both Ummat-ul-Fatima and Mehdi Ali Khan accepted the position of trustees. If either Ummat-ul-Fatima or Mehdi Ali Khan have failed in their duties with regard to the administration of the trust-estate, it seems perfectly clear to us that their misconduct cannot be put forward as a reason for saying that Zaigham-ud-daula never seriously intended to convey his property in trust for his wife and children. To conclude the discussion of this part of the case, all we need say is that we are unable to agree with the Subordinate Judge's finding that the transfer evidenced by the deed of settlement was never intended to operate, that it was never treated as a real transfer by Ummat-ul-Fatima and that it was devised merely in order to secure Zaigham-ud-daula the enjoyment of the property without apprehension of its being seized by his creditors. This finding is entirely against the weight of the evidence and is, in our opinion, altogether erroneous.

The next point for determination is whether the deed executed by Zaigham-ud-daula on the 5th February 1895, is or is not valid in law. The legality of the deed was questioned by both the defendants in their written statements. In the written statement filed by Mirza Sadiq Husain, the plea was that the deed was "invalid" under the law. Sultan Hasan Mirza's plea was that the deed was "illegal." In the proceedings taken previous to the framing of the issues, his plea was explained to be one to the effect that the transaction embodied in the deed was not recognized by the Muhammadan Law and was, therefore, invalid. It is clear, therefore, that the case which the defendant originally set up was that the law to be applied between the parties was the Muhammadan Law. In the course of arguments, however, other objections appear to have been advanced founded upon the provisions of certain sections of the Indian Trusts Act (II of 1882) and the Transfer of Property Act (IV of 1882). The Subordinate Judge found that the law to be applied was the Muhammadan Law, that the transaction evidenced by the deed was to be treated as a gift, that the gift was void because there was no delivery of possession as required by the Muhammadan Law. He held that the gift was not one for consideration (*hiba-bil-ewaz*) and that, accordingly, delivery of possession was essential. Another point on which he found in favour of the defendants was that as the deed purported to create a contingent interest in favour of the sons of Zaigham ud-daula to take effect after the expiry of the life interest created in *Musammat* Ummat-ul-Fatima's favour, it violated the principles of the Muhammadan Law. He overruled the objections to the effect that the interest created in favour of the children could not take effect because of the provisions of sections 13 and 14 of the Transfer of Property Act. The first matter we have to consider is, whether or not the Subordinate Judge was right in holding that the law to be applied was the Muhammadan Law. There is no doubt some authority for the position taken by the learned Subordinate Judge. It has been ruled in the Bombay High Court, *Moosabhai Mahommed Sajan* v. *Yacoobbhai Mahommed Sajan* (2), that the Muhammadan Law applies to trusts and that in the case of trusts, delivery of possession is just as essential as it is in the case of gifts. The learned Advocate for the appellants contests the authority of the ruling and has argued that it should not be followed in this Court. He points out that, so far as the Courts in Oudh are concerned, the question as to what law is to be applied to any particular transaction must be determined

(2) 29 B. 267; 7 Bom. L. R. 45.

with reference to section 3 of the Oudh Laws Act (XVIII of 1876). He contends, and we think rightly, that the Muhammadan Law can only be applied to the transactions which are enumerated in clause (*b*) of that section. Under this clause, the rule is that as between Muhammadns, the Muhammadan Law is to be applied in all questions regarding succession, special property of females, betrothal, marriage, divorce, dower, adoption, gurdianship, minority, bastardy, family-relations, wills, legacies, gifts, partitions or any religious usage or institution. He claims that this enumeration does not include the transaction which is known to the law as a trust and contends that trusts cannot for the purposes of this clause be treated as gift inasmuch as the incidents of the two transactions are essentially different. A gift, it is said, is transfer of property made immediately and without any consideration, the result of which is to vest the absolute ownership of the property transferred in the donee. In the case of a trust the transfer is made to one person in such a manner as to impose upon him an obligation to exercise the rights of ownership for the benefit of a third party.

We agree that in construing clause (*b*) of section 3 of the Oudh Laws Act, we should not enlarge the interpretation of the term "gifts" so as to include trusts. This being so, it seems to follow that a transaction such as the present one must be dealt with in accordance with the statute law (*cf.* section 3, clause (*f*) of the Oudh Laws Act). The Indian Trusts Act does extend to Oudh and we think it must, therefore, be applied to the present transaction unless it can be shown that there is anything in the language of the Act itself which would preclude its being so applied. The Act is described in the preamble as being one to define and amend the law relating to private trusts and trustees. Under section 1, certain transations are exempted from the operation of the Act. The Act does not affect the rules of Muhammadan Law as to *Waqf*. It does not apply to public or private, religious or charitable, endowments and it is admitted that the trust with which we are concerned in this case is neither a religious or charitable endowment nor a *Waqf* in the sense in which that term is used in the Muhammadan Law. We are of opinion then that the validity of the deed in question must be determined with reference to the terms of the Indian Trusts Act and not according to the rules of Muhammadan Law. Section 4 of the Indian Trusts Act lays down that a trust may be created for any lawful purpose. Purposes which are unlawful are specified in the same section. It cannot, we think, be argued with any show of reason that the purposes of the deed we are now considering were in any sense unlawful within the meaning of section 4. The purposes as expresed in the document were to discharge a dower-debt due from the settlor to his wife and to prevent future disputes and litigation between the members of the settlor's family. We notice that the Subordinate Judge in his judgment was of opinion that the Muhammadan Law must be taken to apply to the case, as to hold otherwise would involve a breach of clause (*b*) of section 4 of the Trusts Act. This opinion we hold to be erroneous and to be based upon a misapprehension of the scope of section 4. We know of no provision of the Muhammadan Law which prevents the owner of property disposing of it for such purposes as are expressed in the present deed of trust. We take it, therefore, that this deed cannot be held to be invalid by reason of any provision contained in section 4. Section 5 and 3 of the Trusts Act declare the manner in which trusts can be created. A trust must be declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or it may be created by the Will of the author of the trust or of the trustee. Section 6 lays down the essential elements of a valid document intended to create a trust. The document must indicate with reasonable certainty an intention to create a trust, the purpose of the trust, the beneficiaries of the trust property and, except in cases where the trust is declared by Will or where the author of the trust is himself to be the trustee, there must be a transfer of the trust property to the trustee. The document we are now considering is a non-testamentary instrument which was signed by Zaigham-ud-daula, was duly registered and which contains all the particulars referred to in section 6. There is nothing in the language of section 6 to suggest that trust property cannot be effectively transferred to the trustee by execution of a registered instrument of transfer or that something else is required in addition to the execu-

tion of such an instrument, such for example as physical delivery of the property. Applying this law, therefore, we are of opinion that so far as the provisions of sections 4, 5 and 6 of the Trusts Act are concerned, the document is valid in law to create a trust. It is not to be understood, however, that we hold that in this case there was no delivery of possession of the trust property. We have already referred to certain evidence which, in our opinion, proves that so far at any rate as the Calcutta property was concerned, there was delivery to the trustees of such possession as the property was suceptible of. But the question does not, in our opinion, really arise because as we have just said, the law as contained in the Trusts Act is the law to be applied in this case and no delivery of possession is required under it. We do not think it is necessary for us in this view to take any notice here of other arguments which were urged on behalf of the respondents to show that the transaction was in other ways in conflict with the provisions of the Muhammadan Law.

We have now to deal with the other objections which were raised in argument before the Court below and which have been repeated here, arguments which are based upon the provisions of certain sections of the Transfer of Property Act. Before touching upon these objections, we think it advisable to set out here our opinion as to the proper construction to be put upon the terms of the trust-deed. In a previous portion of the judgment, we have stated that the Subordinate Judge was of opinion that a reversionary interest in the property to take effect upon the determination of Ummat-ul-Fatima's life-estate was reserved to the settlor. We have also expressed our opinion that this interpretation of the instrument was to our minds erroneous. The law as to the construction of documents of this nature has been laid down in the well known case of *Ram Lal Sett* v. *Kanai Lal Sett* (3), in which reference was made to the judgment of their Lordships of the Privy Council in the case of *Rai Bishen Chand* v. *Asmaida Koer* (4). In the course of his judgment, Mr. Justice Wilson remarks as follows :—

"The true ground of decision in that case appears to me to be that in construing family settlements of this nature, Courts are to ascertain the real meaning of the parties to the transaction ; that when that meaning has been ascertained, if it appears that the whole plan cannot be carried out, but that a part of it can, effect is to be given to that part. And that, accordingly, if the plan be to give a present gift to persons capable of taking, that gift is effectual, although it was also intended that other persons incapable of taking should afterwards come in and share in the gift."

In another part of his judgment, the learned Judge in an often-quoted passage lays down that the rules established in English Courts for construing English documents are not as such applicable to transactions between natives of this country. He refers to a passage in the judgment of the Privy Council in the case of *Hanuman Pershad Panday* (5), in which it was said that "deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense is not to be so much regarded as the real meaning of the parties which the transaction discloses." To turn now to the language of the document under consideration, we find that after reciting certain facts bearing upon his family history and his title to the property which he is about to settle, the author of the trust proceeds to describe the purposes for which he is making the settlement. Having done this, he proceeds to declare that he grants, conveys and assigns to the trustees the whole of his estate, right, title and interest in the property specified in the schedule attached to the deed. So far as this language goes, we take it to imply that Zaigham-ud-daula divested himself entirely of the property in question and transferred it to the trustees. Following upon this, we have a declaration of the trusts upon which the property is to be held. Certain annuities of small amount are to be paid to two of the settlor's servants and after payment of these annuities, Ummat-ul-Fatima is to be entitled for her life to the balance of the income arising out of the property subject to charges for the maintenance and education of her children. The deed then goes on to say that after the death of Ummat-ul-Fatima, the trustees are to hold in trust for all the children of the said

(3) 12 C. 663.
(4) 6 A. 560; 11 I. A. 164.
(5) 18 W. R. 81; 6 M. I. A. 393.

Nawab Zaigham-ud-daula by Ummat-ul-Fatima "living at the time of the decease of the said Nawab and their respective heirs as tenants in common in equal shares subject to the payment of such of the said allowances as may be then subsisting." Lastly, we have a further provision in the deed that upon the death of the survivor of the two trustees, or if at any time both of the trustees should become unwilling to act or incapable of acting in execution of the trust, the Official Trustee of Bengal was to become the trustee and to be at liberty to take possession of all the property and to exercise all the powers and authorities expressed in the deed in the same way as if he had been originally appointed trustee by Nawab Zaigham-ud-daula. The argument that the deed creates a reversionary interest in favour of the settlor rests upon that portion of the language which directs that the children who were to get the estate after the determination of Ummat-ul-Fatima's life-interest were those children who should be living at the time of the decease of Zaigham-ud-daula, and it is contended that, as it was possible at the time when the deed was executed that Zaigham-ud-daula might survive his wife, he intended that in that event the estate was to be held for him for the rest of his life and was not to pass to the children until after his death. No doubt, if we look to this portion of the deed alone, such an argument is maintainable, but if we are to gather the intention of Zaigham-ud-daula, as we think we ought to, from the language of the whole of the instrument, we do not think that such a contention can prevail. Zaigham-ud-daula clearly divested himself of all interest in the property in favour of the trustees. He made no declaration that in any event the income of the trust property was to be administered for his benefit or that the property was to revert to him free of the trust in case his wife died before him. It seems to us that he never meant that any of this property should come back to him. It was to remain with the trustees and in the event of their refusing to act or becoming incapable of acting, it was to go over to the Official Trustee of Bengal. The intention seems clearly to have been to provide for his wife during her life-time and to pass the beneficial interest in the property to the children as soon as his wife died. At the time he made this settlement, Zaigham-ud-daula had two sons alive born to him of Ummat-ul-Fatima. He meant certainly to provide for them and also for any other children of himself and Ummat-ul-Fatima who might be born thereafter. No other children of his were to take any benefit under the deed and no such children could come into existence after Ummat-ul-Fatima's decease. We think then that it may reasonably be inferred that the intention was that any children answering this description should take the estate immediately on the death of their mother and that, possibly, the Nawab may have intended that in the event of his surviving his wife, the shares of any of these children who died before him should go to the surviving children and should not descend to their heirs. It must be admitted that the interpretation of this clause of the document is not free from difficulty, but on the whole we are quite satisfied that Zaigham-ud-daula never intended that the property should revert to himself after the death of his wife and that it should descend after his death in accordance with the rules of Muhammadan Law, that is to say, only to those children who should be alive at the time of his decease.

Having then come to a conclusion as to the interpretation which should be put upon the terms of the instrument, we can dispose of the arguments based upon the provisions of certain sections of the Transfer of Property Act. So far as we can ascertain from the judgment of the Court below, the sections of that Act which were relied on by the defendants are sections 13, 14 and 15. It is not argued now that section 14 has any application to the case. As for the objection based upon section 13, upon the interpretation which we have placed upon the instrument, it follows that there was no reservation by Zaigham-ud-daula of any interest in the property to himself to take effect after Ummat-ul-Fatima's life-estate. We think it is clear that after the death of Ummat-ul-Fatima it was intended that the entire interest in the property should devolve upon the children. Consequently, if the transfer is not affected with invalidity by reason of any of the provisions of section 13, it cannot be made invalid under the terms of section 15. Our conclusion, therefore, is that the deed must be treated as valid in law.

The remaining point for decision in this

appeal is that which was decided by the lower Court under issue 4. The issue is as below :—"Are the plaintiffs the sole male heirs of Zaigham-ud-daula ?" It is convenient to point out how this issue arose. In paragraph 4 of the plaint it was alleged that Sultan Mirza, defendant No 2, had no right whatever as son and heir of the late Nawab Zaigham-ud-daula. In the written statement filed by defendant No 1, Sadiq Husain, on the 23rd March 1908, it is stated in paragraph 9 that Sultan Mirza is Zaigham-ud-daula's son from his second wife and under Muhammadan Law he is entitled to a legal share in his father's estate. Sultan Mirza in his written statement of the same date stated in paragraph 9 that he is the legitimate son of Zaigham-ud-daula by his second wife *Musammat* Zohra Khanam. When the case came before the Court on the 30th March 1908, Counsel for defendant No. 2 stated that his client was the son of Zaigham-ud-daula by his *muta* wife Zohra Khanam *alias* Karbalai Khanam, that Zaigham-ud-daula had brought this woman forty years ago from Karbala and that a *muta* marriage had taken place at Lucknow two or three years later. He added that Karbalai Khanam died thirty-three years ago (1875) leaving a son defendant No. 2 two years old.

The following facts material to this issue are not disputed. Nawab Ali Naki Khan, the father of Zaigham-ud-daula, went to Karbala about 1860 and remained there for three or four years During this period, he acquired four or five Abyssinian slave girls and one of them was Zohra Khanam, said to be the mother of Sultan Mirza. Zohra Khanam died or disappeared about 1872 and the *muta* marriage, if it took place at all, must have taken place about 1869 or 1870. This girl was kept in the house of Ali Naki Khan when he came back from Karbala and, therefore, Zaigham-ud-daula who was then quite a young man, probably sixteen or seventeen years of age, could have had access to her without any difficulty, and considering her position in the family, it is difficult to imagine how she could have effectually resisted any advances that he wished to make. It is also admitted that there is no written document of any kind executed or signed by Zaigham-ud-daula before his death in 1898, in which he had acknowledged Sultan Mirza as his legitimate son. On the contrary, a passage in "Tarikh Qaisari," a book published by Zaigham-ud-daula on the 14th October 1890, distinctly sets forth at page 10 that he has no heirs except those specified therein.

The passage is as below :—

"In my childhood, my father married me to Nawab Badshah Begam *alias* Momina Begam Ala Bahu, the daughter of the Nawab Nazim of Bengal. I have a son Nawab Badr-ud-daula Saiyad Jahangir Mirza from her. As the dower debt of the said deceased lady amounted to Rs. 105 only, being the legal dower, she had no claim in respect thereof against me nor does it lie now. But after the death of that lady I contracted a second marriage at Lucknow with Nawab Ummat-ul-Fatima Begam Muazzam Bahu and her dower besides her claims as wife comes to about Rs. 2,00,000. Therefore, my daughter Nawab Roshan Ara Begam, my elder son Nawab Saiyad Jahangir Mirza, my second son Nawab Saiyad Mune Mirza Bahadur and my wife Nawab Ummat-ul-Fatima Begam and their children alone can be the rightful heirs and claimants and they alone are the owners of and the heirs to my entire property. If any other person bring forward a claim it would be deemed null and void by Government."

There is also a memorandum Exhibit No 3, dated the 10th February 1893, signed by Zaigham-ud-daula; as also the deed of trust in suit, dated the 5th February 1895. In neither of these is there any mention of Sultan Mirza as legitimate son of the Nawab. The first written record of the name of Sultan Mirza as one of the sons of the deceased Zaigham-ud-daula appears only after the death of Zaigham-ud-daula, when applications for mutation of names with respect to the Lucknow *zemindari* property were made by his widow, Ummat-ul-Fatima. These were put in, in September and October 1898. In these circumstances, we think that the learned Subordinate Judge was wrong in holding that the burden lay on the appellants to prove that Sultan Mirza was not the legitimate son of Zaigham-ud-daula. He has relied as an authority on the case of *Rajendro Nath Haldar* v. *Jogendro Nath Banerjee* (6). In that case the question

(6) 14 M. I. A. 67; 15 W. R. 41 (P. C.); 7 B. L. R. 216.

arose as to whether a certain man had been adopted by the widow of a Hindu. It was found that he had been received as an adopted son for a period of 27 years and that his legal status had been accepted with the knowledge of all the members of the family. Their Lordships of the Privy Council held that every allowance should be made for loss of evidence during this long period and that there was a very strong presumption in favour of a man who had been recognised during this period. In this case, the recognition, such as it was, by the widow of Zaigham-ud-daula and some other members of the family only commenced *after* the death of Zaigham-ud-daula. It is urged on behalf of the appellants that, in the absence of any document signed by Zaigham-ud-daula before his death expressly acknowledging Sultan Mirza as his legitimate son, the burden of proof clearly lies on the respondents to prove the legitimacy of Sultan Mirza beyond the slightest doubt, and we have been referred to the cases of *Raunak Bakhsh Khan* v. *Roshan Zaman Khan* (7), *Ghazanfar Ali Khan* v. *Musammat Kaniz Fatima* (8) and *Kasim Hasan Khan* v. *Batul Bibi* (9).

In *Raunak Bakhsh Khan* v. *Roshan Zaman Khan* (7), the plaintiff claimed certain property on the allegation that he was the legitimate son of a certain Raja. He relied upon a statement made by the Raja as a witness in a case in which he expressly stated that the plaintiff was his son and the Court was asked to presume that the Raja meant to say that the plaintiff was his legitimate son. It was also proved in that case that the Raja had lived with the plaintiff's mother for some time. In spite of this, it was held that this evidence was wholly insufficient to prove the legitimacy of the plaintiff, more especially as his mother who was alive was not called as a witness. In *Ghazanfar Ali Khan* v. *Musammat Kaniz Fatima* (8), it was held that prolonged cohabitation might give rise to a presumption of marriage, but that presumption was not necessarily a strong one and it did not apply to the case of a mother who before she was brought to the father's house was a prostitute. In the present case, no prolonged cohabitation between Zaigham-ud-daula and the mother of Sultan Mirza is proved at all and, therefore, to this extent no presumption can arise in favour of the legitimacy of Sultan Mirza. In *Kasim Hasan Khan* v. *Batul Bibi* (9), it was held that "an acknowledgment of paternity made by a Muhammadan is not in all cases sufficient to establish the fact that the person so acknowledged is of legitimate descent. In every case the question is whether the acknowledgor, at the time of making the acknowledgment, intended to confer upon the person whom he acknowledges as his son the status of legitimacy."

No definite rule can be laid down to meet every case, but in this case we are of opinion that, as Zaigham-ud-daula during his lifetime expressly denied that he had any legitimate issue except those specified on page 10 of "Tarikh Qaisari," the burden clearly lies on the respondents to prove that Sultan Mirza is the legitimate son of Zaigham-ud-daula. We, therefore, propose to discuss the evidence which has been produced on behalf of the respondents as to this part of the case in order to ascertain whether this burden has been discharged. If it has not been discharged, it follows that the respondents' case must fail.

The learned Counsel for the respondent, has urged that Sultan Mirza got possession of a son's share in the Lucknow property and was in possession thereof at the institution of this suit, and that it is not explained how he was allowed to remain in possession by the other members of the family if he was not a legitimate son, as it was against their interest to allow him any share in it. He has referred principally to the conduct of Ummat-ul-Fatima as proved by admissions made by her in mutation applications of 1898, guardianship applications of June, 1899, and application for succession certificate of August, 1899. It is sufficient to say with reference to this that, as Ummat-ul-Fatima had once committed herself to recognition of Sultan Mirza as a son of Zaigham-ud-daula in her application for mutation of names, the other applications made by her would follow as a matter of

(7) 9 O. C. 246.
(8) 13 O. C. 170; 6 Ind. Cas. 674; 14 C. W. N. 690 7 A. L. J, 579; 11 C. L. J. 649; 12 Bom. L. R. 447; 8 M. L. T. 59; 1910 M. W. N. 312; 20 M. L. J. 579: 32 A. 345.
(9) 13 O. C. 255; 7 Ind. Cas. 1019.

course. We are unable to give any weight to these admissions without the evidence of the lady herself and it is admitted that she was not called as a witness by the respondents. It is urged on their behalf that it was the duty of the appellants to call her and they failed to do so. We have already said that the appellants did attempt to call her, but the learned Subordinate Judge refused to take her evidence because in his opinion the application was made too late. The proceedings in connection with this part of the case are to be found on page 62 of the printed record under order dated the 7th June 1909. It is not necessary to decide here whether the appellants should or should not have asked for the evidence of this lady at an early stage of the case. What we have now to deal with is the reluctance of the respondents themselves to call her. It being conceded that Zaigham-ud-daula had never admitted the legitimacy of Sultan Mirza in any formal document during his life-time, but, on the other hand, had expressly set out a list of his heirs which does not include Sultan Mirza, an admission made by his widow after his death acknowledging Sultan Mirza as one of his sons is a matter which requires full explanation; that explanation could only be given by the lady herself and is not forthcoming. The explanation given by the appellants is that this lady and her father Mehdi Ali Khan had quarrelled and the lady thought that it would be to her advantage to reject the trust in order to obtain actual possession of her legal share as a widow. To effect this object it was deemed advisable to keep Sultan Mirza who had always lived in the family on her side. It is not necessary here to express any opinion on the dispute between this lady and her father which undoubtedly began soon after Zaigham-ud-daula's death. The fact remains that the lady's acknowledgment of Sultan Mirza as the Nawab's legitimate son remains unexplained. We have now only to see what evidence has been produced by the respondents to show that the Nawab in his life-time acknowledged Sultan Mirza as his legitimate son intending to confer upon him the status of an heir.

* * * * *

[After discussing the evidence, the Court came to the following conclusion.]

We find that the respondents have not in any way discharged the burden which lay on them to prove the legitimacy of Sultan Mirza beyond reasonable doubt. We do not hesitate to say that it is not proved that Sultan Mirza is the legitimate son of Zaigham-ud-daula. So far, therefore, as this appeal (First Civil Appeal No. 8 of 1910) is concerned, our findings upon the three points for determination are in favour of the appellants.

The result is that this appeal No. 8 of 1910 must be allowed. We set aside the decree of the Court below and direct that the claim of the plaintiffs-appellants be decreed with costs in both Courts.

Appeal allowed.

(s. c. 15 C. L. J. 142.)

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 153 OF 1911 AND CIVIL RULE No. 1935 OF 1911.

August 30, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

SUBHADRA KOER AND OTHERS—APPELLANTS—PETITIONERS

versus

DHAJADHARI GOSSAIN AND OTHERS—RESPONDENTS—OPPOSITE PARTY.

Guardian and ward—Necessity for appointment of guardian—Minor having no property—Order not bona fide—Legality of order—Jurisdiction to make order—Judge, if chosen as arbitrator—Decision final—Judicial pressure, effect of.

A guardian was not needed for the protection of the person of a minor girl: she had no property of which a guardian could take charge. The machinery of the law was set in motion by one R. who induced his servant, the maternal grandfather of the minor, to make an application for appointment of himself as her gurdian in order that she might be ultimately married to his son:

Held, that orders passed in proceedings so instituted and conducted, even if they were nominally in conformity with statutory provisions, could hardly be regarded as invested with the efficacy of legal orders made in *bona fide* judicial proceedings, and that the orders were wholly without jurisdiction and absolutely null and void.

If the parties have treated a Judge as their arbitrator and have submitted to his decision, even though he had no jurisdiction to deal with the matter in controversy, his decision is binding upon them as f it were the award of an arbitrator.

Ledgard v. *Bull*, 13 I. A. 134; 9. A. 191, followed.

This doctrine, however, cannot be applied to the circumstances of a case where the Judge was not

chosen by the parties voluntarily and where one party acted under judicial pressure of the highest degree, to which he was not in a position to offer effective resistance.

Appeal against the orders of the District Judge of Shahabad, dated the 3rd and 6th January 1911.

Mr. *B. C. Mitter* and Babus *Provash Chunder Mitter*, *Biraj Mohan Mojumdar* and *Susil Madhub Mullick*, for the Appellants and Petitioners.

Dr. *Rash Behary Ghose*, Moulvi *Syed Shamsul Huda* and Babu *Raghunath Singh*, for the Respondents and Opposite Party.

JUDGMENT.—This appeal and Rule are directed against a series of orders under the Guardians and Wards Act of 1890, the validity whereof is assailed on the ground that they were made by the Court below wholly without jurisdiction.

It appears that one Dibakar Bhatta, a wealthy Hindu governed by the *Mitakshara* law, left a daughter, Bachhi Sahdei. The mother of this girl, Bunda Koer, who was the fourth wife of Dibakar Bhatta, had predeceased her husband; but her three co-wives Subhadra Koer, Ram Koer and Mahesha Koer, who are the petitioners and appellants before us, survived him. The case for these three ladies is that one Ramadin Chowdhury, a man of considerable wealth, who is the opposite party in the Rule and respondent in the appeal, was anxious to secure the marriage of his own son with Bachhi, so that ultimately the estate of Dibakar Bhatta might pass into the hands of the representatives of his own family. The petitioners assert that Dhajadhari, the maternal grandfather of Bachhi, was a servant of this Ramadin Chowdhury and was set up by him to make an application to the District Judge for appointment of himself as guardian of the person and property of the girl. It is necessary to state at this stage that the girl was possessed of no property; she had no present interest in the estate left by her father Dibakar Bhatta, and was merely the reversionary heir, entitled to take the estate after the demise of all the three widows. The application of Dhajadhari was promptly opposed by the three widows. But it appears to have been represented to the District Judge, in the course of these proceedings, that the widows were under the control of two unscrupulous persons and that the life of the girl was in danger. No evidence, however, was taken at any stage of the proceedings and we have no definite information as to the character and antecedents of these persons, or the nature and extent of their influence upon the three ladies. However that may be, the District Judge deemed it imperatively necessary to place the girl in absolutely safe custody. To achieve this object, he thought it essential to remove the widows from the influence and control of those two persons, and concluded that the end might be attained if the ladies could be induced to place all their properties in the hands of Ramadin Chowdhury. With this object in view, the District Judge proceeded to pass a series of orders of an extraordinary character, which cannot possibly be justified under the provisions of the Guardians and Wards Act. It has not been disputed that it was not competent to the learned Judge to deal in any manner, directly or indirectly, with the estate vested in the ladies. The only matter before him was the question of the appointment of a suitable person as guardian of the person of the infant, and also of her property, if indeed, she had any property at all. The ladies, however, were obdurate and refused at one stage to place their property in the hands of Ramadin Chowdhury as had been suggested by the District Judge. The learned Judge thereupon proceeded to record in the order sheet more than one order to the effect that if the widows did not agree to the terms proposed by the Court, the minor, whom they dearly loved, would be taken away from their custody and placed in the hands of her maternal grandfather who would be appointed guardian of her person. The learned Counsel for the petitioners has described the method pursued by the District Judge as judicial coercion, and there can be no room for reasonable doubt that, although he may have acted from the best of motives, his orders were wholly without authority, and he put pressure upon the widows in a manner never contemplated by the framers of the Guardians and Wards Act. The result was that the widows at last yielded to the pressure of the Judge. A Commissioner was appointed to make an estimate of the assets in their hands. The terms were arranged by the learned Judge himself, and ultimately a lease of the estate in the hand

of the widows was granted by them to Ramadin Chowdhury. Finally, the widows were made to present an application for appointment of themselves as guardians of the person of their infant step-daughter. This application was granted and they were formally appointed guardians. But there is no room for reasonable doubt that this application was not voluntarily made: the widows had throughout protested that the appointment of any guardian in respect of the person and property of Bachhi was wholly needless and that the application of Dhajadhari in that behalf was not only not made *bona fide* for the benefit of the infant, but had been made at the instance of Ramadin Chowdhury to enable him to get the girl married to his own son and thus ultimately to seize the estate of Dibakar Bhatta. In this view of the matter, it is clear that the orders of the District Judge cannot be supported. The proceedings, from beginning to end, were a grievous misapplication of the provisions of the statute. No guardian was needed for the protection of the person of the minor; she had no property of which a possible guardian could take charge. The machinery of the law was set in motion by Ramadin Chowdhury who induced his servant, the maternal grandfather of the infant, to make an application for appointment of himself as her guardian in order that she might be ultimately married to his son. Orders passed in proceedings so instituted and conducted, even if they were nominally in conformity with statutory provisions, could hardly be regarded as invested with the efficacy of legal orders made in *bona fide* judicial proceedings. The orders are wholly without jurisdiction and must be treated as absolutely null and void.

It has been suggested, however, by the learned Vakil who appeared to show cause that the District Judge acted as an arbitrator chosen by the parties and that his decision cannot consequently be challenged by them by way of appeal to this Court. This argument is wholly fallacious. No doubt, as ruled by the Judicial Committee in the case of *Ledgard* v. *Bull* (1), if the parties have treated a Judge as their arbitrator and have submitted to his decision, even though he had no jurisdiction to deal with the matter in controversy, his decision is binding upon them as if it were the award of an arbitrator. It is plain, however, that this doctrine cannot possibly be applied to the cricumstances of the case before us. The Judge cannot be deemed, by any fiction of law, to have been an arbitrator chosen by the parties voluntarily; the ladies acted under judicial pressure of the highest degree, to which they were not in a position to offer effective and successful resistance. It is difficult to appreciate how, under these circumstances, the orders of the learned Judge can be supported either as proper judicial orders or as the adjudications of an arbitrator to whose judgment the parties have voluntarily submitted the matter in controversy between them.

The result, therefore, is that this appeal is allowed, and the Rule made absolute. All the orders of the Court below from the 3rd January 1911 to the 8th March 1911 are discharged as made without jurisdiction. The appellants are entitled to their costs of this Court, as also of the Court below, from Ramadin Chowdhury who has been at the root of these extraordinary and mischievous proceedings. We assess the hearing fee in the appeal at five gold *mohurs* and make no separate order for costs in the Rule.

Appeal allowed : Rule made absolute.

(1) 9 A. 191; 13 I. A. 134.

(s. c. 15 C. L. J. 120.)

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3326 OF 1909.

July 24, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

GOPAL LAL SAHAI—PLAINTIFF—APPELLANT

versus

BAHORNI—DEFENDANT—RESPONDENT.

"Week," meaning of—General rule—Exclusion of day on which order is made—Deficit Court-fee to be paid "in a week"—Intention to allow full seven days.

The word "week," when used in reference to computation of time from which it is to be reckoned, *prima facie* excludes the day of that date, though the expression may be inclusive or exclusive according to the context.

Howard's case, (1700) 2 Salk. 625; 1 Ld. Raymond 480, *Sidebotham* v. *Holland*, (1895) 1 Q. B. 378; 64 L. J. Q. B. 200; 14 R. 135; 72 L. T. 62; 43 W. R. 228, relied upon.

An inflexible rule of interpretation cannot be allowed and whether the day on which the order is made is to be included or excluded, must depend upon the circumstances and the reason of the thing.

GOPAL LAL *v.* BAHORNI.

Lester v. *Garland*, (1808) 15 Ves. 248 at p. 254; 10 R. R. 68, relied upon.

A fair rule of construction seems to be that where the computation is to be for the benefit of the person affected, as much time should be given as the language admits of, and where it is to his detriment, the language should be construed as strictly as possible.

North, In re. Ex parte Hasbuck, (1895) 2 Q. B. 264, at p. 270, relied upon.

Where the Court ordered the plaintiff to file deficit Court-fee "in a week":

Held, that the intention of the Court was to allow the plaintiff full seven days.

Appeal against the decree of the Subordinate Judge of Chapra, reversing that of the Munsif of Chapra, dated the 27th May 1909.

Babu *Dwarka Nath Mitter*, for the Appellant.

Babu *Indu Bhusan Brahmachari*, for the Respondent.

JUDGMENT.—The sole question of law which arises in this appeal is, whether the suit is barred by limitation as has been held by the Subordinate Judge in reversal of the decision of the Court of first instance. The plaintiff commenced this action on the 29th October 1908 for declaration of his title to a house purchased by him on the 26th October 1896 and for recovery of possession thereof. His title was disputed by the defendants, and it was also urged that the claim was barred by limitation. The Courts below have concurrently found upon the merits in his favour, but they have differed on the question of limitation. It is not disputed that the Court was closed on the 26th October 1908 and did not re-open after the annual vacation till the 29th October 1908. The plaint was presented on that date, but it was found that the full amount of Court-fees had not been paid on the plaint. Thereupon, the following order was made; "Plaintiff to file deficit Court-fee and also summons and *talbana* and copies of plaint *in a week*." The plaintiff carried out the order of the Court on the 6th November; the plaint was registered and the suit was tried in due course. No objection was taken at the trial by the defendants that the order of the Court had not been duly carried out. But when the unsuccessful defendant appealed to the Subordinate Judge, she contended that the order of the first Court had not been carried out because the deficit Court-fee had been paid on the eighth day after the order had been made. The Subordinate Judge accepted this contention as well founded and dismissed the suit as barred by limitation.

On behalf of the plaintiff, it has been argued in this Court that the order of the original Court for the payment of deficit Court-fee was duly carried out and that the plaintiff paid the Court-fee within one week from the date when the order was made. On behalf of the respondents, it has been contended that the day on which the order was made ought to be treated as part of the week allowed by the Court. In our opinion, this contention is not well founded. The order obviously means that the plaintiff was to pay the deficit Court-fee in a week from the date of the order. Now, it is well settled that the word, "week," when used in reference to computation of time from which it is to be reckoned, *prima faice* excludes the day of that date [*Howard's* case (1)], though it is clear that the expression may be inclusive or exclusive according to the context, as pointed out by Lord Lindley in the case of *Sidebotham* v. *Holland* (2). It was observed in the case of *Lester* v. *Garland* (3), that an inflexible rule of interpretation cannot be allowed in cases of this description, and whether the day on which the order is made is to be included or excluded, must depend upon the circumstances and the reason of the thing. Once such reason was suggested by Lord Esher in the case of *In re North, Ex parte Hasbuck* (4). The learned Judge observed: "A fair rule of construction seems to be that where the computation is to be for the benefit of the person affected, as much time should be given as the language admits of, and where it is to his detriment, the language should be construed as strictly as possible." See also *Wilkins* v. *Mc Ginity* (5). Now, there can be no question that, in this case, the intention of the Court was to allow the plaintiff full seven days for payment of the deficit Court-fees. Consequently, we must take it that the order of the Court was duly carried out when the deficit Court-fees were paid in a week exclusive of the day on which the order was made. The principle of interpretation we

(1) (1700) 2 Salk. 625; 1 Ld. Raymond 480.
(2) (1895) 1 Q. B. 378; 64 L. J. Q. B. 200; 14 R. 135; 72; L. T. 62; 43 W. R. 228.
(3) (1808) 15 Ves. 248 at p. 254; 10 R. R. 68.
(4) (1895) 2 Q. B. 264 at 270; 64 L. J. Q. B. 694; 14 R. 436; 72 L. T 854: 2 Manson 326; 59 J. P. 724.
(5) (1907) 2 Ir. R. 660.

SAROOP CHAND *v.* TULARAM.

adopt accords with section 9 of the General Clauses Act and section 12 of the Indian Limitation Act. We may add that, in England, it is well settled that in any case in which a number of days, not expressed to be clear days, is prescribed by the rules of the Supreme Court, the same ought to be reckoned exclusive of the first day and inclusive of the last day. (See Order 64, Rule 12 of the Supreme Court of England, and Daniell on Chancery Practice, Vol. I, p. 37). We are, therefore, of opinion that the suit is not barred by limitation and that the judgment of the Subordinate Judge cannot be supported.

The result is that this appeal is allowed, the decree of the Subordinate Judge reversed and that of the Court of first instance restored with costs in all the Courts.

Appeal allowed.

(s. c. 8 N. L. R. 17.)

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 251 OF 1911.

November 14, 1911.

Present:—Mr. Batten, A. J. C.

SAROOP CHAND—APPELLANT

versus

TULA RAM—RESPONDENT.

Attesation—Illiterate executant—Scribe writing executant's signature—Not an attesting witness.

A document was executed by an illiterate executant. The scribe wrote his name as having scribed the deed and also as the actual writer of the executant's signature. He did not sign as attesting witness:

Held, that the scribe could not be regarded as an attesting witness of the document.

Ajab v. *Mangal*, 6 N. L. R. 152; 8 Ind. Cas. 1119, followed.

Appeal against the decree of the District Judge, Seoni, dated the 17th March 1911, reversing that of the 1st Munsif, Seoni, dated the 29th November 1910.

Mr. *M. R. Dixit*, for the Appellant.

Mr. *M. Chuckerbutty*, for the Respondent

JUDGMENT.—In this case, the appellant's suit on a mortgage-deed has been dismissed by the District Judge on appeal, mainly on the ground that the mortgaged-deed was not properly attested by two attesting witnesses. The facts are that the deed is written by the hand of Wazirkhan who also wrote the name of the executant, who was illiterate, the signature being "Signed Barwar Bhoi Wazirkhan" which evidently means, and is deposed to by Wazirkhan himself as meaning, that it was signed by Barwar Bhoi by the hand of Wazirkhan. There are also the signatures of two persons purporting to be attesting witnesses. The word '*gawah*' 'witness' appears, followed by the names of two witnesses Ganna and Jeonia, also written by the same scribe Wazirkhan. Ganna called as a witness says he is illiterate and that his signature was written by Wazirkhan. It has been found on the evidence that Jeonia who is dead was not present when the document was executed. Thus, there was only one attesting witness, properly so called, namely Ganna, and the scribe did not sign as an attesting witness. The executant did not even put his mark. It is settled law in this Court that a scribe of a document who writes his name as the writer of the document cannot on that account pose as an attesting witness, even if he did see the deed signed by the executant. I am asked to distinguish the present case from the case of *Ajab* v. *Mangal* (1) on the ground that the scribe Wazirkhan has been called as a witness, and that he not only wrote his name as having scribed the deed, but also wrote his name as the actual writer of the executant's signature. It is argued that he has thus expressly attested the executant's signature. It appears to me, however, that the reasons against allowing the scribe of the deed to be considered an attesting witness given in the case cited, apply at least as strongly against the scribe of an illiterate man's signature being considered to be an attesting witness of that signature. The signature is really the work of two persons, the illiterate executant and the person who writes his name for him. If, in the case of an illiterate man who can write his own name, it is necessary to have two attesting witnesses, it is at least as necessary to have two independent attesting witnesses when the man cannot write his name but it is written for him by another, in order that the fact that it has really been written by the authority of the alleged executant may be established. A scribe cannot be an attesting witness of what he has himself written. For these reasons, I agree that the deed was not attested according to law and I dismiss the appeal with costs.

Appeal dismissed.

(1) 6 N. L. R. 152; 8 Ind. Cas. 1119.

CHALASAMY RAMIAH *v.* CHALASAMY RAMASWAMI.

[S. C. 11 M. L. T. 155; (1912) 1 M. W. N. 199.]

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 728 OF 1911.

January 30, 1912.

Present:—Mr. Justice Miller and Mr. Justice Sundara Aiyar.

CHALASAMY RAMIAH—DEFENDANT—PETITIONER

versus

CHALASAMY RAMASWAMI—PLAINTIFF—RESPONDENT.

Partition suit—Jurisdiction—Value—Suits Valuation Act (VII of 1887), *s.* 8—*Court Fees Act (VII of* 1870) *s.* 7, *cls.* 4 (*b*) *&* 5—*Madras Civil Courts Act (III of* 1873), *s.* 14—*Interlocutory order—Revision.*

In a suit for partition of lands of which plaintiff is in joint possession, he is entitled to value the suit at his own estimate for purposes of jurisdiction.

Rangiah Chetty v. *Subramania Chetty*, 21 M. L. J. 21; (1910) 1 M. W. N. 755; 9 M. L. T. 3; 8 Ind. Cas. 512; *Chakrapani Asari* v. *Narasinga Rau*, 19 M. 56, *Chinnasami Pillay* v. *Karuppa Udayan*, 21 M. 234; *Velu Goundan* v. *Kumaravelu Goundan*, 20 M. 289, relied upon.

Ramakrishnamma v. *Bhagamma*, 13 M. 56; *Ramu Iyer* v. *Sankara Aiyar*, 31 M. 89; 17 M. L. J. 573; 3 M. L. T. 73, distingushed.

The High Court has jurisdiction to interfere with interlocutory orders of subordinate Courts.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Ellore, dated the 17th day of October 1911, in Original Suit No. 615 of 1911.

Mr. *T. Prakasam*, for the Appellant.—According to the Full Bench decision in *Rangiah Chetty* v. *Subramania Chetty* (1), the plaintiff is entitled to fix his own valuation for purposes of Court-fee under section 7, clause 4 (*b*) of the Court Fees Act. No dispute so far. But plaintiff cannot fix his own valuation for purposes of jurisdiction. Section 14 of the Madras Civil Courts Act describes the manner of valuation for purposes of jurisdiction. It says that it should be fixed in the same manner as it is done under section 7, clause 5 of the Court Fees Act. Section 14 of the Civil Courts Act applies to all cases in which the subject-matter of the suit is land, or other immoveable property. It applies to partition suits also when the subject-matter is land. Section 8 of the Suits Valuation Act does not apply, because section 6 provides that section 14 of the Civil Courts Act, III of 1873, shall be repealed if rules were framed under section 3. No rules are framed. Section 14 of the Civil Courts Act is in force. Therefore, section 8 of the Suits Valuation Act does not apply. Plaintiff cannot fix any valuation he pleases to choose his own *forum*. *Rama Aiyar* v. *Sankara Aiyar* (2); *Dayaram Jagjiwan* v. *Gordhan Das* (3); *Musammat Bibi Umatal Batul* v. *Musammat Nanji Koer* (4); *Dagdu* v. *Totaram* (5); *Velu Goundan* v. *Kumaravelu Goundan* (6); *Ramakrishnamma* v. *Bhagamma* (7).

Mr. *T. Ramachandra Rao*, for the Respondent.—Section 8 of the Suits Valuation Act applies, because according to the Full Bench decision in *Rungiah Chetty* v. *Subramania Chetty* (1), plaintiff can fix his own value for Court-fees, under section 7, clause 4 (*b*), of the Court Fees Act, in a partition suit of this nature and it does not fall under the cases excepted in section 8 of the Suits Valuation Act. Section 3, 6, 7, and 9 of the Suits Valuation Act also confirm this view.

Chinnasami Pillai v. *Karuppa Udayan* (8); *Samiya Mavali* v. *Minammal* (9); *Guruvajamma* v. *Venkatakrishnama Chetti* (10); *Chinnammal* v. *Madarsa Rowther* (11); *Hari Sanker Dutt* v. *Kali Kumar Patra* (12).

Mr. T. Prakasam in reply:—

Hani Sanker Dutt v. *Kali Kumar Patra* (12) is explained away in a later case in *Musammmat Bibi Umatal Batul* v. *Musammat Nanji Koer* (4). The decisions in *Samiya Mavali* v. *Minammal* (9); *Guruvajamma* v. *Venkatakrishnama Chetti* (10); *Chinnamal* v. *Madarsa Rowther* (11) refer only to the question of valuation of Court-fees. Sections 3, 4 and 6 of the Suits Valuation Act must be read together.

JUDGMENT.—This is an application to revise the order of the District Munsif's Court of Ellore holding that the suit for partition instituted by the plaintiff in that Court was within the jurisdiction of his Court. The question raised for decision before him was whether a plaintiff, claiming partition but alleging that he is in possession jointly with the defendant of the properties belonging to both in common, is entitled to value the relief claimed by him

(1) 21 M. L. J. 21; (1910) 1 M. W. N. 755; 9 M. L. T. 3; 8 Ind. Cas. 512.

(2) 31 M. 89 at p. 92; 17 M. L. J. 573; 3 M. L. T. 73.
(3) 31 B. 73; 8 Bom. L. R. 885.
(4) 11 C. W. N. 705; 6 C. L. J. 427.
(5) 33 B. 658; 11 Bom. L. R. 1074; 4 Ind. Cas. 242.
(6) 20 M. 289.
(7) 13 M. 56.
(8) 21 M. 234.
(9) 23 M. 490.
(10) 24 M. 34.
(11) 27 M. 480.
(12) 32 C. 734; 9 C. W. N. 690.

for purposes of jurisdiction according to his own discretion, or whether the rules contained in section 7, clause 5 of the Court Fees Act, apply to such a suit. The Munsif held that the plaintiff was entitled to put his own value on the relief claimed by him. This petition asks us to set aside that order. A preliminary objection is raised by the respondent that we should not intefere as the order in question is an interlocutory one. It is not contended that we have no jurisdiction to set aside an interlocutory order, and the decisions of this Court have fully established that we have power to do so. In a case of this sort, where the question relates to the proper tribunal that has jurisdiction in the cause, we are not willing to refuse to consider it on the merits. Proceeding to deal with the merits, we must start with the proposition laid down by a Full Bench of this Court that, so far as valuation for Court-fees is concerned, section 7, clause 4 (*b*), applies to a suit for partition where the plaintiff alleges that he is in possession along with those against whom he claims partition. *Rungiah Chetty* v. *Subramania Chetty* (1). Section 8 of the Suits Valuation Act makes the valuation for purposes of jurisdiction the same as for the computation of Court-fees except in certain specific cases. The present case is admittedly not within the exception. *Prima facie*, therefore, the plaintiff in a suit for partition would be entitled to value his relief for purposes of jurisdiction. But it is contended that section 14 of the Madras Civil Courts Act III of 1873 lays down that for purposes of jurisdiction, the rules laid down in section 7, clause 5 of the Court Fees Act, must be applied in all cases where the subject-matter of a suit is land, and that where partition of land is sought, the subject-matter is land. But sections 3 and 6 of the Suits Valuation Act show that section 14 of Act III of 1873 is really not applicable where recovery of possession of land is not sought, for section 6 enacts that, on the framing of rules by the Local Government under section 3 for the computation of the value for jurisdiction purposes in suits for recovery of possession of land, section 14 of Act III of 1873 shall stand repealed. It is unlikely that such a provision would be made if section 14 of Act III of 1873 were regarded as applicable to any suits for land other than for recovery of possession. Section 9 of Suits Valuation Act also goes to strengthen this conclusion. The inference, therefore, is that section 8 of the Suits Valuation Act applies to suits for partition which are not also suits for possession.

In *Chakrapani Asari* v. *Narasinga Rau* (13) and *Chinnasami Pillai* v. *Karuppa Udayan* (8), section 14 of Act III of 1873 and section 8 of the Suits Valuation Act were regarded as applicable to a suit connected with land according as it was one for possession or not. In *Velu Goundan* v. *Kumaravelu Goundan* (6), it was decided that section 8 of the Suits Valuation Act was applicable to a suit for partition. The cases *Ramakristnamma* v. *Bhagamma* (7) and *Ramu Iyer* v. *Sankara Aiyar* (2) have no bearing on the present case, as the suits there were for registration of documents. Section 8 of the Suits Valuation Act was, therefore, inapplicable. In *Ramakristnamma* v. *Bhagamma* (7) reference was, no doubt, made to section 14 of Act III of 1873 as laying down the rule for determining the value for jurisdiction but that was before the Suits Valuation Act was enacted. We must hold that the Munsif was right in holding that the plaintiff was entitled to value the relief for purposes of jurisdiction. It is unnecessary to consider the question whether the plaintiff's valuation is final and not liable to any control by the Court, because that question was not the subject of the Munsif's order. We dismiss the petition with costs.

Petition dismissed.

(13) 19 M. 56.

(s. c. 8 N. L. R. 18.)

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 563 OF 1909.

April 11, 1910.

Present:—Mr. Skinner, A. J. C.

SHRIKISON—APPELLANT

versus

CHATARSINGH—RESPONDENT.

Mortgage—Registered deed—Subsequent transferee—Notice.

SHRIKISON v. CHATARSINGH.

A registered mortgage by a person entitled to dispose of immoveable property binds the property as against subsequent transferees from the mortgagor. It is not necessary for the mortgagee to prove that the subsequent transferees had express notice of his mortgage.

Questions of notice arise only when there is a conflict between a registered deed and an unregistered deed or oral sale, or when the transferor is not entitled to dispose of the property.

Sukhnandan v. *Sadaram*, 13 C. P. L. R. 43, explained and distinguished.

Appeal against the decree of the Additional District Judge, West Berar, Akola, dated the 19th July 1909, modifying that of the Munsif, Khamgaon, dated the 30th November 1908.

Mr. *J. Mittra*, for the Appellant.

Mr. *M. R. Dixit*, for the Respondent.

JUDGMENT.—The plaintiff-appellant sues to enforce a registered mortgage by the defendant Chatarsingh, under whom the other defendants claim through a subsequent sale by him to their vendor, Jhabba Rao. The plaintiff's suit for sale has been dismissed on grounds which are not made clear in the judgment of the Court of first instance, but are explained by the lower Appellate Court, which has upheld the dismissal of the suit, taking the view that the plaintiffs are purchasers without notice, registration having been held not to be of itself notice by this Court in *Sukhnandan* v. *Sadaram Seth* (1). The plaintiff has come up in second appeal, and the decrees of the Courts below are, in my opinion, clearly unsustainable.

The lower Appellate Court has overlooked the fact that the decision of Ismay, J. C., by which it held itself bound, was given in a case in which the right in question was the equitable right created by a hypothecation of future crops, not a legal right in existing immoveable property. *Prima facie*, the property was subject to that right, and could only be transferred subject to it. There is no doubt a current of authority in the Bombay High Court to the effect that a mere mortgage without possession cannot take effect against a subsequent mortgagee or purchaser who has obtained possession without notice thereof. But it has been held by the same High Court that a purchaser with express notice of a previous mortgage takes subject to it, and that either possession under a previous mortgage or registration of it prior to the execution of the subsequent transfer is equivalent to notice—(see Mayne's Hindu Law and Usage, pages 516—518, and the authorities there cited). If the Bombay rule is to be followed in Berar, which I need not in this case decide, its qualifications should also be adopted, and registration be held for this purpose equivalent to notice. In the Central Provinces, the view that has always been taken is that of the Calcutta and Madras High Courts that a registered mortgage by a person entitled to dispose of immoveable property binds the property, and that questions of notice only arise when there is a conflict between a registered deed and an unregistered deed or oral sale, or when the transferor is not entitled to dispose of the property.

In this case, there can be no question of Jhabba Rao having been an ostensible owner of the property, and the 2nd and 3rd defendants consequently entitled to hold it free of encumbrance as purchasers from him, for they would have to show (in accordance with section 41 of the Transfer of Property Act, the principles of which would be applicable, though the Act had not then been introduced into Berar) that "after taking reasonable care to ascertain that the transferor had power to make the transfer, they had acted in good faith," but the lower Appellate Court has held that "they acted with unbusiness-like negligence in not searching the registers in the registration office."

The respondent's learned Counsel has raised in this Court an objection to the plaintiff's dividing the mortgage, and suing for half the mortgage-money only, the co-mortgagor Sawanji being alleged to have paid off half the debt. But this is an objection which involves the joinder of Sawanji. It should, therefore, have been taken in the first Court and cannot be allowed to be raised in second appeal. The decrees of the lower Courts must be set aside, and the case remanded to the Court of first instance for a fresh decision. The plaintiff will receive refunds of the Court-fees on his memoranda of 1st and 2nd appeal, and the other costs in this Court and in the lower Appellate Court will follow the ultimate result of the suit.

(1) 13 C. P. L. R. 43.

Case remanded.

VALLIAMMAI ACHI *v.* NATARAJA PILLAY.

[s. c. 11 M. L. T. 157; (1912) 1 M. W. N. 198.]

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 1769 OF 1911.

January 29, 1912.

Present:—Mr. Justice Miller.

VALLIAMMAI ACHI, BY HER AGENT DORASAWMY PILLAY—PETITIONER—RESPONDENT.

versus

NATARAJA PILLAY AND OTHERS—RESPONDENTS.

Appeal—Objection-Memo.—Adding parties—Parties not necessary to appeal—Civil Procedure Code (Act V of 1908), O. XLI, r. 20.

Though a Court has power to add parties in appeal independently of the provisions of Civil Procedure Code, Order XLI, rule 20, yet when a person is not a necessary party to an appeal, a respondent should not be permitted to add him as a party and to raise cross-objections against him.

Jadunandan Prasad Singh v. *Koer Kallyan Singh*, 15 C. L. J. 61; 13 Ind. Cas. 653; *Bishun Churn Roy Chowdhury* v. *Jogendra Nath Roy*, 26 C. 114, referred to.

Petition praying that, in the circumstances stated therein and in the affidavit filed herewith, the High Court will be pleased to issue an order bringing the names of the respondents in Appeal No. 213 of 1910 on the file of this Court (Original Suit No. 8 of 1909 on the file of the Subordinate Judge's Court of Negapatam).

Mr. *T. R. Venkatarama Sastriar*, for the Petitioner.

Messrs. *G. S. Ramachandra Iyer*, *K. Bhashyam Iyengar* and *S. Krishnamurthi Iyer*, for the Respondents.

ORDER.—The first defendant is the appellant.

The respondent, who has filed his memorandum of objections (the plaintiff in the suit) has by mistake, he says, omitted to make the 2nd and 3rd defendants parties to the memorandum and applies now to add their names to the record.

It has been contended that I have no power to add parties to an appeal except under Order XLI, rule 20 of the Code of Civil Procedure, but I am clear that there is no ground for that contention. But it is also contended that inasmuch as the 2nd and 3rd defendants are not interested in the appeal preferred by the appellant, they ought not to be made parties; not only does the appellant claim no relief against them, but if the plaintiff succeeds against them, the appellant will be in no way directly affected, but, if affected at all, will be indirectly benefited, for it is said the plaintiff will recover property not only for himself but for the appellant. The appellant, however, does not seek any relief in this direction.

In these circumstances, can the 2nd and 3rd defendants be made parties at the respondent's instance? Order XLI, rule 22, gives the right to the respondent to take by way of memorandum of objections any objection to the decree which he could have taken by way of appeal and the sub-rule (3) seems to make clear, what at one time was in doubt, that the respondent may raise objections against co-respondents. But in the most recent case which I have seen, *Jadunandan Prasad Singh* v. *Koer Kallyan Singh* (1), the principles adopted in *Bishun Churn Roy Chowdhry* v. *Jogendra Nath Roy* (2) are affirmed; while it is noted that the new Code is in some respects wider than the old. Applying the principles laid down in the earlier decisions, the learned Judges state as a test that where a person is not a necessary party to the appeal, a respondent should not be permitted to raise objections against him (page 64). If I apply that test, I must dismiss this application. I am asked to hold that, according to the views of this Court, that test would not be applicable. But I have been referred to no case here in which objections have been allowed, when the plaintiff-respondent preferring the objection can gain nothing as against the appellant, and when the other respondents against whom the objections are urged are in no way affected by the decision of the question to be decided between the appellant and the respondent preferring the objection.

Wide as are the words of the Code, I am prepared to accept what I deem to be the view taken by the Calcutta High Court of their scope, at any rate so far as to hold that in a case like the present, the plaintiff must proceed not by way of memo. of objections but by way of appeal.

I dismiss the application with costs.

Application dismissed.

(1) 15 C. L. J. 61; 13 Ind. Cas. 653.
(2) 26 C. 114.

GOURI DUTT *v.* AMAR CHAND.

(s. c. 15 C. L. J. 49.)

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No 2941 OF 1908.

May 12, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

GOURI DUTT—DEFENDANT No. 1—APPELLANT

versus

AMAR CHAND AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 295—"Assets realised by sale or otherwise," meaning of—Private payment by judgment-debtor to one decree-holder—Appeal—Civil Procedure Code (Act V of 1908), s. 102—Provincial Small Cause Courts Act (IX of 1887), Sch. II, cl. (26)—Appeal, second—Suit to compel refund of assets improperly distributed under section 295.

To constitute a realisation within the meaning of section 295 of the Code of 1882, the sum must be realised either by sale in execution under process of the Court or in one or other of the modes expressly prescribed by the Code.

Sew Bux Bogla v. *Shib Chunder Sen*, 13 C. 225, *Prosonnomoyi Dassi* v. *Sreenath Roy*, 21 C. 809, *Purshotam Dass* v. *Maheanant Suraj Bharthi*, 6 B. 588 and *Gopaldai* v. *Chunni*, 8 A. 67, relied upon.

Vibudhapriya v. *Yusuf Sahib*, 28 M. 380; 15 M. L. J. 202, referred to.

Therefore, a payment made privately by a judgment-debtor to one of his decreee-holders is not an asset within the meaning of section 295.

Where a suit is commenced on the ground that the plaintiff is entitled to relief under section 295, the mere circumstance that he is ultimately found to be not entitled to succeed on the merits, does not alter the nature of the suit. Such a suit is excluded from the jurisdiction of a Provincial Small Cause Court and a second appeal lies.

Appeal from the decree of the Subordinate Judge of Mozuffarpur, dated the 14th September, 1908, affirming that of the Munsif of Mozufferpur, dated the 31st March 1908.

Babu *Shoroshi Charan Mitra*, for the Appellant.

Babu *Baldeo Naraian Singh*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the first defendant in an action for recovery of money, commenced by the plaintiffs under the penultimate paragraph of section 295 of the Code of Civil Procedure of 1882. There is no controversy between the parties as to the circumstances under which the claim has been put forward. The plaintiffs allege that they themselves as well as the first, fourth and fifth defendants, held decrees for money against the second defendant, that the latter also held a decree for money against the third defendant, and that in execution of their decrees they have attachad the decree held by the second defendant against the third defendant. The Court thereupon directed rateable distribution of the assets that might be realised in execution under section 295 of the Code of 1882. Eeffect was given to this order, a certain sum was realised and distributed according to law. It appears, however, that although the plaintiffs as well as the first, fourth and fifth defendants had attached the decree held by the second defendant against the third defennant, it was the first defendant alone who had taken steps to execute that decree. It will be observed that the effect of an attachment of a decree for money under section 273 of the Code of 1882 was to stay execution of that decree till the Court which passed the decree sought to be executed cancelled the notice or the holder of the decree sought to be executed applied to the Court receiving such notice to execute its own decree. The only one amongst the execution-creditors of the second defendant who had taken the necessary steps was, as we have already stated, the first defendant. He got his name substituted in the decree held by the second defendant against the third defendant and consequently occupied a position of advantage. The third defendant then sold to the first defendant some immoveable property which he possessed and which had not been attached in execution. The consideration-money was paid into the hands of the third defendant who gave a portion thereof to his creditor, the second defendant. The second defendant then privately made a payment to the first defendant. This transaction took place on the 26th July 1903. On the 27th August 1904, it was intimated to the Court, on behalf of the second defendant that his claim against the third defendant had been satisfied out of Court. The first defendant also at the same time notified to the Court that his claim against the second defendant had been satisfied by payment out of Court. Thereupon on the 16th August 1907, the plaintiffs commenced this action te compel the first defendant to have a rateable distribution of the money appropriated by him; in other words, they claimed that assets had been paid to the first defendant unlawfully in contravention of the provisions of section 295, and that, therefore, he could be compelled to refund the assets. The Courts below have concurrently made a decree in favour of the plaintiffs. Upon appeal, the learned

GOURI DUTT *v.* AMAR CHAND.

Vakil for the first defendant has contested the validity of that decision on the ground that the sum received by him was not liable to be rateably distributed amongst himself, the plaintiffs and the fourth and fifth defendants, because it was not assets realised by sale or otherwise in execution of a decree within the meaning of section 295 of the Code of 1882. In support of this proposition, reliance has been placed upon the cases of *Sew Bux Bogla* v. *Shib Chunder Sen* (1), *Prosonnomoyi Dassi* v. *Sreenanth Roy* (2), *Purshotamdass* v. *Mahanant Suraj Bharthi* (3) and *Gopaldai* v. *Chunni Lall* (4). These cases show that to constitute a realisation within the meaning of section 295 of the Code of 1882, the sum must be realised either by sale in execution under process of the Court or in one or other of the modes expressly prescribed by the Code. The learned Judges of the Madras High Court have even gone further and held, in the case of *Vibudhapriya Tirthaswami* v. *Yuzuf Sahib* (5), that the words "assets realised by sale or otherwise in execution of a decree," mean that the assets must be realised by some process of Court in execution, and, therefore, can cover only sales held by the Court and could not be extended to private sales by the judgment-debtor of properties attached. In the case before the learned Judges of the Madras High Court, the money had in fact been paid into Court in satisfaction of the debt of the attaching creditor. It was ruled that that circumstance did not make any difference and that the money could not be treated as assets realised under section 295 of the Code. It is not necessary for the purposes of this case to go as far as the learned Judges of the Madras High Court have done. The present case, in our opinion, is reasonably free from difficulty. Here the money has not been brought into Court. The payment has been made privately by the third defendant to the second defendant and by the latter to his creditor, the first defendant. It cannot be contended that this money was in any sense assets realised by sale or otherwise in execution of the decree. We may point out that it has been ruled by this Court, in the cases of *Hari Sundari* v. *Shasi Bala* (6), *Bihari Lall Paul* v. *Gopal Lal Seal* (7) and *Roshun Lall* v. *Ram Lall* (8), that money deposited under section 174 of the Bengal Tenancy Act or under section 310A of the Code of 1882 cannot be treated as assets realised in execution of a decree within the meaning of section 295. The learned Vakil for the respondent has, however, contended that the acceptance of this view enables the first defendant to defeat the provisions of section 295 of the Code. In our opinion, there is no force in this contention. The plaintiffs might have protected themselves if they had taken steps to execute the decree attached by them and in execution thereof had attached the property which was transferred by the third defendant to the first defendant. If such attachment had been effected, the first defendant would have taken the property subject to the lien imposed thereon by the other execution-creditors of the second defendant. If they now find themselves in a difficulty, it is due entirely to lack of diligence on their part.

We may add that it has been contended by the learned Vakil for the respondent that this appeal is incompetent because it is in contravention of the provisions of section 102 of the Code of 1908. The learned Vakil for the appellant has, on the other hand, pointed out that the suit is not cognizable by a Court of Small Causes by reason of clause 26 of the second Schedule of the Small Cause Courts Act. The learned Vakil for the respondent, however, has suggested in reply that as the plaintiffs are found not to be entitled to any relief under section 295, it ought to be held that the suit is not one under the penultimate paragraph of that section. This argument is obviously fallacious. The plaintiffs have commenced the suit on the ground that they are entitled to relief under section 295 of the Code of 1882, the mere circumstance that they are ultimately found to be not entitled to succeed on the merits, does not alter the nature of their suit. It follows, therefore, that the appeal is competent.

The result is that this appeal is allowed, the decree of the Court of appeal below set

(1) 13 C. 225.
(2) 21 C. 809.
(3) 6 B. 588.
(4) 8 A. 67.
(5) 28 M. 380; 15 M. L. J. 202.

(6) 1 C. W. N. 195.
(7) 1 C. W. N. 695.
(8) 30 C. 262.

aside, and the suit dismissed with costs in all the Courts.

Appeal allowed.

(s. c. 8 N. L. R. 22.)

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 12 OF 1911.

September 23, 1911.

Present:—Mr. Stanyon, A. J. C.

GANESHDAS—APPELLANT

versus

SHANKAR—RESPONDENT.

Central Provinces Tenancy Act (XI of 1898), ss. 46, 47, 48, 70, 71, 72, 95—Transfer of tenant-right—Transfer prohibited by s. 46 or s. 70—Jurisdiction of Civil or Revenue Court—Suit to avoid transfer.

Where a transfer of tenant-right would be valid between the parties thereto in the absence of the prohibition contained in section 46 or section 70 of the Central Provinces Tenancy Act 1898, it cannot be avoided except in the manner and to the extent provided by that enactment.

No suit would lie in a Civil Court to avoid such a transfer.

Dayaram v. *Shaligram*, 16 C. P. L. R. 135, followed.

Daji Vithal v. *Moreshwar Venkatesh*, 1 N. L. R. 112, not followed.

Chamru Sao v. *Tulsidin Singh*, 17 C. P. L. R. 49, distinguished.

Miscellaneous appeal against the order of the District Judge, Hoshangabad, remanding the case decided by the Subordinate Judge, Hoshangabad, on 6th September 1910.

Mr. *G. L. Subhedar*, for the Appellant.

Mr. *J. Mittra*, for the Respondents.

JUDGMENT.—The disposal of this appeal has been rendered difficult owing to the failure of the Courts below to ascertain, and set out an intelligible statement of, the facts. As far as they can be gleaned from a meagre and confused record, I will endeavour to relate them. The plaintiffs (a father and two sons) are, jointly, the landlord of a village called Samarda in the Harda *Tahsil* of the Hoshangabad district. In that village, three persons, Govinda, Khema, and Sukhya, were formerly tenants. They were three brothers, the sons of one Ganesh Kurmi. What was the precise extent of their holding or holdings it is impossible upon this record to say, but fields Nos. 244, 245 and 344, held in occupancy-tenure, were included therein. There is reason, from the documentry evidence on the record, to think that Govinda was separate from his brothers, but even that cannot be stated with any certainty. This family of tenants had dealings with the defendant Ganeshdas, and, as usual, became heavily involved. He held from them, *inter alia*, two deeds of mortgage, executed and registered in due conformity with the provisions of the Registration Act, on the 21st October 1898, whereby they bound their lands in Samarda as collateral security for the payment of the sum of their debts. These dealings between the tenants and defendant appear to have been subsequently dealt with by some process of arbitration—probably a Debt Conciliation Board—which resulted in a scheme for the adjustment of the debts. On the 14th November 1905, two decrees were made by the Court of the Subordinate Judge of Hoshangabad, purporting to be based on awards. By one of these (Case No. 540 of 1905), Rs. 400 were declared payable by Khema and Sukhya to the present defendant, Ganeshdas, on account of a mortgage-deed, dated 21st October 1898, on two other bonds, and on account-books and it was ordered that this sum should be paid off in sixteen annual instalments of Rs. 25. It was further decreed that 17·50 acres of land in Samarda, held by these debtors (nature of tenure not stated), should continue mortgaged till the decretal debt had been fully satisfied; and that, in case default was made in respect of two instalments, the creditor should be put in possession of the mortgaged land and recover his debt from the usufruct. By the other decree, Govinda was declared liable to pay Rs. 320 to Ganeshdas in respect of a mortgage bond dated 21st October 1898 (erroneously written '1895' in Exhibit P-4) of another bond, and a decree, and he was directed to re-pay that sum in sixteen annual instalments of Rs. 20 each. As collateral security his land in Samarda (nature of tenure not stated), measuring 30 acres, was to remain mortgaged, and here, as in the other case, on default made in respect of two instalments, the creditor was to enter upon possession and satisfy himself out of the usufruct. Apparently, the tenants failed to meet their obligations, and the defendant Ganeshdas got possession of the lands. On the 22nd September 1908, the tenants Govinda and Sukhya executed a document whereby they

surrendered to their landlords, the present plaintiffs, their occupancy rights over fields Nos. 244, 245 and 254, measuring 24·80 acres, and assessed at Rs. 45. Thereupon, the plaintiffs applied to the District Revenue authorities for possession of the above lands from defendant, who was stated to be holding under a transfer in violation of the provisions of the Central Provinces Tenancy Act. By an order of the Deputy Commissioner of Hoshangabad, dated 30th March 1910, the plaintiffs were referred to the Civil Court. In obedience to that order, the present suit was filed, the plaintiffs claiming to eject the defendant on the ground that the transfer to him as mortgagee, having been made without their consent, was not binding on them.

It so happens that the mortgages, under which the defendant mainly holds the land in dispute, were executed on the day on which the Central Provinces Tenancy Act 1898, came into force. By virtue of section 5(3) of the General Clauses Act (X of 1897), the enactment must be deemed to have come into force with the first moment of the 21st October 1898. Therefore, so far as the occupancy-tenure now in dispute is concerned, the two mortgage-deeds were rigistered in violation of the provisions of section 46, sub-sections (3) and (5) of the said Tenancy Act. This condition of things seems to have been discovered for the first time after this suit was filed, and a preliminary objection was taken by the defendant's Pleader that the remedy of the plaintiffs against the transferee lay bfore the Revenue Officer, and not in the Civil Court. The Subordinate Judge accepted this contention and dismissed the suit: but, on appeal by the plaintiffs, the District Judge, following the rule of law laid down in *Daji Vithal* v. *Moreshwar Venkatesh* (1), held the defendant to be, in law, a trespasser, and plaintiffs' suit to be one, in substance though not in form, a suit to eject a trespasser in respect whereof the Civil Court jurisdiction is not barred. The decree of the Subordinate Judge was, therefore, reversed and the case remanded for trial and decision upon the merits. The present appeal has been made against that order of remand.

The question presented is by no means free from difficulty. Section 70 lays down for ordinary tenants the same rule of law as is enacted by section 46 for occupancy-tenants, in respect of transfers of their holdings, and, therefore, the *ratio decidendi* in *Dayaram* v. *Shaligram* (2), which was the case of a transfer by an ordinary tenant, is equally applicable to the case of a transfer by an occupancy-tenant. It is important to remember that the case before Drake-Brockman, A. J. C., was one of sale of an ordinary holding made by the tenant on the 5th April 1899, by a deed which was registered the following day, and that there, as here, both execution and registration were inadvertently in violation of the Tenancy Act, 1898. It was held that the transfer could only be avoided in the manner provided by that enactment, which had " deprived the landlord of his remedy to have the transfer declared void in a Civil suit."

In *Chamru Sao* v. *Tulsidin Singh* (3), there is, at page 50, a direct affirmation of the proposition contained in *Dayaram* v. *Shaligram* (2), by a distinction drawn between a transaction prohibited by the Tenancy Act, but otherwise valid between transferor and transferee, and one which is invalid independently of the prohibition aforesaid. The case before Ismay, J. C., was one of a transfer by a deed compulsorily registrable which in fact had not been registered. In such a case, the apparent transferee was rightly held to be no transferee at all but a mere trespasser *ab initio*, and the jurisdiction of the Civil Court was held to be not barred.

But in *Daji Vithal* v. *Moreshwar Venkatesh* (1), the same learned Judicial Commissioner went further, and held that an inadvertent registration of a transfer in violation of section 46 (5) of the Tenancy Act, 1898, was, in law, no registration at all, and placed the transferee in the same position as the transferee in *Chamru Sao* v. *Tulsidin Singh* (3). The head-note refers to a case of registration obtained by fraud, and if the *dictum* had stopped there, I should have had no difficulty in reconciling it with *Dayaram* v. *Shaligram* (2); because fraud vitiates the most solemn proceedings, and orders obtained thereby are *ab initio* void, in all cases, by reason of the fraud. But in the body of the judgment I find this passage:—

(1) 1 N. L. R. 112.

(2) 16 C. P. L. R. 135.

(3) 7 1C. P. L. R. 49.

"Where registration is essential to the validity of a transfer, the transfer is no longer possible. If through inadvertence or from some other cause, a Registrar or Sub-Registrar does admit any such document to registration, he acts in excess of his powers and the document cannot be deemed to be duly registerd."

In accordance with this view, the learned Judicial Commissioner ruled that the stated transferee was a mere trespasser against whom the landlord could obtain an ejectment decree in the Civil Court. This seems to be in direct conflict with the law propounded in *Dayaram* v. *Shaligrm* (2).

Upon a careful consideration of the subject, I am of opinion that the *dictum* in *Dayaram* v. *Shaligram* (2) is correct, and that where a transfer of tenant-right would be valid between theparties thereto in the absence of the prohibition contained in section 46 or section 70 of the Central Provinces Tenancy Act, 1898, it cannot be avoided, except in the manner, and to the extent, provided by that enactment, as indicated in each case by the concluding words of sub-section (3). It seems to me obvious that the object of the Legislature was to give the Revenue Officer very plenary powers over transfers by occupancy and ordinary tenants, so as to dispose of each case on its merits, and in accordance with equity and good conscience in their bearing upon a tenant's liabilities. The Legislature had to provide for a very wide range of circumstances. It had, on the one hand, to sustain the land policy of securing the true agriculturist against the rapacity of the money-lender, and, on the other, to prevent such protection from being used as a screen by the tenant for the avoidance of his just liabilities. The only practicable method of securing the necessary elasticity of treatment lay in placing the tenant's transfers in the hand of the Revenue Officer for treatment in accordance with the demands of each case. Therefore, an applicant under section 47, or 71, *may* be placed in possession upon terms which are to be guided by rules made for that purpose by the Local Government as the Chief Revenue and Executive Authority. Now, can it be supposed to have been intended that these powers should be confined to such petty transfers as can be made without a registered instrument, and that in all other cases the transferee should be held a trespasser, whether his deed was registered or unregistered, and be liable to treatment under the hard and fast law of the Civil Court? I think not: and yet that would be the logical consequence of the interpretation of the law contained in *Daji Vithal* v. *Moreshwar Venkatesh* (1): for section 95 of the Tenancy Act excludes any theory of concurrent jurisdiction in the Civil Court and the Revenue Officer. In my opinion, the key to the problem of interpretation here presented is to be found in the following passage in *Dayaram* v. *Shaligram* (2), at page 139:—"Such prohibition of transfers as the new Act contains is a creation of its own, and the scope of the prohibition must * * be determined by its own provisions". Where a transfer is invalid, irrespective of the provisions of section 46 or 70 of the Central Provinces Tenancy Act, 1898, the enactment is not called into operation: there is nothing upon which it can fasten: there is no otherwise legal transaction for the consideration of the Revenue Officer. He cannot be required to make terms upon the basis of a nullity. In such a case, the intended transferee is not a transferee at all, and, if he enters upon possession under colour of the transaction, his entry is a trespass at civil law. The following are illustrations of such a case:—

(1) where the transferor is a minor or lunatic acting without a guardian;

(2) where the transferor is not the tenant of the holding transferred;

(3) where the holding is in the hands of the Collector in execution of a decree;

(4) where the transfer is made by an instrument compulsorily registrable but not registered;

(5) where the transfer has been made or obtained by fraud.

But where a transfer would be perfectly valid, as between the parties thereto, except for the prohibition contained in section 46 or section 70 of the Tenancy Act, 1898, then the enactment works out its own operation thereupon, and itself determines the scope of such prohibition. The transfer is not declared void in every case, but voidable in the manner and to the extent provided by the Act, and no further. The civil law is not violated by such transfer, and the Civil Court has no jurisdiction to interfere there-

with, both because of the general law that it may not avoid a lawful contract, and of the special law (contained in section 95 of the Tenancy Act) which excludes from its cognizance every dispute or matter in respect of which authority is given by the enactment to a Revenue Officer. The prohibition against registration contained in sub-section (5) is merely a part of the general scheme Imbodied in the section, whereby the Legis-eature seems to have had a two-fold object in view, namely (1) that transfers to strangers should not take place at all, and (2) that all transfers, if made otherwise legally, should come under the treatment of the Revenue Officer.

For the above reasons, I hold that the present suit is not maintainable, even though it be conceded—and I record no decision on this point—that the decrees of 14th November 1905 do not affect the question at issue. The remedy of the plaintiffs is provided by sections 47 and 48 of the Tenancy Act, and does not lie in the Civil Court. The decree of the lower Appellate Court is reversed, and the plaintiffs' suit is dismissed. But as the suit was the direct result of the order of the Deputy Commissioner, dated 30th March 1910, towards which the defendant appears to have contributed, I direct that each party do bear his own costs throughout.

Decree reversed.

(s. c. 15 C. L. J. 122.)

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 906 OF 1900.

April 20, 1903.

Present:—Mr. Justice Rampini and Mr. Justice Handley.

ALI MOHAMMAD BEPARI—PLAINTIFF—APPELLANT

versus

NAYAN RAJAH BHUIYA—DEFENDANT—RESPONDENT.

Under-raiyat, *lease to—Stipulation that after expiry of term* raiyat *would give* under-raiyat *fresh lease, validity of—Ejectment of* under-raiyat—*Bengal Tenancy Act* (*VIII of* 1885), *s.* 85.

A *raiyat* gave his under-*raiyat* a lease for nine years, and it was stipulated that after the expiry of the term, the *raiyat* would give the under-*raiyat* a fresh lease of the land on a fair rent:

Held, that the stipulation was not null and void, that the lease was not in contravention of the terms of section 85 of the Bengal Tenancy Act, and that the *raiyat* could not eject the under-*raiyat* without giving him the option to take a fresh lease at a fair rent.

Appeal against the decree of the District Judge of Noakhali, dated the 1st of March 1900, affirming that of the Munsif of Lakhipore, dated 7th of August 1899.

Babus *Surendra Nath Guha* and *Girija Prasanna Roy Chowdhury*, for the Appellant.

Babu *Priya Nath Sen*, for the Respondent.

JUDGMENT.—The suit, out of which this appeal arises, is a suit brought by a *raiyat* to eject an under-*raiyat*. The *raiyat* gave the under-*raiyat* a lease for nine years, and it was stipulated that, after the expiry of the term of nine years, the *raiyat* would give the under-*raiyat* a fresh lease of the land. Now, the *raiyat* seeks to eject the under-*raiyat*, and, in the lower Appellate Court, it was argued that this lease was in contravention of the terms of section 85 of the Bengal Tenancy Act; but the learned District Judge has pointed out that the section only lays down that a lease in favour of an under-*raiyat* for more than nine years, should not be valid as against the landlord, that is, the *raiyat's* landlord. But it does not mean to lay down that such a stipulation as the parties to this case entered into, shall be null and void. We think on this point the learned Judge's judgment is quite correct. Then, the learned Vakil for the appellant has raised another plea before us, namely, that although in the defendant's lease it is agreed that the defendant is entitled to a fresh settlement on a fair rent after the expiry of the lease, yet as he has not taken such settlement, the plaintiff is entitled to eject him. He finds the plaintiff has never offered him a lease on a fair rent and has brought this suit to eject the defendant without giving him the option to take a fresh lease at any rent at all. Under these circumstances, we think the decision of the lower Appellate Court is perfectly right and the plaintiff is not in any way entitled to eject the defendant. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

SATISH CHANDRA SARKAR *v.* EMPEROR.

CALCUTTA HIGH COURT.

CRIMINAL REVISION CASE NO. 1375 OF 1911.

January 15, 1912.

Present:—Mr. Justice Holmwood and Mr. Justice Sharf-ud-din.

SATISH CHANDRA SARKAR—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 109, cls. (a) and (b)—Concealment with a view to committing some offence—Conspiracy—Correspondence with criminal outside jurisdiction—Ostensible means of subsistence—Man residing with father capable of supporting him—Action against suspicious strangers.

The whole of clause (*a*) of section 109 of the Criminal Procedure Code must be read together. Concealment in order to avoid observation is no offence.

The object of the concealment must be with a view to committing some offence.

The fact that a person had been previously connected with any criminal conspiracy or might still be connected with anarchist agitation or be in correspondence with any criminal outside the jurisdiction of the Magistrate, would not be relevant in a case under section 109. It would have to form the basis of a substantive proceeding under section 110.

Therefore, a person cannot be called upon to furnish any security under section 109 in respect of an alleged temporary concealment in his father's house unconnected with any intention to commit an offence, nor with any previous concealment which admittedly must have been ouside the jurisdiction.

So long as a young man out of employment is staying in his father's house and the father is a man of substance, able, if necessary, to support him, he cannot be said to be without ostensible means of subsistence within section 109 clause (*b*).

The whole object of the last part of clause (*b*) of section 109 is to enable Magistrates to take action against suspicious strangers lurking within their jurisdiction.

Rule against the order of the District Magistrate of Rajshahi, dated September 26th, 1911, directing the petitioner under section 109, Criminal Procedure Code, to execute a bond of Rs. 500 with two sureties of Rs. 500 each for his good behaviour for one year.

Babu *Manmatha Nath Mukherjee*, for the Petitioner.

Ms. *K. N. Chouduri* and Babu *Srish Chandra Choudhuri*, Junior Government Pleader, for the Crown.

JUDGMENT.—This Rule was issued calling upon the District Magistrate of Rajshahye to show cause why the order directing the petitioner to execute a bond for Rs. 500 with two sureties of Rs. 500 each for his good behaviour for one year under section 109, Criminal Prccedure Code, and on failure to give security to undergo rigorous imprisonment for one year, should not be set aside on the ground that it does not appear that the petitioner is without ostensible means of subsistence and that the account he has given of himself is satisfactory. Having given the case our most attentive consideration, we are of opinion that the Rule must be made absolute. The proceeding upon which the order complained of was based was dated the 12th August 1911, and set out that whereas it was reported that Satish Chandra Sarkar was in Natore or its vicinity and was concealing himself in order to avoid observation and there was reason to believe that he was connected with anarchist agitation and conspiracies for the purpose of committing dacoity and other crimes and whereas he had no ostensible means of livelihood and could not give a satisfactory account of himself, he was called upon to execute securities as set out above.

The proceedings were taken under section 109, Criminal Procedure Code, and not under section 110, and the ground covered was, on the face of it, in respect of both clauses (*a*) and (*b*) of the section. The officiating District Magistrate, however, dealt with it under three heads.

The *first* being that the accused was concealing himself in order to avoid observation. This, of course, is no offence at all and the Magistrate held, as he was bound to hold, that the prosecution had not made out its case on this head. But he omitted to notice that what he calls the second allegation against the accused is really a substantive and necessary part of the first if there is to be any order under clause (*a*) of section 109.

The whole clause must be read together, and the object of the concealment must be with a view to committing some offence.

Now the second allegation is that the accused is connected with anarchist agitation and conspiracies for the purpose of committing dacoity and other crimes.

This, standing by itself, could constitute no ground for a proceeding under section 109 but would properly form the basis of a proceeding under section 110 to which the accused has had no opportunity of answering.

It was found that he only returned to his father's house on the 9th of August and merely secluded himself in the daytime

going out at night for exercise and that the prosecution had not made out that he was taking any particular steps to conceal himself for the purpose of committing any offence. The fact that he had previously been connected with any criminal conspiracy or might still be in correspondence with any criminal outside the jurisdiction, would not be relevant in a case under section 109. It would have to form the basis of a substantive proceeding under section 110. The connection between the alleged concealment and the accused's history having admittedly failed, the proceeding under section 109 (*a*) necessarily fails also.

The District Magistrate may, of course, take any proceedings he is advised under section 110, if he is of opinion that the accused is still a desperate and dangerous character but he cannot be called upon to furnish any security in respect of an alleged temporary concealment in his father's house unconnected with any intention to commit an offence nor with any previous concealment which admittedly must have been outside the jurisdiction.

We come, therefore, to the consideration of the charge under clause (*b*) which is that he has no ostensible means of livelihood and that he cannot give a satisfactory account of himself.

The learned Magistrate finds against him on both these points, although he finds that the accused is a member of a joint family, that he came straight to his father's house on his arrival in Natora, and that his father and brother accompanied him to Court. He appears to expect that the father and brother should go into the witness-box and take oath that he is being supported out of joint family. Obviously, as long as a young man out of employment is staying in his father's house and that father is a man of substance, able, if necessary, to support him, he cannot be said to be without ostensible means of subsistence. The use of the word "livelihood" seems to have led the learned Magistrate into error.

We have no hestitation in finding that the accused's father is a man of a very ostensible means of subsistence as long as he keeps his son in his house and that no further evidence is required.

As regards the account he is asked to give of himself, it would appear that the Magistrate has exceeded his jurisdiction under section 109.

The account he gives of his presence in the limits of the Magistrate's jurisdiction is quite satisfactory. He had fled from fear of a warrant directed against him in a specific case. That warrant having been withdrawn 3 months ago, he has ventured to return to his home though he keeps himself, as is natural and we think proper, in strict seclusion from curious inquirers.

He cannot be called upon to give any account of his presence in any other jurisdiction except by the Magistrate who is empowered to take proceedings in that jurisdiction.

The whole object of this part of the clause is to enable Magistrates to take action against suspicious strangers lurking within their jurisdiction. The greatest criminal in the world is not liable to be questioned as to his presence in his own home unless there is some specific outstanding charge against him.

We, therefore, hold that the proceeding under clause (*b*) of the section also fails and that the proceedings in this case must be set aside and the accused discharged from his bail subject to any action the District Magistrate may see fit to take under section 110 but no such proceeding, we may point out, should be taken unless there is evidence that the petitioner is still connected with conspiracies to commit crime or is a desperate and dangerous character at the present time.

The Rule is made absolute and the proceedings under section 109 are set aside.

Rule made absolute.

[s. c. U. B. R. (1911), I, 90.]

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 244 OF 1911.

May 30, 1911.

Present:—Mr. Eales, J. C.

ME THA—APPLICANT

versus

NGA SAN E—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 488—Maintenance—Child—Father able-bodied person—Sufficient means—Presumption—Burden of proof—Denial of

sufficiency of means—Evidence Act (I of 1872), s. 103.

Any able-bodied man, who is not prevented by any physical infirmity from working, should, in proceedings under section 488 of the Criminal Procedure Code, be presumed to have sufficient means to support his child as well as himself.

The *onus* lies on him to show that he has not sufficient means.

A mere denial by such a man himself of sufficiency of means is not conclusive proof of want of sufficient means.

Queen-Emprss v. *Roshan Lall*, 4 A. H. C. R. 123, followed.

Mr. *H. M. Lutter*, Government Prosecutor, on behalf of th Crown.

JUDGMENT.—The present case was called for on the Court's own motion by my predecessor and the District Magistrate was asked to instruct the Government Prosecutor to appear for the Crown, and the respondent was asked to show cause why the order of the first class Head-quarters Magistrate, Monywa, refusing an application made by one Ma Me Tha under section 488, Criminal Procedure Code, on the ground that he (the respondent) had not sufficient means to support his child, should not be set aside.

I have heard the Government Prosecutor and also Maung San E. The learned Government Prosecutor has drawn my attention to an unpublished order of this Court in *Ma Ta Zin* v. *Maung Taung Bo*, Criminal Revision Case No. 298 of 1903. That order, which is worthy of reproduction, is as follows:—

"There is no doubt that respondent is the father of applicant's child, but the Magistrate has dismissed the case because respondent has not sufficient means to maintain the child. Respondent is an able-bodied man and he cannot be allowed to escape his obligations on grounds of this nature. He can work and earn means to maintain his child. The Magistrate's order is set aside and he is directed to make such further inquiry as may be necessary, and to pass orders awarding a suitable maintenance for the child."

My attention is also drawn to the case of *Mi E Thin* v. *Nga Tha Zin*, Criminal Revision Case No. 479 of 1907. In the course of his order, my learned predecessor wrote as follows:—

"Respondent is an able-bodied man and he cannot be allowed to escape his obligation on the grounds of this nature, *i.e.*, that he has not sufficient means to maintain the child. He can work and earn means to maintain his child."

In both of these case, the orders of the Magistrate were set aside, and he was directed to hold further inquiry and dispose of the case according to law.

The question turns on the interpretation to be placed on the words "sufficient means." The learned Government Prosecutor quotes Ogilvie's English Dictionary, the definition of which runs as follows:—"the medium or what is used to effect an object; measure or measures adopted; agency; instrumentality (though plural in form generally used as singular; by *this means*, a *means* to an end); income, revenue, pecuniary resources (his *means* were large)."

The learned Government Prosecutor urges what has already been ruled by this Court that any able bodied man, who is not prevented by any physical infirmity from working, may be presumed to have sufficient means to support his child as well as himself. He also quotes Blackstone's Commentaries, Volume I, page 224, and Stephen's Commentaries, Volume II, page 308, to show that in English Law an obligation is laid on the father to support his children. In view of the wording of section 488, Criminal Procedure Code, it is not necessary to discuss what English Law on the subject is. It merely supports the obligation already imposed by that section.

He also draws attention to the ruling of the Allahabad High Court, *Queen Empress* v. *Roshun Lall* (1), where it was held that "the circumstance that the father of an illegitimate child is sixteen years old only, and still studying at school, is not by itself a sufficient reason for holding him excused from the necessity of providing for his illegitimate offspring.—

"The law requires that the person on whom the order of maintenance is issued must have sufficient means to support the child." In the course of his order Spankie, J., remarked as follows:—"The youth, too, was possibly more sinned against than sinning, and the woman most to blame. However this may be, the law requires that the person on whom the order is made must have sufficient means to support his child. The Court, therefore, annuls the order, and directs the Assistant Magistrate to complete

(1) 4 . H. CR. 123.

his inquiry by determining the point wherein his investigation has failed."

In the present case, it appears to me that the first class Magistrate of Monywa has not made a proper investigaton. In Burma, where it is easy for any able-bodied man to obtain work sufficient to support his children, it may be presumed, till the contrary is shown, that he is able to support his child, and the *onus* lies upon him to show he has not sufficient means. The respondent who appears before me seems to be an able-bodied man. He is only forty-three years of age and his assertion that his eyes are weak and that he is, therefore, unable to work properly, is a fact which, as he asserted it himself, he should, under section 103 of the Evidence Act, be called upon to substantiate. It is significant that he made no mention of his bad eye-sight (or weak sight) before the Magistrate who heard the case in Monywa. At any rate, this is a matter which can be attested by the expert evidence of the Civil Surgeon of the Station.

A mere denial by the man himself of sufficiency of means, when that man is an able-bodied man, is not conclusive proof of want of sufficient means.

The order of the first class Head quarters Magistrate, Monywa, is, therefore, set aside and he is ordered to hold a further investigation in the matter.

(s. c. 7 N. L. R. 185.)

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 50-B OF 1911.

August 21, 1911.

Present:—Mr. Batten, A. J. C., and Mr. Stanyon, A. J. C.

VITHOO—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), *ss.* 84, 85 86—*Insanity—Temporary insanity—Intoxication resulting from bout of drinking or* ganja *smoking—Distinction—Ground of exemption—Absence of motive, effect of.*

If a person is of unsound mind, he is to be judged by the ordinary rules in regard to insanity, no matter whether the insanity arose from disease of the brain or from persistent indulgence in intoxicating drugs or liquor.

Emperor v. *Harka*, A. W. N. (1906) 193; 4 Cr. L. J. 88; *Reg.* v. *Davis*, 14 Cox. C. C. 563 referred to.

But intoxication resembling a temporary form of insanity, resulting from one bout or repeated bouts of drinking or *ganja* smoking, which is of such a temporary nature as to pass off a few hours after the consumption of the liquor or drug, must be distinguished from unsoundness of mind, even temporary unsoundness of mind coming within the purview of section 84 of the Penal Code. Such intoxication should be dealt with according to the provisions of law contained in sections 85, 86.

Therefore, the fact that a person commits a crime while under the influence of such intoxication caused by a bout of *ganja* smoking, affords no excuse to the prisoner unless the intoxication be involuntary.

Queen Empress v *Sakharam*, 14 B. 564, followed.

Emperor v. *Bhelaka Aham*, 29 C. 493, distinguished.

The enormity or apparent purposelessness of the crime itself without any further evidence cannot be relied on to establish insanity.

Appeal against the conviction and sentence passed by the Sessions Judge, West Berar, Akola, on the 20th July 1911.

Mr. *G. L. Subedar*, for the Appellant.

JUDGMENT.—The appellant has been sentenced to death for the murder of his wife.

* * * * *

The appellant was defended by a Pleader in the Court of Session and the defence raised on his behalf was that he was entitled to be acquitted under the provisions of section 84, Indian Penal Code, because he was, when he killed his wife, insane owing to excessive *ganja* smoking. The same plea is urged by the learned Counsel who appears for the appellant in this Court. It is clearly established by evidence that appellant is a *ganja* smoker, and that he also drinks liquor. But there is no evidence whatever that the habit of *ganja* smoking had so affected his mind that he was regarded as insane. There is in fact no evidence that his mind was affected at all. The appellant's own brother merely says that his brother used to smoke *ganja* occasionally but not always. Appellant's own statements are to the effect that he went about his ordinary business, up to the very eve of the crime. The Civil Surgeon in charge of the Akola Jail was examined as to the appellant's state of mind when he was in Jail as an under-trial prisoner. He found the prisoner in no way mentally deranged and there was no such nervous condition present as would be caused by excessive *ganja* smoking. We have examined the conclusions of the *ganja* Commission and of other authorities as set out in Taylor's Medical Jurisprudence, and it is clear that excessive use of the drug may lead to temporary insanity

lasting sometimes for several months after deprivation of the drug, but that if the insanity lasts for more than about 10 months it should be attributed either to a predisposition to insanity brought to a head by the *ganja* habit, or to insanity existing previous to the acquirement of the drug habit. It is equally clear, on the other hand, that if a man's mind has become really deranged to the extent of insanity by the *ganja* habit, the deprivation of the drug will not effect a cure in a few days or hours. The Civil Surgeon deposes, and his evidence is in accordance with the text-books, that one large dose of *ganja* eaten or smoked might cause hallucinations, and these symptoms would last for 24 to 48 hours. It is clear that recovery in this short space of time would be recovery, not from insanity or unsoundness of mind properly so called, but from the effects of a bout of intoxiaction. And this brings us to the evidence regarding the appellants's condition not generally but at or about the time of the crime. There is no evidence whatever in support of the appellant's allegation that he was unusually affected by the smoke he says he had had with one Hydersha Fakir of Atali on the previous Thursday. We have the appellant's own statements that he went about his business as usual after that Thursday. This is not a case where the drug habit has taken such a hold upon the man as to render him incapable of working or gaining his livelihood. The evidence as to the appellant's condition immediately after the crime is somewhat conflicting. But the very detailed confession of the appellant is in itself strongly contra-indicative of insanity. It bears intrinsic evidence of having been made by a man in full possession of his faculties with a very clear recollection of the sequence of events.

On the evidence as a whole, we consider that not only is it not proved that appellant's mind had been rendered unsound by the *ganja* habit, but that it is proved that it had not been rendered unsound, that in fact between the bouts of intoxication from *ganja* smoking, he was perfectly sane and normal. On the other hand, we consider it extremely probable, though it is not proved beyond doubt, that at the time of the crime appellant was suffering from the effect of a recent smoke of *ganja*.

In applying the law, there are difficulties arising from the effects of *ganja* smoking which do not often arise in cases of drunkenness from alcohol. For the effects of *ganja* simulate the symptoms of insanity in a way which the effects of alcohol usually do not The Civil Surgeon deposes that there may be hallucinations, and such hallucinations are sometimes accompanied by strong emotional excitement and even violent delirium, *vide* Taylor Op. Cit., Volume II, pages 691, 692, 848—850. This extremely temporary form of insanity must be clearly distinguished from the unsoundness of mind, even temporary unsoundness of mind, coming within the purview of section 84, Indian Penal Code, and must be dealt with rather according to the provisions of law contained in sections 85 and 86. It may be taken as the law, though we consider that the law in this regard has sometimes been unduly strained in favour of the prisoner, that if a person is of unsound mind, he is to be judged by the ordinary rules in regard to insanity, no matter whether the insanity arose from disease of the brain or from persistent indulgence in intoxicating drugs or liquor: *Emperor* v. *Harka* (1). Drunkeness is no excuse, but *delirium tremens* caused by drinking and differing from drunkeness, if it produces such a degree of madness, even for a time, as to render a person incapable of distinguishing right from wrong, relieves him from criminal responsibility: *Reg.* v. *Davis* (2). But temporary insanity caused by one bout of drinking or *ganja* smoking, which is of such an extremely temporary nature as to pass off a few hours after the consumption of the liquor or drug, is not even temporary unsoundness of mind within the scope of these rulings, but is nothing more or less than intoxication, and affords no excuse to the prisoner unless the intoxication be involuntary. The law on the subject has been very fully discussed in *Queen-Empress* v. *Sakharam* (3) and the observations of Birdwood and Jardine, J J., are of special value to us now, as the case they had before them was almost exactly similar to the case before this Court. It will be sufficient to quote the following words of Jardine, J., "I am of opinion that section 84 of the Penal Code does not apply in his favour. We have considered whether the proved habit of smoking and drinking *ganja* has so weakened the prisoner's

(1) A. W. N. (1906) 193; 4 Cr. L. J. 88.
(2) 14 Cox. C. C. 563.
(3) 14 B. 564.

brain as to cause a disease such as would absolve him in circumstances under which the existence of *delirium tremens* induced by a habit of taking intoxicants may absolve the killer of another from responsibility to the criminal law. On this point, we referred to Mr. Justice Stephens' charge in *Reg* v. *Davis* (2). . . . . .

I agree with the Sessions Judge that it is not proved that by one or more such practices (of taking intoxicants), 'an habitual or fixed frenzy' was caused, of which it may be said, in the words of Lord Hale, whom I am quoting, 'though this madness was contracted by the vice and will of the party, yet the habitual and fixed frenzy caused thereby puts the man in the same condition as if it were contracted at first involuntarily': 1 Hale 32. The facts of this case are very different to those in *Queen-Empress* v. *Lakshman Dagdu* (4), which has been followed by the High Court of Madras in the case of *Queen-Empress* v. *Venkatasami* (5). I think, therefore, the prisoner was rightly convicted of murder, agreeing with the Sessions Judge and both Assessors that he was not insane."

These are exactly our views in the present case, and we would add that a continuous series of states of intoxication resulting from continued acts of resort to the drug, would not amount to temporary insanity or "fixed frenzy" in the sense in which that expression was used.

Most of the arguments of the appellant's learned Counsel have been dealt with in the above discussion, but he especially refers to the case of *Emperor* v. *Bhaleka Aham* (6), in which the prisoner was acquitted on the ground of insanity due to the opium habit. But in that case the victim, a boy, was a complete stranger to the prisoner who killed him on meeting him in a field and there was and could have been no quarrel of any kind, and the evidence showed not only that the prisoner was addicted to excessive use of opium, but also that for some days before and after killing the boy, he was irresponsible for his actions. The facts here are quite different. It is also urged that the appellant's confession which has been used against him must be taken as a whole, and that, taken together with the proved fact that the appellant is a *ganja* smoker, it establishes his unsoundness of mind. But there is ample evidence against the appellant without the confession, and even if the confession established unsoundness of mind, which we hold it does not, the unsoundness of mind described in the confession was not such as to render the appellant incapable of knowing the nature of his act or that it was both wrong and contrary to law. The whole tenor of the confession shows that the appellant knew perfectly well what he was doing, he knew that he was killing his wife and he did not suppose, for instance, that he was defending himself against an enemy, and he evidently knew that his act was a wrong act. His conduct in going and telling his neighbours does not, in our opinion, tend to show that he was mad, as is argued on his behalf, but is consistent, according to our experience, with the sense that he had done wrong, a sense that is clearly indicated by his having told the Jagila Sidhi Kalu that he was prepared to take the consequences.

The absence of known motive is also relied on as indicating insanity, but it is settled law that the enormity or apparent purposelessness of the crime itself without any further evidence cannot be relied on to establish insanity, and we must point out that our not knowing the motive does not prove that there was no motive. The whole question of the circumstances in which and the extent to which the plea of insanity is a valid plea has been very fully discusssed by a member of this Bench in *Emperor* v. *Katay Kisan* (7), and it is unnecessary to repeat here what has been said there. We are of opinion that the appellant cannot claim the benefit of section 84, Indian Penal Code.

What we are concerned with, moreover, is the intention and not the motive, and appellant confessedly intended to kill his wife; in this case there is no question of the intention being inferred by a legal fiction, the intention to kill was apparent and has never been denied. The intoxication, if it conduced to the crime, was voluntary and the appellant can get no benefit from section 85, Indian Penal Code.

* * * * *

We consider we should be doing wrong if

(4) 10 B. 512.
(5) 12 M. 459.
(6) 29 C. 493.
(7) 17 C. P. L. R. 113.

we did anything to encourage the idea that a man, who gives way to the vice of *ganja* smoking to such an extent that it makes him more prone to commit crimes, will in any way be excused for his crime because he has so given way. Appellant has rightly been convicted of murder and, in our opinion, has rightly been sentenced to death by the Sessions Judge.

The appeal is dismissed and the sentence of death will be confirmed.

Appeal dismissed.

(s. c. 7 N. L. R. 180.)

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 87 OF 1911.

August 7, 1911.

Present:—Mr. Batten, A. J. C., and Mr. Stanyon, A. J. C.

WARIS ALI—

versus

EMPEROR—

Penal Code (Act XLV of 1860), ss. 85, 86—Drunkenness as ground of exemption—Valuntary drunkenness—Involuntary drunkenness—Knowledge—Intention—Nature of the legal offence committed.

Voluntary drunkenness is never an excuse for crime, The fact that a man was drunk makes no difference. *per se*, to the question of his criminal liability.

Involuntary drunkennss, as a ground of exemption, is treated in just the same way as insanity. In order that *involuntary* drunkenness may be accepted as a ground of exemption, it must be shown that the accused was so drunk that he did not know (1) the nature of the act, or (2) that it was wrong, or (3) that it was contrary to law.

Pearson case, 2 Lewin C. C. 144, *Rex* v. *Meakin* 7 Car. and p. 297 relied upon.

A man is assumed to intend the natural or necessary consequences of his act, and, in the majority of cases, the question of intention is merely the question of knowledge. Section 86 of the Penal Code only provides that, where intent is to be inferred from an act, a man voluntarily drunk is treated in the same way as a man sober.

Although neither voluntary drunkenness nor involuntary drunkenness, which does not involve one or other of the three states of mind mentioned in section 85 of the Penal Code, can excuse crimes committed under its influence, yet the fact of drunkenness may alter the nature of the *legal offence* committed in cases where an essential of the crime is the presence of *some particular knowledge or intention.*

Regina v. *Gamlen*, 1 F. and F. 90, *Regina* v. *Cruse*, 8 Car. and P. 541 at p. 546; 2 M. C. C. 53; *The Queen* v. *Zuljukar Khan*, 8 B. L. R. App. 21; 16 W. R. Cr. 36; *The Queen* v. *Ram Sahoy Bhur*, (1864) W. Cr. 24, *Rex* v. *John Thomas*, 7 Car. and P. 817, referred to.

Appeal against the conviction and sentence passed by the Sessions Judge, Nerbudda Division, on 14th July 1911.

FACTS.—The accused, while drunk, killed one Hoseinbux during the celebration of the *Holi* festival. The accused made several statements, and in all of them his defence was that he was under the influence of drink and did not know what he did. In some of the statements he asserted that another person forcibly made him drink. It was proved that the accused took the drink voluntarily and wilfully and deliberately shot Hoseinbux and caused his death.

The prosecution failed to prove any motive for the offence. Although it was proved that the accused was under the influence of drink when he committed the offence and the liquor had stimulated his barbaric tendencies, yet it appeared that the drink had left his cognitive faculties unimpaired. The crime appeared to be an afterclap of the *Holi* orgies.

The accused's consciousness and intention were evident from the facts of the case. He picked out his victims, he was able to arm himself, to choose between ball and buckshot cartridges and to aim at and hit, what he wanted to hit, by moonlight.

After finding Hoseinbux alive after the first shot, the accused immediately re-loaded and fired a more deadly shot.

JUDGMENT.

* * * *

[After discussing the evidence and stating the facts as proved, the judgment proceeded as follows:—]

It may be well, in this case, to consider the law regarding intoxication as a defence against responsibility for criminal acts. The Indian law is contained in sections 85 and 86 of the Indian Penal Code, and there seems to be no reason to suppose that the framers of the Code intended to introduce any rule involving a departure from the English law on the subject. *Voluntary* drunkenness is never an excuse for crime. The fact that a man was drunk makes no difference, *per se*, to the question of his criminal liability. *Involuntary* drunkenness, as a ground of exemption, is treated in just the same way as insanity under section 84, Indian Penal Code. Therefore, it would be no ground of excuse for crime to plead merely that accused was involuntarily drunk. It must be shown that he was so drunk that he did not know

(1) the nature of the act, or (2) that it was wrong, or (3) that it was contrary to law. Therefore, in the present case, even if the accused had made good his belated plea that his intoxication was involuntary, it would not have availed him as a defence against conviction; because it is clear, as already stated and explained, that his cognitive faculties were practically unimpaired. Section 86, Indian Penal Code, lays down that where an act done is not an offence unless done with a particular knowledge or intent, voluntary intoxication will not ordinarily be allowed to disturb the usual presumptions as to knowledge or intent. Intention is sometimes a presumption of law; sometimes it is a mere fact, to be proved like any other fact. Section 86 lays down no fixed rule as to the inference of intent in cases of intoxication. It merely provides that, where intent is to be inferred from an act, a man voluntarily drunk is liable to be treated in the same way as a man sober. Where, however, the intoxication is involuntary, the legal inference from the act may, in certain cases, be rebutted. A man is assumed to intend the natural or necessary consequences of his own act, and, in the majority of cases, the question of intention is merely the question of knowledge, i., in a state of voluntary drunkenness, shoots *B.* dead, not knowing what he has done. *A.* is guilty of murder; for whether he was voluntarily drunk or sober, the law presumes that he intended to kill *B.* *Rex* v. *Pearson* (1). So, if *A.* strikes *B.* on the head with a loaded club, he is assumed to know that the act will probably cause death, and if that result follows, he will be assumed to have intended it: *Rex* v. *Meakin* (2). As the voluntary drunkard is assumed to have had the knowledge, he would necessarily be presumed to have the intention, since, assuming the knowledge, the law will allow no other explanation of the act to be given.

But though neither voluntary drunkenness, nor involuntary drunkenness which does not involve one or other of the three states of mind mentioned in section 85, Indian Penal Code, are excuses for crimes committed under their influence, yet the fact of drunkenness may alter the nature of the *legal offence* committed, though it is no excuse for the *act*. This occurs where an essential of the crime is the presence of some *particular* knowledge or intention: and in such cases, the Jury would be called on to take into account the fact of drunkenness in order to determine whether the accused had that particular knowledge or intention: *Regina* v. *Gamlen* (3). If *A.* is found late at night on the premises of *B.* without *B.*'s consent, he would be guilty of trespass, whether drunk or sober. But if he was charged with trespass *with intent to commit theft*, the fact that he was drunk would be very material in coming to a conclusion. So, where *A.* is indicted for inflicting on *B.* a dangerous injury, *with intent to murder*, the fact that *A.* was drunk at the time is no excuse for the infliction of the dangerous injury (unless his cognition was impaired to the extent already stated); but it must be taken into account in order to determine whether he intended something more than resulted from his act, namely, the death of *B.*: *Regina* v. *Cruse* (4); *The Queen* v. *Zulfukar Khan* (5), *The Queen* v. *Ram Sahoy Bhur* (6). The same rule applies where killing by a drunkard follows upon provocation: *Rex* v. *John Thomas* (7); and also in determining whether forged bank notes or counterfeit coins were passed with guilty knowledge or intention. In cases of this kind, though the law makes a presumption against the voluntary drunkard, such presumption is rebuttable by direct or circumstantial evidence.

In the case now before us, the law allows no room for any plea of intoxication short of a state in which, by reason of something administered to him without his knowledge or against his will, accused had become, for the time being, incapable of knowing the nature of his act, or that he was doing what was either wrong or contrary to law. Until that condition is established, there remains an irrebuttable presumption that accused intended the natural consequence of firing a bullet at close quarters into the body of a man, namely, the death of that man. Not only is there no proof whatever of irresponsible intoxication, but the whole of the evidence

(1) 2 Lewin C. C. 144.
(2) 7 Car. and P. 297.
(3) 1 F. and F. 90.
(4) 8 Car. and P. 541 at p. 546; 2 M. C. C. 53.
(5) 8 B. L. R. App. 21; 16 W. R. Cr. 36.
(6) (864) W. R. Cr. 24.
(7) 7 Car. and P. 817.

EMPEROR v. RAM NARESH SINGH.

on the record is contra-indicative of it, and satisfies us that, though accused lost control over his savage instincts under the stimulus of liquor, he was otherwise perfectly aware of what he was doing, and indulged his lawless impulses with savage premeditation and reckless disregard of the consequences to himself. Under such circumstances, we do not feel justified even in reducing the sentence. Those who choose to unbridle their passions with the help of excessive drinking must, in the interests of the community, be held responsible for offences wilfully committed in defiance of consequences known to them.

We, therefore, dismiss this appeal, and maintain both the conviction and sentence.

Appeal dismissed.

(s. c. 9 A. L. J. 51.)

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 613 OF 1911.

October 26, 191 .

Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.

EMPEROR—APPELLANT

versus

RAM NARESH SINGH AND OTHERS—ACCUSED.

Offence committed in British India—Accused committed to Sessions—Subsequent transfer of the place where offence was committed to a Native State—Jurisdiction—Appeal—Revision—Criminal Procedure Code (Act V of 1898), s. 435.

The accused were charged with the commission of an offence within the British territory and were committed to the Sessions Court at Mirzapur. Subsequent to the committment, the place where the offence had been committed was transferred to the State of Benares.

The High Court, however, transferred the case from the Court at Mirzapur to the Sessions Court at Benares for trial.

The Sessions Judge of Benares held that he had no jurisdiction to try the case. The Government appealed against the order and also applied in revision against it:

Held, that no appeal lay inasmuch as there was no order of acquittal, but that the High Court could interfere under section 435 of the Criminal Procedure Code in revision.

Held, further, that the constitution of the State of Benares did not deprive the Court at Mirzapur of jurisdiction to dispose of criminal appeals then pending in it or cases which had been committed to it for trial At the time of the constitution of the State of Benares, the accused were in British India in the custody, in point of law if not in fact, of a Court competent to try them. Consequently, the Sessions Judge of Mirzapur had jurisdiction to try the case and it was properly transferred to the Court of Sessions in Benares who had the jurisdiction to try the case.

Mahabir v. *King-Emperor*, 8 A. L. J. 630; 33 A. 578; 11 Ind. Cas. 585; 12 Cr. L. J. 401, followed.

Damodar v. *Deo Ram*, 1 B. 367, 25 W. R. 261; 3 I. A. 102, distinguished.

Appeal by the Local Government against an order of the Sessions Judge of Benares.

Mr. *A. E. Ryves*, Government Advocate, for the Crown.

JUDGMENT.—On the 17th of March 1911, Ramnaresh Singh, Ram Niranjan Singh, Dubri Singh, Dhakelu, Munnu and Jarbandhan were committed to the Court of Session at Mirzapur by a Magistrate of first class exercising jurisdiction in that district on a charge of having committed murder at a place in *pargana* Bhadohi in the Mirzapur district, which was, both at the time of the alleged offence, and at the date of the commitment, part of British India. On the 1st of April 1911, the State of Benares was constituted, and the village where the offence is said to have been committed became part of that State. For reasons, which it is unnecessary to state, this Court, on the 5th of April, 1911, transferred the case from the Court of the Sessions Judge, Mirzapur, to the Court of the Sessions Judge of Benares. The latter then referred the case to this Court with a recommendation that the order transferring the case to Benares should be set aside on the ground that this Court had no jurisdiction to make such an order. On that, this Court made an order which concludes as follows:—

"We do not understand the reference made to us by the learned Sessions Judge of Benares. It is for him to carry out the orders of this Court and not to question them. Let the record be returned to him with instructions to try the case committed to the Court of Session at Mirzapur, and transferred by this Court under Order No. 1692, dated the 5th of April, 1911."

The Sessions Judge of Benares did not understand that order to mean that the Sessions Judge of Benares had jurisdiction to try the case. He understood that the question whether he had or had not jurisdiction to try the case was to be decided by him. Accordingly, on the case being called on, he took up the question of jurisdiction and decided that he had no jurisdiction to try the case. He seems

EMPEROR v. MURLI SINGH.

to have been of opinion that the only Court which could try the case was some Court in the State of Benares. In support of that view, he referred to the order passed by this Court in *King-Emperor* v. *Mata Prosad.* (Cr. Rev. No. 149 of 1911). That also was a reference by the Sessions Judge of Benares. The accused was charged with having committed an offence at a place which formed part of the Family Domains of the Maharaja of Benares in the Benares district. At the date of the alleged offence, the accused would have been properly committed to the Court of Session at Benares. But on the 7th of February 1911, a Government notification was issued transferring the place in question to the district of Mirzapur, and the question arose whether the case which had been committed to the Court of the Sessions Judge of Benares should be tried by the Sessions Judge of Benares or by the Sessions Judge of Mirzapur. This Court decided that the case should be tried by the Sessions Judge of Mirzapur, and, under section 185 of the Code of Criminal Procedure, directed that the case should be tried by the Sessions Judge of Mirzapur. That case appears to us to have no bearing upon the present case. The learned Sessions Judge has attempted to distinguish from the present case the case of *Mahabir* v. *King-Emperor* (1), which was brought to his notice. He says that in that case the question was as to the form of appeal, whereas in the present case the question is what Court of original jurisdiction has power to try the case. It seems to us that the principle, on which the case of *Mahabir* v. *King-Emperor* (1) was decided, applies to the present case. The accused in the present case are charged with having committed an offence at a place which was in British India. They were properly committed to the Court of Session at Mirzapur and that Court had jurisdiction to try them when the State of Benares was constiuted. It is impossible to hold that the Sessions Court at Mirzapnr was, by the constitution of the State of Benares, deprived of jurisdiction to dispose of criminal appeals then pending in it or cases which had been committed to it for trial. The Sessions Judge has referred also to the case of *Damodhar Gordhan* v. *Deo Ram Kanji* (2). It is sufficient to say that the actual decision in that case has no bearing whatever on the question which arises in the present case. The remark, at the end of the judgment of their Lordships, regarding the effect of a cession of territory upon cases where the jurisdiction over the subject-matter and parties is territorial, does not apply to the present case. At the date of the constitution of the State of Benares, the accused persons were in British India in the custody, in point of law if not in fact, of a Court competent to try them. We hold that the Sessions Judge of Mirzapur had jurisdiction to try this case; that it was properly transferred to the Court of Session at Benares, and that the Sessions Court at Benares has jurisdiction to try the case. The Govenment Advocate presented both an appeal against and an application for revision of the order of the Sessions Judge. In our opinion no appeal lay, inasmuch as there was no order of acquittal, but we have no doubt that we have jurisdiction under section 435 to set aside the order of the Sessions Judge directing that the accused should be set at liberty. One of the six accused has not been arrested. We think that the Sessions Judge should proceed to try the five accused who have been arrested. For the above reasons, we set aside the order of the Sessions Judge of Benares, and direct him to proceed with the trial of the five persons who have been arresed. The appeal is formally dismissed.

Appeal dismissed; *Application allowed.*

(1) 8 A .L. J. 630; 33 A. 578; 11 Ind. Cas. 585; 12 Cr. L. J. 401.

(2) 1 B. 367; 25 W. R. 261; 3 I. A. 102.

(s. c. 33 A. 775.)

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 214 OF 1911.

June 15, 1911.

Present:—Mr. Justice Piggott.

EMPEROR—PROSECUTOR

versus

MURLI SINGH—APPLICANT.

Criminal Procedure Code (Act V of 1898), *s.* 107—*Security to keep the peace—Religious act when likely to provoke breach of the peace—Blowing of* conch *in a place not set apart for the purpose with intention to wound feelings of neighbours.*

The blowing of a *conch* in a public place for one's personal amusement, or with any other lawful and innocent motive and without any intention of thereby annoying or hurting the religious feelings of any other person, is not a wrongful act.

EMPEROR *v.* MURLI SINGH.

The blowing of a *conch* in connection with ceremonial acts of worship, in accordance with established usage in a place fixed for the ceremonial or periodical performance of such ceremonies or worship, will not as a rule be a wrongful act, even though there may be persons, within hearing of the sound, who find their religious feelings hurt in consequence. But if certain Hindus commence to perform ceremonies involving the blowing of a *conch* in a place in no way set apart for the purpose and where no such ceremonies had hitherto been performed with deliberate intention of triumphing over, insulting and wounding the religious feelings of their Muhammadan neighbours, their act is a wrongful act, which is likely to provoke a breach of the peace and disturb the public tranquillity.

Revision from an order of the District Magistrate of Bareilly, dated the 31st of March, 1911.

Mr. *D. R Sawhny*, for the Applicant.

Mr. *R. Malcomson*, the Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application in revision against an order of the District Magistrate of Bareilly, which had the effect of confirming an order passed by a Subordinate Magistrate, whereby the applicant was bound over under section 107 of the Criminal Procedure Code to keep the peace for one year. The facts found are simple. Some months previous to the institution of the present proceeding, certain Muhammadan residents of the Kathgarh *mohalla* of Bareilly City took exception to the performance in the house of one Bajrang Das in the said *mohalla* of certain religious rites or ceremonies accompanied by the blowing of a conch. A prosecution was instituted against Bajrang Das for an offence under section 298 of the Indian Penal Code, which resulted in his acquittal by the Sessions Court. Some Hindus of the neighbourhood, not satisfied with the victory thus gained, proceeded further and began to perform ceremonies of some sort involving the blowing of a conch in a grove or orchard situated near the house of Bajrang Das. This innovation was strongly resented by the Muhammadans of the neighbourhood, and the Police authorities found that there was serious danger of a breach of the peace. Proceedings were instituted against both parties, that is to say, against the Hindus and Muhammadans both; but the Joint Magistrate came to the conclusion that the Muhammadans before him had done nothing to justify their being bound down to keep the peace. He accordingly discharged them, and bound over five Hindus for a period of one year. The latter appealed to the District Magistrate, who found on the evidence that it was not proved as regards four out of the five appellants before him that they had been guilty in the past of any such conduct as would justify him in inferring that they personally were likely to do any wrongful act that might probably occasion a breach of the peace or disturb public tranquillity. He accordingly set aside the order passed by the first Court as against these four persons. He held that Murli Singh, who admitted before him to be in possession of the grove or orchard in which the obnoxious proceedings had taken place, was a proper subject for the order passed by the Joint Magistrate. I have to consider, in the first place, whether the blowing of a conch in the grove or orchard under the circumstances found by the lower Court was or was not a wrongful act. The blowing of a conch in a public place for one's personal amusement, or with any other lawful and innocent motive, and without any intention of thereby annoying or hurting the religious feelings of any other persons, is not a wrongful act. The blowing of a conch in connection with ceremonial acts of worship, in accordance with established usage, in a place fixed for the occasional or periodical performance of such ceremonies or worship, will not, as a rule, be a wrongful act, even though there may be persons, within hearing of the sound, who find their religious feelings hurt in consequence. In the present case, I take it from the findings before me that certain Hindus of Bareilly commenced to perform ceremonies involving the blowing of a conch in a place in no way set apart for the purpose, and where no such ceremonies had hitherto been performed, and that they did it with the deliberate intention of triumphing over, insulting and wounding the religious feelings of their Muhammadan neighbours. I hold that this was a wrongful act. As there can be no doubt that it was also an act likely to provoke a breach of the peace and disturb the public tranquillity, any persons found to be responsible for such conduct were proper subjects for an order under section 107, Criminal Procedure Code. As regards Murli Singh personally, the view taken by the District Magistrate is that, whoever may or may not have blown the conch, and whoever may or may not

have been present on any particular occasion when it was blown, the circumstances of the case as a whole justified the inference that the objectionable proceedings could not have been started, and could not have been continued in that grove or orchard, without conduct amounting to abetment of the said proceedings on the part of the person in possession of the grove. This is, in my opinion, a conclusion which it was fairly open to the District Magistrate to arrive at on the facts before him, and I decline to interfere with it in revision.

I have already said enough to dispose of Murli Singh's application with reference to the grounds of revision set forth in his petition to this Court. I am disposed, however, to add a few words regarding matters which were made the subject of a considerable amount of discussion before me at the hearing. Murli Singh is a Jail *Darogha* in the public service in these Provinces; and though he was on leave at Bareilly at the time of the proceedings now before me in revision, I may take it that he either has returned, or is likely very shortly to return, to his duties at a station a considerable distance from Bareilly. It has been suggested before me that, as matters stand, it is difficult to see what practical purpose is served by the existence of the security-bond which Murli Singh has furnished in this case, or what effect could be given to the provisions of that bond in the event of disturbance occurring at Bareilly (no matter what the immediate cause of the disturbance might be) while Murli Singh was engaged in watching over the comfort and security of the convicts in a jail two hundred miles distant. Exception was also taken to the actual finding of the District Magistrate regarding Murli Singh's possession over the grove in question, and it was pointed out to me that in the order of the Joint Magistrate and in the evidence upon which it proceeds, the place in question is spoken of as the grove of Jai Singh; also that a Hindu of that name was one of the persons who appeared along with Murli Singh as appellant before the District Magistrate. In his petition addressed to this Court, Murli Singh does not suggest any such line of argument as this; and in any case I cannot permit myself in revision to go behind the express finding of the District Magistrate that the possession of Murli Singh over this grove was not merely a fact, but an admitted fact, in his Court. This is no case of a clerical error, for the District Magistrate's order shows clearly that he understood the admission as to possession to be made in respect of Murli Singh, a Jail *Darogha*, on leave. The actual result of the admission was that the District Magistrate holds a security-bond as to the practical utility of which there certainly seems room for doubt, while the man Jai Singh, who was spoken of as the owner of the grove or orchard in the first Court, and who appears to be a permanent resident of Bareilly, has been discharged without security. I do not feel it incumbent on me to take upon myself duties and responsibilities which section 125, Criminal Procedure Code, lays upon the District Magistrate. I have thought the matters above referred to worth noting for the information of the said Magistrate or his successor in office. The order against Murli Singh, at the time when it was passed, was, in my opinion, a proper and legal order upon the facts found, and I shall not interfere with it. The application is dismissed.

Appeal dismissed.

(s. c. 1 P. R. 1912 Cr.)

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 570 OF 1911.

July 15, 1911.

Present:— Mr. Justice Johnstone.

EMPEROR—PROSECUTOR

versus

SADAPUR AND OTHERS—ACCUSED.

Forest Act (VII of 1878), ss. 32, 54, 55—Conviction for forest offence—Confiscation of forest produce even when not Government property—Produce to be made over to Forest Department—Practice.

Where a person is convicted of an offence under section 32 of the Forest Act, the whole of the forest produce, in respect of which the offence was committed, may be confiscated, even though it may not be Government property. When confiscated, the produce should be made over *in specie* to the Forest Department of the Government.

Case reported by the District Magistrate, Kangra, on the 12th April 1911.

FACTS.—The accused sold 87 maunds 32 seers of *karroo* (*Gentiana karroo*), and the Magistrate ordered that the *karroo* be confiscated and sale-proceeds credited to Government-

TUNOO MIA *v.* EMPEROR.

Each of the accused, except Chharang Giaju, on conviction by Mr. J. Coldstream, Assistant Commissioner, exercising the powers of a Magistrate of the 1st class in the Kulu Sub-Division, Kangra District, was sentenced, by order, dated 21st November 1910, under section 32 of the Forest Act, VII of 1878, to a fine of one rupee.

GROUNDS.—I do not propose to, in any way, interfere with the Magistrate's order as far as it affects the accused persons. My object in making this reference is to get that part of the order, which deals with the disposal of the property, set aside.

The accused were convicted of a forest offence under section 32, Act VII of 1878, with respect to 87 maunds, 32 seers of *karroo* (*Gentiana karroo*). The Magistrate confiscated and ordered it to be sold and the proceeds credited to Government (Law and Justice). The net proceeds amounted to Rs. 819-15 8 which has been paid into the treasury. The correspondence between my predecessor, Mr. H. A. Casson, the Assistant Commissioner, Kulu, Mr. J. Coldstream, and the Assistant Conservator, Forests, Kulu Sub-Division, is attached. It appears to me to be satisfactorily established by this that the *karroo* in question was not wholly the propertry of Government but was the property of the share-holders in the Kunawar Forests, and that Government in the Forest Department has a prescriptive right to share in the proceeds since it (the *karroo*) has been extracted by persons other than such share-holders.

I, therefore, suggest that the Magistrate's order should be varied in so much as that the order regarding the disposal of the property should be: "the *karroo* will be sold and the proceeds, after deduction of the expenses of the sale, &c., shall be divided as follows:—half to the Forest Department, half for division among the share-holders in the Kunawar Forests, in accordance with their respective rights."

ORDER.—In the present case, the whole of the proceeds of sale of *karroo* must go to the Forest Department. The Magistrate rightly confiscated the stuff in full, for Government has at least a large interest in it, and it was apparently solely through the zeal of Government officers in the Forest Department that the offence was brought to light and further damage stopped. Under section 54 of the Act, timber, &c, even when not Government property in connection with which a forest offence has been committed, may be confiscated, and thus it is clear that the Magistrate's order of *confiscation* was not illegal in any way. And from section 55, it follows upon this that the proceeds must go to Government in the Forest Department. I think the Magistrate should have literally made over the *karroo* to the Forest Officer to dispose of, but this is a minor point.

I, therefore, direct that the Magistrate's order be so modified as to make the sum realised by the sale of *karroo* in this case a credit to the Forest Department and not to Law and Justice.

In future, the Magistrate should always make over the timber or produce *in specie* to the Forest Officor.

Revision accepted.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 898 OF 1911.
November 9, 1911.
Present:—Mr. Justice Stephen and Mr. Justice N. Chatterjea.
TUNOO MIA—ACCUSED—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Thumb impression, whether may be proved against accused in another proceeding—Voluntary statement without compulsion, whether may be used against witness —Evidence Act (I of 1872), s. 132, proviso.

The taking of a thumb impression is merely observing a characteristic feature of a man's body, and is not equivalent to asking a question and receiving an answer; that is, the thumb impression is not equivalent to an answer within the purview of the proviso to section 132 of the Evidence Act, and may in a criminal proceeding be proved against the person whose thumb impression is taken.

Where an accused person has made a statement voluntarily and without compulsion on the part of the Court, it may be used against him on his trial if relevant; that is, the proviso to section 132 of the Evidence Act does not apply unless the witness objects to answer the question.

Queen-Empress v. *Gopal Das*, 3 M. 271 and *Moher Sheikh* v. *Queen-Empress*, 21 C. 392, followed.

Therefore, even if taking a thumb impression is equivalent to an answer, no objection being made to the thumb impression being taken, the proviso to section 132 does not apply.

Rule against the order of the Sessions Judge of Chittagong, dated July 15th, 1911, affirming on appeal the order of the Deputy Magistrate of Chittagong, dated June 28th, 1911, convicting the petitioner under sec-

TUNOO MIA v. EMPEROR.

tion 193 of the Indian Penal Code and sentencing him to undergo rigorous imprisonment for three months and to pay a fine of Rs. 50.

Mr. *K. N. Chaudhri*, Counsel, and Babu *Khitish Chandra Sen*, for the Petitioner.

Babu *Manindra Nath Banerjee*, for the Crown.

JUDGMENT.—The petitioner in this case is Tunoo Mia, who has been convicted under section 193, Indian Penal Code, of giving false evidence. A Rule has been granted calling on the District Magistrate to show cause why the conviction of and sentence on the accused should not be set aside and a re-trial of his case ordered, on the ground that the evidence of thumb impression was admitted contrary to the provisions of section 132 of the Evidence Act, and also that the lower Courts have not dealt with a great deal of the evidence placed before them.

On the first point, the facts are that the petitioner brought a charge of defamation against one Mahim Chandra Guha, and during his cross-examination swore that he was not convicted at Rangoon on a charge under section 408, Indian Penal Code, brought by Fazal Rahman Chaudry, and was not sentenced to imprisonment and fine, and did not appeal. During the hearing of that case, the trying Magistrate took, or caused to be taken, the petitioner's thumb impression, and that impression corresponds with the impression of a man who was convicted at Rangoon in the circumstances above stated. The argument indicated by the Rule as arising on these facts is that taking a thumb impression is equivalent to asking a question and receiving an answer, and that, therefore, the thumb impression is equivalent to an answer within the purview of the proviso to section 132 of the Evidence Act, and may not, therefore, be proved against the petitioner in the present proceedings. To this there are several answers. In the first place, the taking of a thumb impression is merely observing a characteristic feature of a man's body. Whether the Magistrate had a right to take the impression is a question we are not concerned with, and at present we need not consider whether the prisoner consented or not to the impression being taken. The impression was in fact taken, that is, an observation was made and recorded, and in principle the position is the same as if the Magistrate had photographed the appellant, or noticed a deformity or a scar, matters which might certainly be proved if they were relevant. The analogy between taking a thumb impression and asking a question, therefore, breaks down.

In the second place, it was held, by the majority of the Court in *Queen-Empress* v. *Gopal Das* (1), that where an accused person has made a statement voluntarily and without compulsion on the part of the Court, it may be used against him on his trial, if relevant; that is, the proviso to section 132 does not apply unless the witness objects to answer the questions, and this decision has been followed by this Court in *Moher Sheikh* v. *Queen-Empress* (2). See, too, the note to section 132 in Woodroffe's Evidence. In this case there is nothing to show that the appellant made any objection to the impression of his thumb being taken and the proviso to section 132 does not, therefore, apply.

In the third place, section 132 obviously only applies to questions asked in the Court of the trial, and there is nothing to show that the thumb impression in this case was taken during the trial. It seems in fact to have been taken with a view to the possibility of this trial.

For these reasons, we are of opinion that the first reason for setting aside the conviction mentioned in the rule must fail.

As to the second ground, the only evidence placed before the Court with which it is suggested that it has not dealt, is the record of the case tried in Rangoon which it is said shows that the Fazal Rahman, who was the complainant then described, gave a different description of his own parentage and age, and the parentage of this Tunoo Mia, then accused, from that given of the same matters by the Fazal Rahman who gave evidence in the present case. Fazal Rahman in the present case, however, was not asked to explain the discrepancy, nor were the contents of the Rangoon record, said to be in the record in this case, though it is not before us, brought to his notice. We cannot, therefore, hold that the matter was not sufficiently considered by the lower Courts. No reason for our interference is, therefore, made out on the second ground mentioned in the Rule; and it must, therefore, be dismissed.

Rule discharged.

(1) 3 M. 271.
(2) 21 M. 392.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 1571 OF 1911.

February 3, 1912.

Present:—Mr. Justice Chevis.

BHOJA RAM—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Stay of criminal proceedings—Civil suit instituted in respect of the same matter—Practice.

Where a person, against whom criminal proceedings are started in respect of a matter, has instituted a Civil suit without waste of time, the decision of which is likely to throw considerable further light on the case, the criminal prosecution should be stayed pending the decision of the Civil suit.

Ram Charan Singh v. *Emperor*, 5 C. L. J. 233; 5 Cr. L. J. 199, followed.

Gobherdhone Pramanick v. *Iswar Chunder*, 5 C. W. N. 44, referred to.

Petition for revision, under section 439 of the Criminal Procedure Code, of the order of the Officiating Sessions Judge, Multan, dated 10th November 1911, rejecting the application for revision of the petitioner against the orders of the District Magistrate, Muzaffargarh, dated 1st August 1911, and of the District Magistrate, Muzaffargarh, dated 7th August 1911.

Rai Sahib Pandit *Sheo Narain* and Sardar *Vishnu Singh*, for the Petitioner.

Mr. *C. Bevan Petman*, Government Advocate, for the Respondent.

JUDGMENT.—This is an application for stay of Criminal proceedings against the petitioner pending decision of a suit which has been instituted by him under section 77 of the Registration Act. The District Magistrate, who is also the Registrar, suspected that the deed in question had been tampered with and that the document had really been executed on the 7th March 1911 and not on the 12th, and so he ordered prosecution of the petitioner under section 468, Indian Penal Code.

It appears that there is a dispute between the parties to the deed as to how much property was covered by the mortgage.

The petitioner's version is, so I understand, that certain *khasra* numbers were entered in whole instead of in part on 7th March, and that the mistake was discovered and the necessary corrections made on the 12th March and that this latter date is the correct date of execution of the deed as it now stands. So far the dispute may be regarded as one between the parties to the

deed, but there is another point which is that alteration of the date from 7th to 12th March may be an attempt to evade the penalty leviable under section 25 of the Registration Act for presentation after 4 months (the document was presented on 10th July). So it is, of course, possible that the deed has been tampered with in order to defraud the Government also.

But the decision of the Civil suit filed by the petitioner under section 77 of the Act will probably throw considerable further light on the case, and it can then be considered much better than at present how far there really are grounds for a Criminal prosecution. I can see no particular reason for hurrying on the Criminal prosecution. The disadvantages of conflict of decisions between the Civil and Criminal Courts in such cases are pointed out in *Gobherdhone Pramanick* v. *Iswar Chunder* (1). A very similar case to the present is *Ram Charan Singh* v. *Emperor* (2), in which a Criminal prosecution was stayed pending the decision of a suit under section 77 of the Act. Here, too, as in that case, the petitioner has instituted the Civil suit without waste of time.

I direct that the Criminal prosecution be stayed pending the decision of the Civil suit.

(1) 5 C. W. N. 44.

(2) 5 C. L. J. 233; 5 C. L. J. 199.

[s. c. (1912) 1 M. W. N. 85.]

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 389 OF 1911.

CRIMINAL REVISION PETITION No. 292 OF 1911.

January 5, 1912.

Present:—Mr. Justice Spencer.

A. M. RASOOLKHAN SAHEB—PETITIONER—ACCUSED

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 480—False trade-mark—Offence or a wrong.

Where the trade-mark used by the accused is a crescent encircling a crown over the letters A. M .R. and the one used by the complainant is a crescent encircling a star over the letters A. G. M. no offence of using a false trade-mark or selling goods under a counterfeit trade-mark is committed.

A Civil action for damages may lie.

Surja Prasad v. *Mahabir Prasad*, 11 C. W. N. 887; 6 Cr. L. J. 151; *Emperor* v. *Bakaullah Mallick*, 31 C. 411; 8 C. W. N. 307; 1 Cr. L. J. 140; *Dowlat Ram* v. *Emperor*, 32 C. 431; 2 Cr. L. J. 326, referred to.

BALMOKAND v. NANAK CHAND.

Petition, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of the Court of the Sub-Divisional 1st Class Magistrate of Erode, in Criminal Appeal No. 43 of 1911, presented against the conviction and sentence of the Court of the Stationary 2nd Class Magistrate of Erode, in Calendar Case No. 619 of 1910.

ORDER.—The conviction cannot be supported. Though the get-up of the accused's packets of *beedies* bears considerable resemblance to the get-up of the complainant's packets, and it may be that the complainant may be entitled in a Civil action to obtain an injunction against the accused's selling his goods in such packets, yet the trade-mark used by the accused, a crescent encircling a crown over the letters A. M. R, is sufficiently different from the complainant's trade-mark, a crescent encircling a star over the letters A. G. M. I do not think that it can be said that the accused has been guilty of using a false trade-mark, or of selling goods having a counterfeit trade-mark. The dispute is one which may be fitly decided in a Civil Court, vide *Surja Prasad* v. *Mohabir Prasad Tribedy* (1), *Emperor* v. *Bakaullah Mallik* (2) and *Dowlat Ram* v. *Emperor* (3). The conviction is set aside and the fine, if paid, must be refunded. The petitioner is entitled to a refund of the sum of Rs. 100 ordered to be paid as costs and to a return of the property directed to be forfeited.

Conviction set aside.

(1) 11 C. W. N. 887; 6 Cr. L. J. 151.
(2) 31 C. 411; 8 C. W. N. 307; 1 Cr. L. J. 140.
(3) 32 C. 431; 2 Cr. L. J. 326.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 1545 OF 1911.

February 9, 1912.

Present:—Mr. Justice Kensington.

BALMOKAND AND OTHERS—COMPLAINANTS—PETITIONERS

versus

NANAK CHAND—ACCUSED—RESPONDENT.

Practice (criminal)—Witness in attendance—Magistrate unable to record evidence—Adjournment—Witnesses to be told to appear at next hearing.

Where a Magistrate has entertained a complaint, he is bound to proceed according to law.

Where a Magistrate is unable to record the evidence of the witnesses in attendance on the date fixed and the case is adjourned, the witnesses should be told to appear on the adjourned date. A party should not be required to repeatedly summon his witnesses on payment of fresh process-fees merely because the Magistrate is unable to record evidence on the date originally fixed.

Petition, under section 435 of the Criminal Procedure Code, for revision of the order of the Magistrate, 1st Class, Lahore District, dated the 10th of October 1911, dismissing the complaint under section 204, clause 3, of the Criminal Procedure Code.

Mr. *Nihal Chand Mehra*, for the Petitioners.

Lala *Bhagwan Das*, for the Respondent.

JUDGMENT.—In this case a complaint was instituted on the 14th August under section 145 and section 107, Criminal Procedure Code. On the 16th August, notice issued for the 1st September. The complainant paid process-fee for eight witnesses whom he desired to call for that date, and all but two of these were duly served.

On the 1st September, no evidence was taken and the case was simply adjourned to 10th October. The Magistrate does not appear to have done what he was required to do by telling the witnesses in attendance to appear on the adjourned date.

On the 4th October, the complainant, finding apparently that no such orders had been given to his witnesses, applied for fresh summons for the six men already summoned and two others, for the 10th October.

On the 10th, the Magistrate dismissed the complaint on the ground that the application of 4th October had been made too late.

The Magistrate's procedure was quite improper and the order of dismissal is not fair to the complainant. A man should not be required to repeatedly summon his witnesses on payment of fresh process fees merely because the Magistrate may have been unable to record the evidence on the date originally fixed. The complaint may or may not be substantial, but having entertained it, the Magistrate is bound to proceed by law.

The revision is allowed. The order of dismissal, dated 10th October 1911, is set aside as not justified, and the Magistrate should now take steps to see that the complainant and his witnesses are given a fair hearing.

Revision allowed.

MEWA LAL *v.* AHMAD ALI.

(S. C. 9 A. L. J. 17.)

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL No. 663 OF 1911.

November 30, 1911.

Present:—Mr. Justice Tudball.

MEWA LAL AND ANOTHER—DECREE-HOLDERS—APPELLANTS

versus

AHMAD ALI—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 48—Fraud—Extension of period of limitation—First application for arrest—Second application for attachment—Whether second application is in continuation of the first—Execution of decree.

Where an application is made for execution of a decree by arrest of the judgment-debtor, and then a second application is made for execution by attachment of his property, the second application is not in continuation of the first.

Where a judgment-debtor evaded arrest and, when finally arrested, spent two years in pretending to prosecute proceedings in an insolvency Court whereas he never intended to press them and thus successfully prevented the decree-holder from executing his decree within the period of 12 years:

Held, that the judgment-debtor was guilty of fraud within the meaning of section 48 of the Civil Procedure Code, 1908.

Beni Prashad v. *Kashi Nath*, 6 A. L. J. 401; 2 Ind. Cas. 222, followed.

Execution second appeal against an order of the District Judge of Allahabad.

Mr. *Damodar Das*, for the Appellants.

JUDGMENT.—This appeal arises out of execution proceedings. The appellants obtained a decree on the 18th of December 1895, against the opposite party. On the 12th of September 1907, they applied for the arrest of the judgment-debtor. This was the last one of the applications made within the period of 12 years from the date of the decree. Several attempts were made to arrest the judgment-debtor who successfully evaded them until one day he inadvertently attended the Court, thinking that he was protected from arrest by some provision of law. He was arrested, and he at once applied to the Court to be allowed to apply in an insolvency Court to be declared insolvent. He put in his application, and for two years the proceedings continued in the insolvency Court until they were finally struck off for want of prosecution. In the meantime, the appellants had applied for attachment of certain property. That property was released on an objection preferred by the judgment-debtor's wife to the effect that it had been transferred to her by her husband. On the 1st of August 1910, the decree-holder made the present application for execution of his decree by means of the attachment of certain money deposited in Court to the credit of the judgment debtor. Objections were taken that the application was barred by time in that it had been made more than 12 years after the date of the decree. The Court of first instance held that the present application was one in continuation of the former application of 12th September 1907. It further held that the judgment-debtor had been guilty of fraud, and concluded that the application was not barred by section 48 of the Code of Civil Procedure. On appeal, the District Judge held that the present application was not in continuation of the former application. He refused to decide the question as to whether or not the judgment-debtor had by fraud or force prevented the execution of the decree at some time within 12 years preceding the date of the present application. In this the lower Court was wrong. It ought to have gone into the question which was distinctly raised between the parties.

On the question as to whether the present application is one in continuation of the former application of 12th September 1907, I fully agree with the lower Court that it is not in continuation of the former application. The former application was for execution by arrest of the judgment-debtor. The present application is one for execution by attachment of a sum of money. But on the second point, I fully agree with the Court of first instance that the judgment-debtor has by fraud prevented the execution of the decree within 12 years immediately preceding the date of the present application. The case very much resembles that of *Beni Prasad* v. *Kashi Nath* (1). There cannot be any doubt that the judgment-debtor evaded arrest and, when finally arrested, spent two years' time in pretending to prosecute proceedings in an insolvency Court—whereas he clearly never intended to press them. He has done his best and most successfully prevented the decree-holders from executing their decree within the period of 12 years. Therefore, in my opinion, the present application for execution is not barred by section 48 of the

(1) 6 A. L. J. 401; 2 Ind. Cas. 222.

FATMA v. IMTIAZI JAN.

Code of Civil Procedure. I threfore allow this appeal, set aside the decree of the Court below, and restore that of the Court of first instance. The appellants will have their costs in all Courts.

Appeal allowed.

(s. c. 1 P. R. 1912; 33 P. W. R. 1212.)

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1107 OF 1909.

April 1, 1911.

Present:—Mr. Justice Johnstone and Mr. Justice Shah Din.

Musammat FATMA—PLAINTIFF—APPELLANT

versus

Musammat IMTIAZI JAN *alias* CHUNI JAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation—Principal and agent—Accounts—Suit for rendition of accounts against agent's heirs—Rendition of accounts, meaning of—Refusal, what constitutes—Limitation Act (XV of 1877), ss. 62, 89, 120.

The refusal by an agent to render accounts, mentioned in Article 89 of the Limitation Act, 1877, must be an *express refusal on a definite date* and not merely a virtual refusal to be inferred from the ommission or failure on his part to fulfil a promise made by him to render the account to the principal in answer to a demand by the latter.

Hari Narain Ghose v. *Administrator-General*, 3 C. L. R. 446, dissented from.

Easin Sarkar v. *Barada Kishore*, 11 C. L. J. 43; 5 Ind. Cas. 186, explained and distinguished.

Rendition of accounts by an agent means something more than merely sending the accounts or making over account-books to the principal; it means and includes submitting and explaining accounts to the principal and paying over to him any balance which might be found due from the agent upon the taking of accounts.

A suit for rendition of accounts, against the heirs of a deceased agent, as regards the receipt by him of the rents and profits of the principal's property which was under his control during his life-time, with a prayer for realization of the amount due from the deceased's estate, is governed by Article 120, and not by Article 62 or by Article 89 of the Limitation Act, and limitation begins to run from the date of the agent's death.

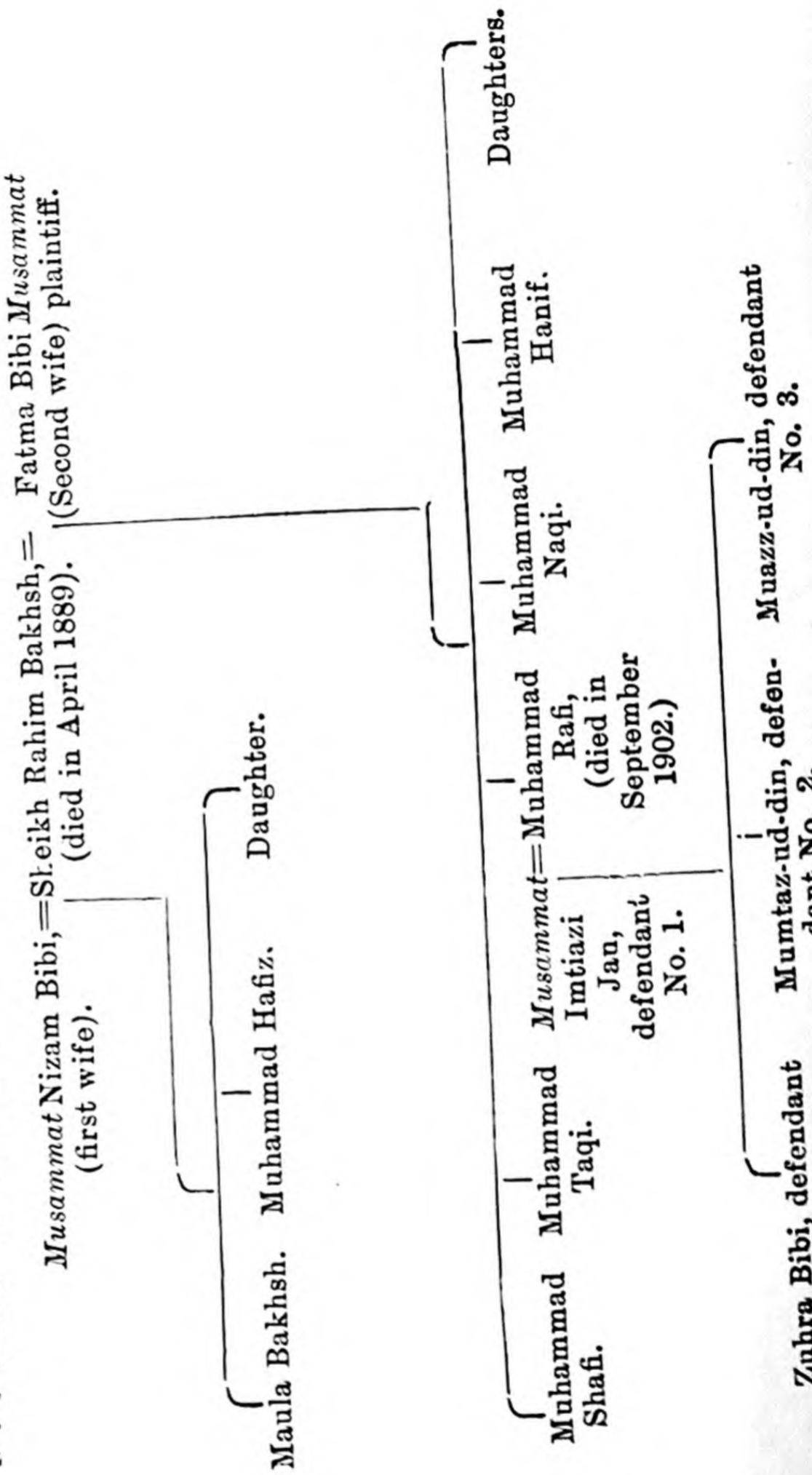
Seth Chand Mal v. *Kalian Mal*, 96 P. R. 1886, *Gurudas Pyne* v. *Ram Narain Sahu*, 10 C. 860, 11 I. A. 59 and *Rao Girraj Singh* v. *Ram Raghubir*, 31 A. 429; 2 Ind. Cas. 118, followed.

First appeal from the order of the Additional District Judge, Delhi, dated 24th August 1903.

The Hon'ble K. B. *Muhammad Shafi* and Hon'ble R. B. *Shadi Lal*, for the Appellant.

R. S. Pandit *Sheo Narain*, Mr. *Muhammad Shah Nawaz* and Sh. *Abdul Kadir*, for the Respondents.

JUDGMENT.—The following pedigree-table will help to an understanding of the facts of this case:—



Sheikh Rahim Bakhsh, a rich merchant of Lahore, had two wives, *Musammat* Nizam Bibi and *Masammat* Fatma Bibi. By his first wife, *Musammat* Nizam Bibi, he had two sons and one daughter, and by his second wife, *Musammat* Fatma Bibi, he had five sons and several daughters. By a registered deed, dated the 16th February 1872, Sheikh Rahim

FATMA *v.* IMTIAZI JAN.

Bakhsh gifted to his second wife, *Musammat* Fatma Bibi, four properties which are set out in detail at page 4 of the printed record. This was followed by another registered deed, dated the 12th May 1873, by which Muhammad Shafi, eldest son of Sheikh Rahim Bakhsh by his second wife, gifted in favour of his own mother five bungalows situated in the Mian Mir Cantonment and Lahore, the details of which are given at page 7 of the paper-book. On the 11th November 1876, Sheikh Rahim Bakhsh, before proceeding to Mecca on pilgrimage, executed another deed of gift under which, after settling the greater part of his property, both moveable and immoveable, on his minor sons, Muhammad Rafi and Muhammad Naqi, out of the residue he gifted to their mother, *Musammat* Fatma Bibi, a sum of Rs. 1,000 and in addition thereto allowed her an annuity for her life at the rate of Rs. 200 per mensem chargeable on and to be paid out of the income of the estate conveyed to Muhammad Rafi and Muhammad Naqi. Sheikh Rahim Bakhsh returned from Mecca and continued to carry on business as a general merchant in Lahore until his death, which took place at Delhi in April 1889. Both Muhammad Shafi and Muhammad Taqi had predeceased Sheikh Rahim Bakhsh; so at the time of his death, Muhammad Rafi was his eldest surviving son by *Musammat* Fatma Bibi. Muhammad Rafi appears to have attained the age of majority towards the end of 1889 or in the beginning of 1890, but Muhammad Naqi was at that time admittedly a minor and he remained a minor for some years.

Towards the end of 1889, *Musammat* Nizam Bibi and her issue brought a suit (Original Suit No. 330 of 1889) in the Court of the District Judge, Delhi, against *Musammat* Fatma Bibi and her issue for partition of the whole of the property alleged to have been left by Sheikh Rahim Bakhsh, on the allegation that the said property was in the possession of the then defendants, and that they had refused to give the then plaintiffs their proper share. In that suit, the then defendants including Muhammad Rafi pleaded, *inter alia*, that the bulk of the property then in dispute had been gifted by the late Sheikh Rahim Bakhsh, by registered deeds, dated the 16th February 1872, 12th May 1873 and 11th November 1876, in favour of *Musammat* Fatma and Muhammad Rafi and Muhammad Naqi respectively, and that the suit in respect of the properties covered by the said deeds of gift, must, therefore, fail. One of the issues framed by the Court in that suit was as follows:—

"Are the three gifts of the 16th February 1872, 12th May 1873 and 11th November 1876, valid? Were they acted upon?"

Upon this issue, the District Judge found with reference to the gifts of 1872 and 1873 "that the gifts in question were complete being accompanied by possession and that this possession had continued unbroken and uninterrupted in the life time of the donors. The gifts were, therefore, valid" (page 19 of the record). Similarly, with regard to the gift of 1676, the Judge held that it "was a valid one and that it was fully and completely acted upon so far as it could have been" (page 21). As a result of his findings on the whole case, the District Judge, on the 13th May 1891, decreed the then plaintiffs' claim against Muhammad Rafi only in respect of the three properties which he held to have constituted Rahim Bakhsh's paternal estate and which had not been gifted away by him. We have referred to this litigation of 1889-91 because the pleadings of the parties in that suit with respect to the gifts of 1872, 1873 and 1876, the issue drawn by the District Judge regarding their genuineness and validity and the finding recorded by him on that issue, have a bearing on the present litigation in connection with the question of *res judicata*, which has been raised by the present defendant-respondent No. 1 and has been decided against her by the lower Court. Since the death of her husband in 1889 *Musammat* Fatma Bibi seems to have lived peaceably with her sons, of whom Muhammad Rafi was the eldest and he as the eldest male member of the family appears to have managed the family business and to have had in his hands the control of the extensive family estate, consisting of valuable house and shop property situate in Lahore, Mian Mir and Delhi. Muhammad Rafi died in September 1902, and thereafter Muhammad Naqi is said to have assumed the control and management of the family business and the family estate. The suit, out of which the present appeal has arisen, was brought on the 14th July 1905, by *Musammat* Fatma, against *Musammat* Imtiazi Jan, widow of

FATMA v. IMTIAZI JAN.

Muhammad Rafi, and against his sons and daughter, Mumtaz-ud-din, Muazz-ud-Din and Zuhra Bibi (who are all minors), for rendition of accounts, the suit being valued at Rs. 10,500. The principal allegations, on which the suit was based, were that the plaintiff was the owner of the property described in the list attached to the plaint, consisting of 18 bungalows in Lahore and Mian Mir and one house in Delhi; that after the death of her husband, she made over the management of the said property to her son Muhammad Rafi who continued to realize the rent thereof as her agent and on her behalf till his death on the 10th December 1902; that Muhammad Rafi had also realized, as her agent, the sum of Rs 1,000 and Rs. 20 per mensem which had been gifted to her by her husband (under the deed of 1876); that Muhammad Rafi during his life-time had not rendered to the plaintiff an account of the rents and profits of the said property; and that after his death, the defendants, who were his heirs, had also not rendered any account, although they had been called upon to do so. The plaintiff prayed that defendants be called upon to render an account of the income of the property and of the sum of Rs. 1,000 cash and of Rs. 20 per mensen which Muhammad Rafi had realized as her agent, that a decree for the amount found due by the deceased be passed against his property, and that all such directions as may be necessary for rendition of accounts and recovery of money due to plaintiff be issued.

In answer to the plaint, defendant No. 1, who is principal defendant in the case, filed a written statement on the 1st November 1905, in which she pleaded in substance that the plaintiff was not owner of the property referred to in the plaint, that she had never made over the management of the said property to Muhammad Rafi, that Muhammad Rafi had never realized the rents and profits of the said property on behalf of the plaintiff, and that the suit was barred by limitation. The defendants Nos. 2 to 4 also filed a written statement, through their guardian Muhammad Naqi, in which the plaintiff's claim was practically admitted. On the 2nd November 1905, the District Judge (Mr. Harcourt) framed six issues, the first of which was "whether the suit as framed is barred by time." After the issues had been framed, the District Judge thought it necessary to examine the plaintiff and defendant No. 1 as parties, and as they were both *pardanashin* ladies, their statements were taken by commission on the 12th December 1905 (pp. 32 to 34 of the record). After several adjournments, the case came up for hearing before Mr. Ellis who had succeeded Mr. Harcourt as District Judge; and Mr. Ellis took down the statements of the Pleader for the plaintiff and of the Counsel for defendant No. 1 on the 16th May and 19th May 1906, respectively (pp. 36 to 38). The learned District Judge then framed the following issues:—

(1) Were the respective gifts of February 1872, May 1873 and November 1876 duly and properly executed?

(2) If executed, were they not intended to be operated on, *i. e.*, were they merely made with intent to defeat the rights of other heirs?

(3) Are the pleas of non knowledge of the deeds and the intention of non-operation inconsistent and cannot the defendant raise the pleas?

(4) With respect to the deed of 1873, had Muhammad Shafi the power to convey irrespective of the authorization of his father and did he receive such authorization?

(5) Did plaintiff appoint Muhammad Rafi as her agent to recover rents, and if so, for what period?

(6) If so, does a suit for accounts against the heirs of an agent not lie?

(7) Is defence estopped by former pleadings?

These issues, it will be observed, are in some respects different from the issues framed by Mr. Harcourt on the 2nd November 1905, and it is worthy of note that no issue on the point of limitation was drawn. Of the above issues, the most important are the first, the second, the fifth, and the seventh issues, of which the first two and the last are connected together and bear upon the question whether or not the plaintiff is the owner of the property set forth in the list attached to the plaint, and in respect of the management of which she alleges that she appointed her son Muhammad Rafi as her agent. The fifth issue relates to the alleged relationship of principal and agent between the plaintiff and Muhammad Rafi and is the most material issue in the case. The

other issues have not been discussed before us and may, therefore, be left out of consideration. With reference to the four issues just mentioned, the lower Court (Lala Sri Ram Poplai) has held (1) that the three gifts of 1872, 1873 and 1876 were made merely with the object of defeating the rights of Rahim Bakhsh's first wife, *Musammat* Nizam Bibi, and her children and were not acted upon; but (2) that defendant No. 1, as representative of Muhammad Rafi, was precluded by section 13 of the Civil Procedure Code, 1882, from setting up a defence founded on the fictitious nature of the said gifts, as the question of the genuineness and validity of those gifts was *res judicata* between the parties by reason of the decision of the District Judge of Lahore, dated the 13th May 1891, in Original Suit No. 330 of 1889; (3) that the plaintiff has failed to show that Muhammad Rafi was appointed by her as her agent to manage on her behalf the property referred to in the plaint and to receive the rents and profits thereof; (4) that all that has been shown is that Muhammad Rafi acted as plaintiff's agent in realizing the income of the said property, not in his private capacity as plaintiff's son but in his capacity as the manager of the firm of Muhammad Rafi and Brothers, of which he was the senior partner. As a result of the above findings, the lower Court has held that the plaintiff had no cause of action as regards the rendition of accounts against the defendants in their private capacity as heirs of Muhammad Rafi, but that she was at liberty to sue them and other members of the firm of Muhammad Rafi and Brothers on the ground that Muhammad Rafi, as a partner of that firm, had managed her property and received the income thereof. The plaintiff's suit has, therefore, been dismissed.

From the decree of the District Judge, an appeal has been preferred to this Court by the plaintiff, and we have heard the appeal argued at great length on both sides. The questions, which require determination in this appeal are:—

(1) Whether the plaintiff's suit was in whole or in part barred by limitation.

(2) Whether the decision of the District Judge of Lahore, dated the 13th May 1891, in Original Suit No. 330 of 1889, operates as *res judicata* between the parties as regards the question of the genuineness and validity of the three gifts of 1872, 1873 and 1876, respectively.

(3) Whether, if the said decision does not operate as *res judicata*, the aforesaid gifts were duly executed and acted upon and were valid.

(4) Whether Muhammad Rafi acted as plaintiff's agent in managing the property that belonged to the plaintiff under the gifts in question and in realising the rents and profits thereof.

(5) Whether, if Muhammad Rafi acted as plaintiff's agent in the management of the said property in his capacity as senior partner in the firm of Muhammad Rafi and Brothers, the defendants, as heirs of Muhammad Rafi, were alone liable to the plaintiff in a suit for rendition of accounts, without the other members of the firm being joined as defendants.

We now proceed to discuss these questions *seriatim*.

As regards the question of limitation, it has been argued by the learned Pleader for the defendant, *Musammat* Imtiazi Jan (who is the sole contesting respondent in this appeal), that the suit was barred by time under Article 89 of the second Schedule of the Limitation Act, 1877. In this connection reliance has been placed on the plaintiff's statement in the lower Court, dated the 12th December 1905 (p. 33), which runs as follows:—

"I always called upon Muhammad Rafi to render accounts, but he kept putting off the matter and did not render any account. On coming here (Delhi), I wrote to him letters and he sent replies to those letters. I produce the letters received by me."

In one of these letters (letter dated the 11th December 1895, marked as Exhibit E.), which was so produced by the plaintiff, Muhammad Rafi writes to the plaintiff as follows:—

"I send currency notes of the value of Rs. 400. These sums are due on account of November.....If God helps, I will send accounts towards the end of December..... .....In future, I will send at once any amount that is realized by me."

With reference to this letter and to the statement of the plaintiff set forth above, the learned Pleader has contended that accounts having been demanded by the plaintiff from Muhammad Rafi from time to time, and Muhammad Rafi having per-

sistently neglected to render accounts after having promised to send accounts by the end of December 1895, the plaintiff's cause of action against Muhammad Rafi accrued on the 1st of January 1896, and that, therefore, the present suit against the heirs of Muhammad Rafi was long barred by time under the Article of the Limitation Act above referred to. In support of this contention, two decisions of the Calcutta High Court—*Hari Narain Ghose* v. *Administrator-General* (1), and *Easin Sarkar* v. *Barada Kishore* (2)—have been cited. The head-note of the first mentioned decision runs as follows:—

"An account of his receipts and disbursements having been demanded from a Mukhtar, he, on the 3rd of August 1872, wrote a letter in which he promised to render full accounts during the ensuing vacation. This he neglected, though he did not refuse to do. *Held*, that the limitation for a suit to compel an adjustment of account ran from the time when the defendant's promise to render account was broken and was governed by Act IX of 1871, Schedule II, Article 90 (see Act XV of 1877, Schedule II, Article 89)."

This ruling, so far as it goes, seems to help the defendant's Pleader; but with every respect to the learned Judges who decided that case, we do not think that the view taken by them is correct. The judgment is a brief one and no reasons whatever are given by the learned Judges in support of their decision. In the body of the judgment they observed:—

"In this case, the lower Court found that the account being demanded, the defendant at first promised to render it during the vacation of 1872, that is, in *Assin or Kartick* 1279, but he never fulfilled that promise and, therefore, *virtually* refused to render the account at that time. The present suit is brought on the 15th of June 1875 or *Assar* 1282, and it is accordingly in time." According to Article 89 of the present Limitation Act, 1877, which corresponds to Article 90 of Act IX of 1871, in a suit by a principal against his agent for moveable property received by the latter and not accounted for, limitation begins to run from the date when the account is.....demanded and refused, or when no such demand is made when the agency terminates. The language of this Article, in our opinion, clearly contemplates that, apart from the termination of agency, the cause of action must accrue to the principal against his agent on a definite date, and that date must be the date on which the account having been demanded by the principal from the agent is refused by him. The refusal by the agent to comply with the principal's demand for the account must, in our judgment, be an express refusal on a definite date; for if the non-fulfilment of a promise on the part of the agent to render account during a particular period or, where no definite period is named, within a reasonable time from the date of the demand, were held to be tantamount to a refusal to render the account at the end of that period or such reasonable time within the purview of Article 89, very many difficulties in the application of that Article might conceivably arise. For instance, the agent in answer to a demand by the principal for an account might promise to render the account without naming a definite period, and on his failing to do so within a reasonable time, and on the demand being repeated, he might renew the promise from time to time, and yet fail for a considerable period to render the account as promised. If such conduct on the part of the agent is to be deemed to amount to a *virtual* refusal, to use the words of the learned Judges of the Calcutta High Court, to render the account within the meaning of Article 89 of the Limitation Act, as seems to have been held in the above cited case, and as, in fact, has been contended before us by the defendant's Pleader, it would be impossible to fix the terminus *a quo* for the purposes of applying the said Article. In our opinion, the correct interpretation of the Article in question is to hold that the refusal by the agent to render account as mentioned therein must be an express refusal on a definite date and not merely a virtual refusal to be inferred from the omission or the failure on his part to fulfil a promise made by him to render the account to the principal in answer to a demand by the latter. We are not, therefore, prepared to follow the ruling in *Hari Narain Ghose* v. *Administrator-General* (1).

The more recent decision of the Calcutta High Court—*Easin Sarkar* v. *Brada Kishore* (2)—on which reliance has been placed by

(1) 3 C. L. R. 446.
(2). 11 C. L. J. 43; 5 Ind. Cas. 186.

the defendant's Pleader, while it approves of the ruling discussed above, is not directly in point so far as the alleged applicability of Article 89 to the present suit is concerned. In that case, the point actually decided is, that when there is a contract between principal and agent to render accounts year by year, Article 116 of the Limitation Act applies if the contract is registered, and Article 115 if it is unregistered. The Court, no doubt, held, following the earlier ruling above cited, that the neglect on the part of the agent to comply with the principal's demand to render account was tantamount to a refusal within the meaning of Article 89 of the Limitation Act, but this opinion was mere *obiter dictum*, as the learned Judges accepted the argument that Article 115 of the Act was applicable to the case before them. But, apart from this, the case is clearly distinguishable from the present one, in that there the suit was based upon an express agreement to furnish accounts year by year in pursuance of which a demand to render accounts had been made year by year, and there was a breach of the contract by the agent at the end of each year by reason of his omission to render the accounts as expressly agreed upon. In other words, there had been successive demands by the principal in pursuance of the contract and successive breaches thereof by the agent at the end of every year, and the principal having brought his suit for accounts within three years of the last breach, it was held within limitation both under Article 115 and under Article 89 of the Act. In the case before us, there was no express contract on the part of Muhammad Rafi to render accounts to the plaintiff at the end of any definite period or year; in his letter to the plaintiff marked as Exhibit E, he simply promised to send accounts to the plaintiff towards the end of December 1895. Surely this bare promise did not amount to a contract between the parties concerned, and his omission to send the accounts as promised by the end of December could not be legitimately construed, especially having regard to the natural relationship between them, to amount to a refusal to render accounts. In this connection, we may observe in passing that rendition of accounts by an agent means something more than merely sending the accounts or making over account-books to the principal; it means and includes submitting and explaining accounts to the principal and paying over to him any balance which might be found due from the agent upon the taking of such accounts. No such rendition of accounts was ever promised by Muhammad Rafi to the plaintiff, and, therefore, his omission to render accounts in this sense could not have amounted to a refusal to render accounts. We, therefore, think that the plaintiff's cause of action against Muhammed Rafi for rendition of accounts did not accrue at the end of December 1895 and that the present suit is not barred under Article 89 of the Limitation Act.

But, even if Article 89 were held to apply to this case, it clearly could not apply to the plaintiff's suit so as to bar it in respect of the rents and profits of the plaintiff's property, alleged to have been received by Muhammad Rafi after 1895, for there is nothing on the record to show that after that year the plaintiff demanded account on any particular date from Muhammad Rafi and that the latter refused it. Unless the date of the demand followed by a refusal is established, the plaintiff's cause of action against her agent would not accrue under Article 89; and, in our opinion, the plaintiff's indefinite statement that she always called upon Muhammad Rafi to render accounts "but that he kept putting off the matter and did not render any account" (page 33 of the record), cannot be interpreted as meaning that a specific demand for accounts was made after 1895 and that Muhammad Rafi refused to comply with the demand; Article 89 of the Limitation Act, therefore, has no application to the case as laid. The Article which is really applicable is, in our opinion, Article 120, for the plaintiff's suit is one, not against Muhammad Rafi himself, who is dead, but against his heirs, and is for rendition of accounts as regards the receipt by Muhammad Rafi of the rents and profits of the plaintiff's property which was under his control during his life-time, with a prayer that the amount found due might be directed to be paid out of the estate of Muhammad Rafi in the hands of those heirs. To a suit of this description, neither Article 62 nor Article 89 of the Limitation Act is applicable; it is governed by Article 120, and limitation begins to run from the date of the agent's death, which in the case before us took place on 10th September

1902 [see *Seth Chand Mal* v. *Kalian Mal* (3), *Gurudas Pyne* v. *Ram Narain Sahu* (4) and *Rao Girraj Singh* v. *Ram Raghubir* (5)]. For these reasons, we hold that the plaintiff's suit, which was instituted within three years of Muhammad Rafi's death, was within limitation.

There was a good deal of argument before us in reference to the second question, namely, whether the decision of the District Judge, Lahore, dated the 13th May 1891, operated as *res judicata* as regards the question of the genuineness and validity of the gifts of 1872, 1873 and 1876 relied upon by the plaintiff. We do not, however, think it necessary to discuss and decide this question as we have no hesitation in holding, with reference to the third question set out above, that the gifts in question were genuine and valid and that under those gifts the plaintiff became owner of the property covered by them. The gifts were made by means of registered deeds and *prima facie* they were perfectly genuine and valid, as Sheikh Rahim Bakhsh had every power to make those gifts. The *onus*, therefore, lay on defendant No. 1 of proving that those gifts were nominal or fictitious and that the plaintiff acquired no rights of ownership in the property gifted. This she has entirely failed to prove No reason whatever has been given by the defendant why the donor should not have intended these gifts to be acted upon. So far as the record goes, he did all in his power to divest himself of his control over the property gifted and put the donee in possession thereof. By the deed of 1876 Sheikh Rahim Bakhsh, before proceeding to Mecca, gifted the whole of his property, with the exception of a small residue, in favour of his two sons Muhammad Rafi and Muhammad Naqi and he excluded from the operation of that deed property which he had already gifted to the plaintiff in 1872 as also the property which his son Muhammad Shafi, in whose name it had been purchased by Sheikh Rahim Bakhsh, had gifted to the plaintiff by the deed of 1873. Surely, if both these gifts of 1872 and 1873 had been merely fictitious transfers, Sheikh Rahim Bakhsh would either have treated the property covered by them as his own in 1876 or would have secured deeds of release in respect of that property from his first wife and her children. He was going to Mecca on pilgrimage and was making a final settlement of all his property in view of the contingency of his not returning home. The fact that he did not in any way deal with the property covered by the deeds of 1872 and 1873 as his own up to 1876, coupled with the fact that he disposed of the rest of his property in 1876, shows that the gifts in question were perfectly *bona fide* gifts and had not been made with any ulterior object. There is a considerable body of oral evidence on the record to prove that the plaintiff was considered to be the owner of the property which had been gifted to her by her husband, and that in the books of the family firm, large sums of money, alleged to have been realized as rents and profits of that property were from time to time credited to her. There is also evidence to show that Sheikh Rahim Bakhsh himself and after his death Muhammad Rafi had stated to the tenants of certain houses covered by the gifts in question that the said houses had been given to the plaintiff and were her property (pp. 44 to 70 of the printed record). Further, it is proved that the *nazul* lands, on which stood some of the houses and shops gifted to the plaintiff, were, subsequent to the gifts, purchased in the name of the plaintiff, and that compensation to the amount of Rs. 71,000 was paid by Government to the plaintiff in respect of the acquisition of certain property, the subject of the said gifts, which was in the proprietary possession of the plaintiff. This sum is credited to the plaintiff in the books of the family firm (p. 56 of the record).

The mere fact that on his return from Mecca, Sheikh Rahim Bakhsh lived with the plaintiff in the residential house in Lahore which he had gifted away to her previously, is absolutely insufficient to show that no genuine gift of any property had been made to her by Rahim Bakhsh and that, if any such gift had been made, it was not acted upon. Sheikh Rahim Bakhsh being plaintiff's husband would naturally on his return live with her; and it would have been the most improper thing on her part not to have received him or not to have allowed him to live with her in the house in question. Not one circumstance has been pointed out to us by the defendant's Pleader which would, in any way, be inconistent with the plaintiff being the

(3) 96 P. R. 1886.
(4) 10 C. 860; 11 I. A. 59.
(5) 31 A. 429; 2 Ind. Cas 118.

owner of the property gifted to her by her husband and there are so many weighty facts in support of the genuineness of the gifts in question that we have no hesitation in holding that those gifts were made in good faith in favour of the plaintiff, that they were acted upon, and that they were perfectly valid so as to constitute the plaintiff owner of the property convered by them.

This brings us to a consideration of the question whether Muhammad Rafi acted as plaintiff's agent in managing the property which belonged to her and in receiving the rents and profits thereof. This question must, we think, be answered in the affirmative. It is not denied that when Sheikh Rahim Bakhsh died, Muhammad Rafi was the eldest male member of the family, and that he, having attained the age of majority about that time, assumed practical control of all the property belonging to the family. The plaintiff was a *parda-nashin* woman, and she could not, therefore, have personally managed her estate, which consisted of about 19 bungalows and houses in Lahore, Mian Mir and Delhi. Her case is that she appointed her eldest son, Muhammad Rafi, as her agent to manage that property on her behalf and to realize the income thereof ; that he continued to manage it and to receive the rents and profits as her agent up to the date of his death ; that out of the income so received he paid her small sums from time to time, but that he never rendered accounts to her as he was bound to do, and that at the date of his death in 1902, a large amount of money was still due by him to her. The case *prima facie* fits in with the probabilities of the situation, and there should be no difficulty in believing it, if it receives support from attendant circumstances and from evidence of an apparently trustworthy character relating to the receipt of income of plaintiff's property by Muhammad Rafi.

It is not necessary in a case of this kind that there should be evidence of an express contract of agency ; the existence of such a contract can be, and should be inferred from circumstances which, considered in the light of the relationship and conduct of the parties, show that one of them stood to the other in the relation of agent to principal. There is ample material on the record in this case in support of such implied contract of agency, and the defendant's Pleader has, in our opinion, entirely failed to point to any one material fact incompatible with the existence of such a contract. The letters written by Muhammad Rafi to the plaintiff (Exhibits A, B, D and E) go to show that he was, at all events, in possession of money belonging to the plaintiff, that he was making remittances to her from time to time and that he felt himself under an obligation to render some sort of accounts to her. The last mentioned Exhibit, dated the 11th December 1895, is more explicit on the point. It shows not only that Muhammad Rafi was in possession of plaintiff's money, but also that he used to realise money on her behalf; and in that letter Muhammad Rafi also says that he will send the accounts by the end of December 1895, and that in future he will remit (to the plaintiff) any money which was realized by him. He also asks for acknowledgment of the receipt of the money remitted, Rs. 400. It is exceedingly difficult to believe that all this correspondence means nothing ; for no suggestion is made of any property other than the property referred to in the plaint having belonged to the plaintiff which yielded her an income, and with which income the letters under consideration might have had some connection. Further, no reasonable hypothesis has been put forward to account for Muhammad Rafi being in possession of monies on behalf of the plaintiff otherwise than as her agent, or to show that he was sending money to the plaintiff out of his own pocket for her maintenance as his mother. The contents of the letter of 11th December 1895 are hopelessly at variance with any such theory, for they show that Muhammad Rafi felt that he was bound to send accounts to his mother and to remit her monies due to her as of right as soon as he had realized them for her. The necessary implication is that he was receiving money belonging to her as her agent, and that he was either actually keeping accounts of the receipts or pretending that such accounts were being kept and there is a clear acknowledgment of his duty both to keep accounts and to submit them to his mother.

The oral evidence produced by the plaintiff strongly supports her case as proved by the above letters written by Muhammad Rafi. Sheikh Mahbub Ali, proprietor of Bombay House, Lahore; Sheikh Nabi Bakhsh, shopkeeper, Anarkali; Sheikh Chiragh Din, Ke-

barya; D. Jennings, Guard, North-Western Railway, and *Qazi* Ghulam Rabbani, Extra Assistant Commissioner, Lahore, who as tenants occupied some of the houses and shops referred to in the plaint, give more or less direct evidence to prove that Muhammad Rafi admitted before them that the premises occupied by them belonged to his mother, the present plaintiff; and as all these witnesses are perfectly independent and more or less respectable, we have no hesitation in believing their testimony. Further, Nur Din and Karam Elahi, who were servants of the family in the life-time of Sheikh Rahim Bakhsh and also after his death, also fully support the plaintiff's case. Sheikh Muhammad Naqi, younger brother of Muhammad Rafi, whose position as an Honorary Magistrate, Lahore, gives weight to his evidence, proves that ever since he attained years of discretion he saw Muhammad Rafi regularly realizing the income of the plaintiff's property on her behalf, and that he himself never did so during Muhammad Rafi's life-time. He adds that the income of the said property was realized by Muhammad Rafi through Nur Din and Karam Elahi, servants of the family, and that entries in respect of it were made by the said Karam Elahi and Munshi Muhammad Husain in the *bahi khata* to the plaintiff's credit. This is amply supported by the evidence of Karam Elahi (pages 67 to 70 of the record). Muhammad Husain appears to have died about 1895, and in the books of the family firm there is a long series of entries in his hand showing credits made to the plaintiff in respect of sums of money realized as the income of the plaintiff's property. The witness proves that in the *roznamcha* of the plaintiff, commencing 1st July 1889, the balance brought forward to her credit is Rs. 5,000, and that from that date, rents are credited in the *roznamcha* apart from the accounts of the shop. The book runs up to 30th April 1894. Up to that date the accounts are debited to the *khata* of Muhammad Rafi-Muhammad Naqi. After that date, the rents of plaintiff's property were credited to Muhammad Rafi's own personal property *khata*. The cross-examination of this witness is perfectly barren in result so far as the defence is concerned, and the central fact that Muhammad Rafi, the eldest male member of the family and the senior partner in the family firm, used to have the income of the plaintiff's property realized and credited to her in the books of the family, remains undisturbed. In coming to the conclusion that Muhammad Rafi is not proved to have been the agent of the plaintiff, the lower Court seems to have been impressed by the facts that no separate account of the plaintiff's income was kept: that plaintiff never demanded any account of the income of her property; and that the accounts relied upon by the plaintiff in the family books are written on blank pages left between regular accounts of the family firm and are merely transfer items, the existence of which does not affect previous or subsequent entries.

These reasons for disbelieving the existence of the relationship of principal and agent between the plaintiff and Muhammad Rafi are, in our opinion, inconclusive. If no separate account of the income of the plaintiff's property was kept by Muhammad Rafi, it was not plaintiff's fault, and we do not see how plaintiff could have compelled Muhammad Rafi to keep a separate account-book. That plaintiff must have demanded the account is clear from Muhammad Rafi's letters to which we have referred above, and the circumstance that the accounts were never rendered by Muhammad Rafi is perfectly immaterial for the purposes of the plaintiff's case. Lastly, we have not been able to verify the alleged fact that the accounts are written on blank pages left between the regular shop accounts; but even if that were so, it by no means affects their genuineness, inasmuch as the entries are most of them in the handwriting of Muhammad Husain who died so far back as 1895, and it is not suggested that they have been forged subsequently. The defendant's learned Pleader has made no attempt to show that the fact of any of the items in question being transfer items in any way tends to disprove the alleged agency, and we can attach no importance to this point. For all these reasons, we hold that the plaintiff has succeeded in proving that Muhammad Rafi acted as her agent in managing her property and in receiving the income thereof.

The above findings dispose of the whole case for it is not disputed that if Muhammad Rafi acted as the plaintiff's agent in receiving the income of her property, the defendants as representatives of Muhammad Rafi are liable

to account to the plaintiff in respect of that income to the extent of the property which they have inherited from him. In this view of the case, the 5th question set forth above needs no decision.

The result is that we accept this appeal, set aside the decree of the lower Court, and under Order XX, rule 16, Civil Procedure Code, pass a preliminary decree directing that accounts be taken of the rents and profits of the plaintiff's property received by Muhammad Rafi as plaintiff's agent and of the monies paid by him to the plaintiff as such agent between the date of Sheikh Rahim Bakhsh's death and the 10th September 1902. The case will go back to the lower Court for these accounts to be taken, and the lower Court will then pass a final decree for the amount of money, if any, which might be found due to the plaintiff from the defendants as Muhammad Rafi's heirs to be recovered from Muhammad Rafi's property in the hands of the defendant.

The stamp on the appeal will be refunded and other costs will be costs in the cause.

Appeal accepted.

(S. C. 9 A. L. J. 29.)

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 295 OF 1910.

November 28, 1911.

Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.

KANHAI LAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

HULAS SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Decree for sale not providing successive periods for redemption—Failure to redeem—Prior and puisne mortgagee—Right to bring separate suit—Payment by puisne mortgagee of decree on prior mortgage—Shield as against subsequent incumbrancers—Amount payable.

Where in a suit for sale on a mortgage, the decree gives the subsequent mortgagees the right to redeem the mortgage on which the suit has been brought, but it does not provide successive periods within which different parties might redeem each other, the decree cannot debar one of the subsequent mortgagees from enforcing his mortgage in a subsequent suit.

Where one of the subsequent transferees pays off the amount due under the decree, he or his heirs can hold the mortgage on foot of which the decree was obtained as a shield against the other puisne mortgagees.

Gokuldas Gopal Das v. *Puran Mal*, 10 C. 1035; 11 I. A. 126, followed.

A transferee who pays off the decree is entitled to claim the amount due under the mortgage on which the decree was obtained and not merely the sum due under the decree.

Ganga Pershad Sahu v. *The Land Mortgage Bank*, 21 C. 366, 21 I. A. 1; *Dip Narain Singh* v. *Hira Singh*, 19 A. 527, relied upon.

First appeal from a decree of the Subordinate Judge of Bareilly.

Mr. *J. N. Chaudri*, for the Appellants.

Mr. *B. E. O'Conor* (with him Mr. *Lalit Mohan Banerji*), for the Respondents.

JUDGMENT.—This was a suit by the appellants upon a mortgage made in their favour by one Ganga Ram Singh, on March the 24th, 1890. The principal sum secured was Rs. 600, and the mortgagor agreed to pay compound interest with yearly rests at the rate of 2 per cent. per mensem. The appellants in their plaint say that there is due to them Rs. 600 on account of principal and Rs. 402 on account of interest, but they claim only Rs. 10,500. The first respondent, Hulas Singh, resisted the suit on the ground that there was no consideration for the mortgage and on the ground that the mortgagor was incapable of understanding the transaction, and that the interest was penal and excessive and should not be allowed. The respondents Nos. 2 to 7 are the sons of Gauri Sahai, who purchased the mortgaged property in execution of a decree obtained by him against the mortgagor upon an unregistered mortgage of May 17th, 1888. These respondents pleaded, and it is now admitted, that the mortgagor, on March 2nd, 1890, that is to say, a few weeks before the mortgage now in suit, mortgaged the property to one Sham Lal who brought a suit upon his mortgage impleading both the mortgagor and the present plaintiffs, and obtained a decree which was made absolute on January the 15th, 1898, in execution of which one of the mortgaged villages was put up to sale and purchased by the second respondent, the eldest son of Gauri Sahai. After that, Gauri Sahai, who, as already stated, had purchased the property at a sale held in execution of the decree on his mortgage, paid to the decree-holder, Sham Lal, Rs. 2,930 odd being the amount remaining due under the decree. Respondents Nos. 2 to 7 pleaded that inasmuch as the present appellants were parties to Sham Lal's decree and had not chosen to redeem Sham Lal's mortgage but allowed Gauri

Sahai to pay off the decree, they had lost their rights to enforce their mortgage; and these respondents pleaded further that if the appellants were entitled to enforce their mortgage at all, they could do so only on paying the amount due on Sham Lal's mortgage, namely, Rs. 2,930 odd on account of principal and Rs. 21,243 on account of interest. The present suit was instituted on the 10th June, 1910, and on August the 2nd, 1910, the appellants presented a petition to the Court in which they prayed that three other persons who were subsequent mortgagees of the property might be made defendants. The Court took up the petition on August the 10th, after the time for bringing a suit against those three persons had expired, and refused to make them parties on the ground that any suit as against them was barred by limitation. In the view which we take of another question which arises in this appeal, it is unnecessary to express any opinion as to whether the Court below was right in refusing the appellant's petition of August 2nd.

The first important question in this appeal is whether the appellants can now enforce their mortgage. The Court below has held that they are not entitled to do so because they were parties to the suit brought by Sham Lal and had a right under that decree to redeem Sham Lal's mortgage, and as they did not avail themselves of that right, they have lost it and cannot re assert it in the present case. It seems to us that there is nothing in the decree passed in Sham Lal's suit that can be held to debar the appellants from enforcing their mortgage, and we do not understand the decision of the Court below on this point. The decree gave the appellants and Gauri Sahai a right to redeem Sham Lal but did not provide successive periods within which the different parties might redeem each other.

The second and most important question in the appeal is, on what terms the appellants are entitled to enforce their mortgage. On their behalf, it is contended that the mortgage of Sham Lal is now merged in the decree which he obtained, and that the amount, which the appellants must pay to the respondents Nos. 2 to 7 as a condition precedent to enforcing their mortgage, must be calculated on the decree and not on the mortgage. We cannot accept this contention. In the first place, the decree in Sham Lal's suit only brings the account down to October the 12th, 1907. In the next place, it is quite clear on the authorities and on principle that respondents Nos 2 to 7, having paid off Sham Lal's mortgage, are entitled to stand in the shoes of Sham Lal and to resist the sale of the property at the instance of the appellants until the amount due on Sham Lal's mortgage has been paid to them. If authority is needed for the proposition that respondents Nos. 2 to 7 are entitled to hold up Sham Lal's mortgage against the claim of the present appellants, we would refer to the well known case of *Gokul Das Gopal Das* v. *Puran Mal Premsukhdas* (1).

The question whether in a case of this kind the amount to be paid is to be calculated on the decree or on the mortgage, has been the subject of several decisions of which we need only mention those in *Ganga Pershad Sahu* v. *The Land Mortgage Bank* (2) and *Dip Narain Singh* v. *Hira Singh* (3). Neither of these cases very closely resembles the present case on the facts but the principle on which they rest applies fully to the present case. They show that the respondents are entitled to be paid what is due on Sham Lal's mortgage and not merely what is due on the decree obtained by Sham Lal. The result is that, in our opinion, the appellants are not entitled to bring to sale the property mortgaged to them except on payment of a sum exceeding Rs. 24,000 and far exceeding the value of the property, and it is on this account that we do not think it necessary to say anything more in regard to the decision of the Court below on the appellant's petition on August the 10th, 1910. It would obviously be useless to send the case back to have other parties added. For the above reasons, we allow this appeal, set aside the decree of the Court below, and give the appellants a decree in the usual form for sale of the mortgaged property subject to payment by them of the amount due on the prior mortgage of March the 2nd, 1898, in favour of Sham Lal.

Decree modified.

(1) 10 C. 1035; 11 I. A. 126.
(2) 21 C. 366; 21 I. A. 1.
(3) 19 A. 527.

MOHADEO PERSHAD *v.* PACHKARI.

(s. c. 16 C. W. N. 322.)

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3163 OF 1909.

August 25, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

Chowdhury MOHADEO PERSHAD—PLAINTIFF—APPELLANT

versus

Sheikh PACHKARI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Usufructuary mortgage—Non-transferable holding—Abandonment—Usufructuary mortgagee placed in possession—Payment of rent by tenant—Decree for ejectment.

A usufructuary mortgage of a part of a non-transferable holding is not equivalent to abandonment.

Mahomed Taqi v. *Choa Lal*, 7 Ind. Cas. 750; 13 C. L. J. 499, relied upon.

Consequently, when the tenant of such holding executes a usufructuary mortgage in favour of a third party, and places him in possession, there is no repudiation of the relationship of landlord and tenant as between himself and the person under whom he holds the land. And if, after the execution of the usufructuary mortgage, the tenant has paid rent to the superior landord and has throughout expressed his willingness to hold himself responsible for due payment of rent, it cannot be suggested that there has been any severance of his connection with the land.

Therefore, in such a case the landlord is not entitled to a decree for ejectment.

Appeal from the decree of the second Sub-Judge of Mozaffarpur, dated September 3rd, 1909, modifying that of the Munsif of Sitamarhi, dated March 31st, 1909.

Babus *Uma Kali Mukherjee* and *Jogesh Chandra Dey*, for the Appellant.

JUDGMENT.—This is an appeal on behalf of the plaintiff in an action in ejectment. The subject-matter of the litigation is an occupancy-holding in respect of which the second defendant was the tenant under the plaintiff. On the 12th May 1905, the second defendant executed a usufructuary mortgage in favour of the first defendant under the terms whereof the mortgagor was entitled, if he so chose, to remain in possession of the homestead upon payment of a nominal rent. The case for the plaintiff is that upon the execution of the usufructuary mortgage, the second defendant abandoned the holding and the first defendant came into occupation as mortgagee. The plaintiff, therefore, contends that he is entitled to a decree for ejectment against both, against the first defendant, because he is a trespasser in possession, and against the second, because he has severed his connection with the holding. The Court of first instance accepted this contention as well founded and made a decree for ejectment against both the defendants. The two defendants jointly preferred an appeal against this decree. The Subordinate Judge has held that in so far as the first defendant is concerned, the decree for ejectment must be maintained, but in so far as the second defendant is concerned, he is not liable to be ejected.

On the present appeal, it has been argued on behalf of the plaintiff that this view is erroneous in law and that the plaintiff is entitled to a decree for ejectment against the transferor as well as the transferee. In our opinion, this contention cannot be supported.

On behalf of the appellant reliance has been placed upon the decisions of this Court in the cases of *Krishna Chandra Dutta* v. *Mir n Baania* (1) and *Rashi Lall Dutt* v. *Bidhumukhi Dasi* (2). Neither of these cases, when analysed, is found to be of any assistance to the appellant. In the first of these cases, after a usufructuary mortgage had been executed by the tenant in respect of a non-transferable holding, he abandoned it. The landlord found the transferee in possession and forcibly ejected him. The originial tenant thereupon commenced an action for ejectment against the landlord and contended that if the usufructuary mortgage was invalid in law, his tenancy had not been terminated and he was consequently entitled to be restored to possession. This contention was negatived on the ground that the tenant by abandonment had terminated his interest in the land. This decision possibly goes too far and the view may, perhaps, be supported that a temproary abandonment does not necessarily imply an extinction of the rights of the tenant. It is not necessary, however, for the purposes of the present case to consider this aspect of the matter. In the second case, it was found that the tenant, after he had created usufructuary mortgage and placed the mortgagee in possession of the holding, not only completely severed his connection therewith but, as a matter of fact, disappeared from the village. Under these circumstances, it was ruled that the landlord was entitled to possession of the holding not merely as against the transferee but also as against the

(1) 10 C. W. N. 499; 3 C. L. J. 222.
(2) 10 C. W. N. 719; 4 C. L. J. 306; 33 C. 1094.

MOHADEO PERSHAD v. PACHKARI.

transferor. In the case before us, although the mortgagee was placed in possession by the mortgagor, yet the latter continued in occupation of a part of the land of the holding. It is well settled that a usufructuary mortgage of a part of a holding is not equivalent to abandonment [*Mahomed Taqi* v. *Choa Lal* (3)]. It has been argued by the learned Vakil for the appellant that he was in possession as a sub-lessee of the transferee, which involved a repudiation of his character as tenant of the landlord. In our opinion, this view cannot be maintained. There is a fundamental distinction between a sale and a mortgage of a holding. A tenant who executes a deed of sale may, perhaps, be deemed to have severed his connection with the holding, although it would be difficult to maintain this view in the light of the decision of this Court in the case of *Dina Nath Roy* v. *Krishna Bijoy Saha* (4). The case of a mortgage, however, is reasonably free from difficulty. The mortgage is executed on the assumption that the tenant has a transferable interest in the land. The execution of a mortgage by itself does not imply a severance of connection of the tenant with the holding, because it is only on the assumption that the tenancy continues in operation that the mortgagee can have any subsisting interest in the land. Consequently, when a tenant executes a usufructuary mortgage in favour of a third party and places him in possession, there is no repudiation of the relationship of landlord and tenant as between himself and the person under whom he holds the land. The decision of the Full Bench in *Nurendro Narain Roy* v. *Ishan Chunder Sen* (5) is thus of no avail to the appellant. In the case before us, it has further been found that the second defendant, after the execution of the usufructuary mortgage, has paid rent to the superior landlord and has throughout expressed his willingness to hold himself responsible for due payment of rent. It cannot, consequently be suggested that there has been any severance of his connection with the the land. In so far as the right itself is concerned, he has not abandoned it; in so far as the physical enjoyment of the right is concerned, he is still in occupation of a part of the land of the holding. Under these circumstances, it is difficult to appreciate how the the view can be seriously maintained that the tenant has abandoned the holding and that the landlord has become entitled to re enter. The learned Vakil for the appellant invited our attention to the provisions of section 25, clause (*b*) of the Bengal Tenancy Act. That section provides that an occupancy-*raiyat* shall not be ejected by his landlord from his holding except in execution of a decree for ejectment passed on the ground that he has broken a condition consistent with the provisions of the Act and on breach of which he is, under the terms of a contract between himself and his landlord, liable to be ejected. Apart from the question whether the Legislature intended to apply this section to cases of transfers of holdings, it is necessary to observe that the obvious intention of the section is that the term of the contract should be an express term. It has not been suggested that in the case before us, there was any term in the agreement between the second defendant and his landlord that the former would be liable to be ejected in the event of an attempt at a transfer of the holding. We must further bear in mind that if reliance is placed upon section 25, the provisions of section 155 have also to be complied with. There is no suggestion that the landlord has made any attempt to bring his case within the provisions of the latter section. We are, therefore, of opinion that in the case before us, there was no abandonment of the tenancy by the original tenant and that consequently the landlord is not entitled to a decree for ejectment against him.

The result is that the decree made by the Subordinate Judge is affirmed and this appeal dismissed but without any costs as the respondent has not entered appearance.

Appeal dismissed.

(3) 13 C. L. J. 499; 7 Ind. Cas. 750.
(4) 9 C. W. N. 379.
(5) 13 B. L. R. 274, 22 W. R. 22.

(s. c. 9 A. L. J. 15.)

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 324 OF 1911.

November 30, 1911.

Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.

BALMAKUND—APPELLANT

versus

KUNDAN LAL—RESPONDENT.

Limitation Act (IX of 1908), s. 5—Appeal filed one day beyond time—Delay in office of Court to deliver copy—Sufficient reason—Misapprehension of fact—Second appeal—Right of appellant to raise question.

By reason of the delay in the office of the Court, copies of judgment and decrees of the first Court were delivered to the appellant late so that the appeal in the lower Appellate Court was filed one day beyond time. The lower Appellate Court, misapprehending the fact as to the delay in filing the appeal, dismissed the appeal as time-barred:

Held, that this was a case which eminently required the exercise of the discretion of the Court under section 5 of the Limitation Act.

An appellant is not debarred from urging in second appeal that the lower Appellate Court has improperly held that no sufficient cause existed for delay in filing the appeal, when it is found that the lower Appellate Court misapprehended the facts.

Second appeal from a decree of the Judge of the Court of Small Causes of Cawnpore, exercising the powers of a Subordinate Judge, confirming a decree of the Munsif of Akbarpur.

Dr. *Sarat Chandra Chaudhri* (for Messrs. *J. N. Chaudri* and *Satya Chandra Mukeri*), for the Appellant.

Mr. *Motilal Nehru*, for the Respondent.

JUDGMENT.—The only question in this appeal is whether the lower Appellate Court was right in dismissing the appeal to that Court as barred by limitation. The decree of the first Court was passed on the 29th September 1910. The Courts were closed from the 30th of September to the 4th of of November and re-opened on the 5th of November The appellant applied for the necessary copies on the 29th of September, but the folios could not be obtained. He applied again on the 5th of November, and on the 10th of November the usual notice was posted on the notice-board. On the evening of the 10th or the morning of the 11th, the Munsif's office despatched the copies by post to Cawnpore to the address given on the appellant's application. The cover containing the copies reached the appellant sometime on the 11th. His Pleader says it was on the evening of the 11th. The appeal was filed on the 12th. The Judge of the Court of Small Causes has declined to hold that the appellant has shown sufficient cause for not presenting his appeal within time. He says that the appellant took delivery of the copies on the 10th of November. In this, he was clearly wrong. An examination of the record shows that the appellant did not take delivery on the 10th, for the copies were sent to him by post. Had the cover been posted on the evening of the 10th, as it might and ought to have been, it would have reached the appellant on the morning of the 11th, and he could have filed his appeal on that date. We decline to hold that the appellant is guilty of negligence in applying to the Court to send the copies to him by post. If they were sent on the 10th, they ought to have reached him on the 11th, in time for him to file his appeal on that day. If they were despatched on the 11th, the appellant is not to blame. The learned Judge has not apprehended the facts correctly. On the facts as we now find them, we think this was eminently a case for the exercise of the Court's discretion under section 5 of the Limitation Act. We cannot hold that the appellant is debarred from raising the question here, when we find that the learned Judge of the lower Appellate Court has misapprehended the facts. We allow the appeal, set aside the decree of the lower Appellate Court and remand the case for trial on the merits according to law.

Appeal decreed ; Cause remanded.

(s. c. 16 C. W. N. 325.)

CALCUTTA HIGH COURT.

CIVIL RULE No. 2653 OF 1911.

November 23, 1911.

Present:—Mr. Justice Stephen and Mr. Justice Coxe.

A. T. BHUTTACHARYA AND CO.—PLAINTIFFS—PETITIONERS

versus

CAWNPORE WOOLEN MILLS Co. LD.—DEFENDANTS—OPPOSITE PARTY.

Place of suing—Contract—Place of performance—Civil Procedure Code (Act V of 1908), s. 20.

A contract was to be performed by the defendants sending certain goods to Ranchi, where they were to be accepted by the plaintiff :

Held, that the contract was to be carried out at Ranchi and the Courts at Ranchi had jurisdiction to

SOHNI v. MOHAN KUER.

entertain a suit for damages for breach of the contract.

Rule aginst the decree of the Small Cause Court at Ranchi, dated March 17th, 1911, by which the suit of the plaintiffs was dismissed.

Babu *Nagendra Nath Ghosh*, for the Appellant.

Babus *Jogesh Chandar Roy* and *Sarat Chandra Ghosh*, for the Opposite Party.

JUDGMENT.—In this case a firm at Ranchi was suing a firm at Cawnpore for failure to deliver certain goods on contract. The Munsif held that he had no jurisdiction to try the case. The Rule was granted on the opposite party to show cause why the judgment of the Court below should not be set aside and the case tried on the merits.

It seems to be quite clear on the facts before us that the contract was to be performed by the defendants sending the goods to Ranchi, where they were to be accepted by the plaintiffs. The contract, therefore, as it stands, was to be carried out at Ranchit. This gives the Munsif jurisdiction which he should have exercised. There is also a question in this case which can only be determined by the evidence, namely, whether a man named Green had or had not the power to make contracts on behalf of the defendant. But on this point we need not say anything. We think that the contract was to be performed by the delivery of the goods at Ranchi and, therefore, in part carried out there.

The rule is, therefore, made absolute and the case sent back to the Munsif to be tried on the merits.

Costs one gold *mohur*.

Rule made absolute.

(s. c. 9. A. L. J. 23.)

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 79 OF 1911.

November 24, 1911.

Present:—Sir Henry Richards, KT., K.C., Chief Justice, and Mr. Justice Banerji.

SOHNI—DEFENDANT—APPELLANT

versus

MOHAN KUER—PLAINTIFF—RESPONDENT.

Hindu Law—Mitakshara—*Joint family—Sale in execution of a decree on a mortgage executed by father—Son not a party to the mortgage—Right of son's widow to impeach the sale—Decree, execution of.*

BAJRANG BEHARI LAL v. LACHMI NARAIN.

A Hindu joint family consisted of a father and four sons, one of whom was a minor. The father executed a mortgage on the basis of which the mortgagee brought a suit for sale and obtained a decree in execution of which the property was sold. The minor son died leaving a widow :

Held, that it was not open to the widow of the minor son to say that her husband's share could not be mortgaged by his father and could not pass to the auction-purchaser at a sale in execution of the mortgage decree.

Letters Patent Appeal from the decision of Mr. Justice Karamat Husain, printed as 10 Ind. Cas. 228, under section 10 of the Letters Patent.

FACTS are fully stated in 10 Ind. Cas 228

Mr. *Sital Prasad Ghose*, for the Appellant.

Mr. *Govind Prasad*, for the Respondent.

JUDGMENT.—We think that the ground on which our learned collegues decided the case is correct, and it is unnecessary to go into the other question of the powers of a Hindu father and the right of the sons to challenge the exercise of those powers. We accordingly dismiss the appeal with costs.

Appeal dismissed.

(s. c. 15 C. L. J. 88.)

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 433 OF 1908.

December 21, 1909.

Present:—Mr. Justice Harington and Mr. Justice D. Chatterjee.

BAJRANG BEHARI LAL—JUDGMENT-DEBTOR—APPELLANT

versus

LACHMI NARAIN AND ANOTHER DECREE HOLDERS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), ss. 244, 258—Execution of decree—Adjustment of decree out of Court—Certificate of adjustment—Recognition of payment.

The provisions of section 258 of the old Code are express that no payment or adjustment shall be recognised unless it has been certified; and, therefore, an alleged uncertified adjustment is no answer under section 244 to an application for execution of a decree.

The objection of the judgment-debtor cannot be treated as an application under section 258.

If a decree-holder agreed with his judgment-debtor that he would not execute his decree and that the matter should be settled between them, then if he broke that agreement, he would be liable for an action for damages, just as any other person would who breaks an agreement.

Appeal from the order of the District Judge of Durbhanga, dated the 2nd July 1908.

Dr. *Rash Behary Ghose* and Babus *Umakali Mukherjee*, *Jogesh Chandra Roy* and *Buldeo Narain Singh*, for the Appellant.

Babu *Lachmi Narain Singh*, for the Respondents.

JUDGMENT.—This is an appeal against an order of the District Judge disallowing an objection to the execution of a decree. The objection on which the judgment-debtor, who is the appellant, relied was that the claim under the decree had been adjusted by an agreement between the decree-holder and himself and the difficulty that lay in his way was that no such adjustment had been certified under section 258 of the old Civil Procedure Code. He meets this by saying that by fraud he was prevented from learning that the adjustment of the decree had not been certified by the decree-holder in accordance with his promise. The difficulty that seems to us to stand in the way of the appellant is this. The provisions of section 258 are express that no payment or adjustment shall be recognised unless it has been certified and, therefore, the alleged adjustment relied upon by the objector in the present case is no answer under section 244 to an application for execution of a decree. Then, it is said that it can be treated as a substantive application under section 258 of the Civil Procedure Code, but we do not think it can be so treated.

With regard to the case that the judgment-debtor was prevented from getting this adjustment certified owing to the fraud on the part of the decree-holder, all we need say is this, that if, in point of fact, the decree-holder agreed with the judgment-debtor that he would not execute hs decree and that the matter should be settled between them, then if he broke that agreement he would be liable for an action for damages just as any other person would who breaks an agreement. With these observations, we dismiss the appeal with costs. The hearing fee in this appeal is assessed at three gold *mohurs*.

Appeal dismissed.

(s. c. 9 A. L. J. 63.)

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1210 OF 1910.

December 16, 1911.

Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.

DIRG BIJAI SINGH—APPELLANT

versus

BHAN PARTAB SHAH SINGH AND ANOTHER—RESPONDENTS.

Hindu Law—Mitakshara—Joint family—Manager, powers of—Alienation by manager—Necessity—Appeal, second—Finding of necessity not a pure question of fact.

The question whether necessity has been established for an alienation of family property is not a pure question of fact and a decision that necessity has been proved can be challenged in second appeal.

In ascertaining whether there was necessity for an alienation by a managing member, the actual pressure on the estate, the danger to be averted or the benefit to be conferred on it, are the things to be regarded. A *bona fide* lender is not affected by previous mismanagement of the estate.

A lender is bound to inquire into the necessities for a loan and satisfy himself as well as he can that the manager is acting for the benefit of the estate.

Hanooman Persad Panday v. *Musammat Babooee*, 6 M. I. A. 393; 18 W. R. 81, relied upon.

Where a part of family property was proclaimed for sale, and the money advanced on a mortgage of such property was actually used to avert the sale and the lender dealt with a person who had for years managed the property of the family and who had obtained the assent of several members of the family to the mortgage:

Held, that, under the circumstances, there was legal necessity for the mortgage and for collateral security which was not excessive.

Per Karamat Husain, J.—The exceptional power given by Hindu Law to the manager of a joint family of transferring family property for family purposes must be limited to the narrowest possible compass. In those cases only in which there is an immediate and pressing need, in which it is impossible to meet the need without making a particular transfer, and in which there is no time to obtain the consent of the other members of the family, the transfer should be held to be binding on the members who have not consented to it.

Second appeal from a decree of the District Judge of Gorakhpur, confirming that of the Additional Subordinate Judge.

Mr. *Baldev Ram Date* (with him Mr. *Iswar Saran*), for the Appellant.

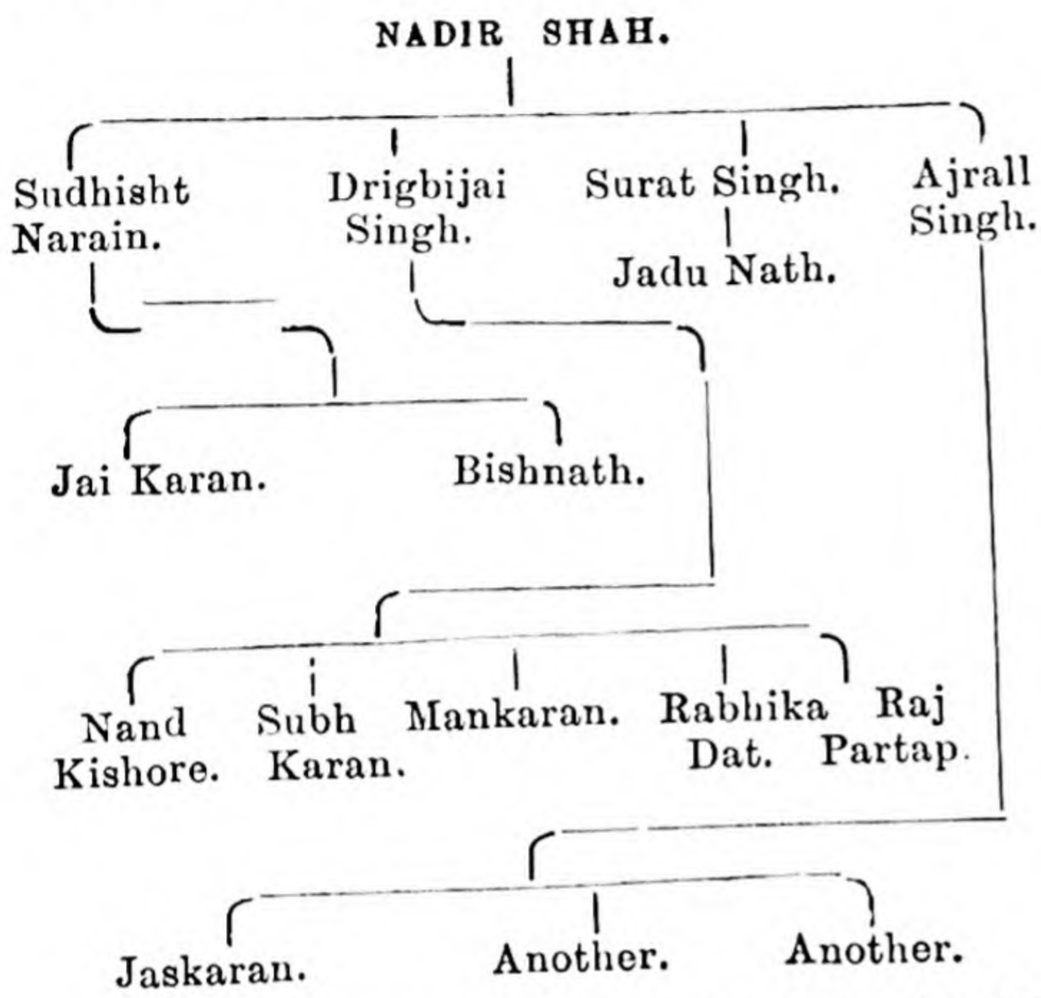
Mr. *Sarat Chandra Chaudhari* (for the Hon'ble Mr. *Sundar Lal*), for the Respondent

JUDGMENT.

CHAMIER, J.—The question for decision in this appeal is whether a mortgage made by three members of a joint Hindu family in

favour of the first respondent was binding upon the appellant who was also a member of the family. The appellant died since the appeal was filed and is now represented by four of his sons. His eldest son, Nand Kishore, is the second respondent and is one of the three who signed the mortgage.

The following table shows all the members of the family:—



One Dalthaman Singh transferred all his property by deed of gift to Jaikaran, Surat Singh, Bishnath and Nand Kishore. It has been found that the transfer was intended to operate for the benefit of the whole family and that the property transferred was treated by all as part of the joint family property.

In September 1890, the four persons, in whose favour the deed of gift had been executed, mortgaged part of the property to one Kunnu Mal to secure payment to him of a loan said in the mortgage to have been taken for the purpose of paying the Government revenue and for domestic expenses of the family. Kunnu Mal put his mortgage in suit and obtained a decree for sale of the property. On October 14th, 1895, the same four persons mortgaged part of the family property to the first respondent in order to pay off Kunnu Mal and avert a sale. On the same day, Nand Kishore, Surat Singh and Ajrail Singh mortgaged several other villages to the first respondent by way of collateral security for the same loan. The first respondent brought a suit on his mortgage and collateral security and ultimately obtained a decree for sale of the villages comprised in the collateral security. The appellant claims in the present suit a declaration that what he calls his share in one of the villages in not liable to be sold in execution of the first respondent's decree. The remainder of the property appears to be in Oudh and to be the subject of another suit in that Province.

The defence of the first respondent is that the loan taken from Kunnu Mal was taken for family necessity and that the money borrowed from the first respondent was taken for the purpose of discharging the debt due to Kunnu Mal and also for the purpose of averting a sale of the property in execution of his decree. It was further pleaded that the respondent, Nand Kishore, who signed the mortgage in favour of Kunnu Mal and both deeds of October 14th, 1895, was the manager of the property of the family, and the rest of the family are bound by his acts. It was also pleaded that the appellant was a religious devotee who lived in temples and wandered about the country and the first respondent was not aware of his existence when the mortgage of October, 1895, was made.

Both the Courts below have found that the mortgage of October, 1895, was made for family necessity and that the respondent, Nand Kishore, was at the time and had been for several years previously manager of the property of the family.

The question whether necessity has been made out in a case of this kind is not a pure question of fact, and, therefore, the decision of the lower Appellate Court that necessity has been proved can be challenged in this Court. As was observed in a recent case by their Lordships of the Privy Council [*Kishan Parshad* v. *Har Narain Singh* (1)], the Indian decisions as to the powers of the managing members of an undivided Hindu joint family are somewhat conflicting. It is impossible to extract from them any definite rule as to what does and what does not constitute necessity, nor would it be possible, or even desirable, to lay down any definite rule applicable to all cases, for the facts in different cases are infinitely different. It has been contended by the appellant in the present case that in order to constitute legal necessity, it

(1) 15 C. W. N. 321; 8 A. L. J. 256; 9 M. L. T. 343; 13 C. L. J. 345; 21 M. L. J. 378; 13 Bom. L. R. 359; 33 A. 272; (1911) 2 M. W. N. 395; 9 Ind. Cas. 739.

must be proved that there was at the date of the transaction in question an immediate and pressing necessity which must be proved; secondly, that it was impossible to meet the necessity except by means of the transaction in question; and thirdly, that there was no time to obtain the consent of the other adult members of the family. No case has been cited, and I know of no case, which lays down the law in this sense. If the rule is as contended by the appellant, the manager of a joint family property has no power to exercise his discretion even in case of obvious necessity and his acts will bind the family only where both necessity exists and the circumstances compel him to act at once without reference to the other adult members of the family. The powers of a manager of a Hindu estate were fully considered in the much cited case of *Hanooman Persad Panday* v. *Musammat Babooee* (2). That was the case of a mother managing as guardian for an infant, but the principles therein laid down have always been considered to apply to other managers of Hindu properties. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred on it, is the thing to be regarded and a *bona fide* lender is not affected by precedent mismanagement of the estate. The lender is bound to inquire into the necessities for the loan and satisfy himself as well as he can that the manager is acting for the benefit of the estate.

In the present case, part of the family property was proclaimed for sale, the money advanced was actually used to avert the sale and the lender dealt with a person who had for years managed the property of the family and who had obtained the assent of several members of the family to the mortgage. In all the circumstances, it seems to me that there was legal necessity for the mortgage. It was said that there may have been neceessity for the mortgage, but no necessity for the collateral security. But it has not been suggested that the security given was excessive. In fact, as it now appears, it was not excessive. In my opinion, the Courts below were right in holding that there was necessity for the transaction and that the transaction was binding upon the plaintiff, who for years had left the management of the property in the hands of his son, Nand Kishore.

(2) 6 M. I. A. 393; 18 W. R. 81.

I would dismiss the appeal with costs.

KARAMAT HUSAIN, J.—On principle, one of the joint owners of a property has no power to transfer it for any purpose to anybody without the consent of other joint owners. The Hindu law seems to make an exception in favour of the managing member of a joint Hindu family when he alienates the joint family property for family purposes. His exceptional power to transfer what is not his must, on principle, be limited to the narrowest possible compass. In those cases only in which there is an immediate and pressing need, in which it is impossible to meet the need without making a particular transfer, and in which there is no time to obtain the consent of other adult members of the joint family, the transfer should be held to be binding on the members who have not consented to it. Having regard, however, to the view taken by my learned brother, I am not inclined to differ from him.

BY THE COURT.—The order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.

(S. C. 13 P. W. R. 1912).

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1192 OF 1906.

June 17, 1907.

Present:—Mr. Justice Lal Chand.

ABDUL KARIM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat SAHIB JAN—DEFENDANT—RESPONDENT.

Custom—Succession—Daughter—Collaterals of 7th degree—Chohan *Muhammadan* Rajputs *in Jagadhri Tahsil of the Ambala District—Declaratory suit—Land in possession of mortgagees and tenants—Specific Relief (Act I of* 1877), *s.* 42.

No custom exists among *Chohan* Muhmmadan *Rajputs* of Jagadhri *Tahsil* in the Ambala District by which reversioners in the 7th degree can exclude a daughter from succeeding to the ancestral land of her deceased father.

There is no general custom in the Punjab whereby daughters are excluded from inheriting their father's ancestral land in the presence of collaterals, however remote. Usually reversioners up to the 5th degree exclude daughters.

Samanda v. *Nurbibi*, 36 P. R. 1905; 37 P. L. R. 1905, distinguished.

ABDUL KARIM *v.* SAHIB JAN.

Musammat Sahib Jan v. *Karm Bakhsh*, [80 P. R. 1975, not approved.

Wazeera v. *Haku* 31 P. R. 1867, *Ranjhi Khan* v. *Kamun*, 179 P. R. 1889 and *Kirpa Ram* v. *Ude Ram*, 77 P. R. 1896, referred to.

A suit for a mere declaration of title as owner by inheritance is maintainable where one party relies on mutation and the other on *girdawari* entries while the land is in possession of either the mortgagees, occupancy-tenants or tenants-at-will and it is not shown that defendant has realized the rent from the tenants.

Chinnammal v. *Varadrayulu*, 15 M. 307, followed.

First appeal from the order of the District Judge, Ambala, dated 27th August 1906, dismissing plaintiff's claim.

Mr. *Oertel*, for the Appellants.

Mr. *Macdonald*, for the Respondent.

JUDGMENT.—Munir Khan, a *Chohan* Mohammadan *Rajput* of *Mauza* Kharwan in Jagadhri *Tahsil* of the Ambala District, died about 1888 and was succeeded by his widow *Musammat* Dasondhan who died recently, in February 1905. On her death, the estate of Munir Khan was mutated in favour of his married daughter, Sahib Jan, who has been sued by the plaintiffs-appellants for a declaration that they were by custom entitled to succeed to the exclusion of the defendant. The plaintiffs allege in their plaint that they are collaterals of Munir Khan in the 7th degree and hold possession of part of his estate which had not been mortgaged by his widow, *Musammat* Dasondhan. The defendant denied that the plaintiffs were related to Munir Khan or were in possession of any part of his estate and pleaded that in any case by custom she was entitled to succeed in preference to the plaintiffs. The District Judge after inquiry held that the plaintiffs were Munir Khan's collaterals in the 7th degree, and that the property in dispute was ancestral, but he found that the plaintiffs were not in possession of any part of the estate and hence were not entitled to sue for a mere declaration, and on the merits of the dispute he held that by custom the defendant was entitled to suceeed in preference to the plaintiffs. The suit was accordingly dismissed with costs. The plaintiffs appeal. It is no longer disputed by the defendant that the plaintiffs are related to Munir Khan as alleged in the plaint, and we are satisfied on the record, though the matter was contested, that the property in dispute is ancestral as held by the District Judge. But we are unable to agree with his finding that a suit for a mere declaration of title as owners by inheritance is not maintainable in this case. Neither party has succeeded on the record to prove his or her possession by affirmative evidence. The defendant relied on the mutation entry in her favour and the plaintiffs on entries in the *Girdawari* papers. The lands are held in actual possession by mortgagees, by occupancy-tenants and by tenants-at-will. The suit was instituted within one year of the mutation proceedings and it is not at all clear on the record whether plaintiffs or the defendant have received rents from the tenants-at-will. Under the circumstances, the authority quoted by the learned Counsel for the appellants *Chinnammal* v. *Varadrayulu* (1) seems to be exactly in point and we hold that the suit for a mere declaration of title was maintainable. On the merits, we do not see any good reason for differing from the view taken by the District Judge. It was contended for the appellants that the *onus* lay on the defendant to prove that by custom she was entitled to succeed in preference to the plaintiffs who are agnatic relations of her father, Munir Khan.

An unreported judgment in C. A. No. 522 of 1895, which is apparently cited with approval in *Samanda* v. *Nur Bibi* (2), was quoted to support this contention.

Samanda v. *Nur Bibi* (2) was a case of *Naru Rajputs* of *Tahsil* Thanesar in the Karnal District and the collaterals, who claimed in opposition to the daughter of the deceased proprietor whose property was in dispute, were found to be related to him in the 5th degree. This case is, therefore, not in point. The degree of relationship in the unreported judgment in C. A. No. 522 of 1895 is not given, but apparently the collaterals were very distant relatives as the village was found to have been founded four hundred years prior to the last Settlement and the defendants were held to be related to the deceased proprietor whose property was in dispute through the founder of the village. It is significant, however, that the defendants there alleged that they were related in the 5th degree though they were unable to prove their allegations in Court. It was decided that, according to "the general rule of agnatic succession," a daughter can never succeed to ancestral property and that

(1) 15 M. 307.

(2) 36 P. R. 1905; 37 P. L. R. 1905.

the nearest agnates are the heirs. No authority is cited in the judgment to support the rule. It is apparently opposed to para. 23 of the Digest of Customary Law by Sir William Rattigan, which lays down that a daughter succeeds in default of near male collaterals of her father; and in Remark 1 under this para., 7th degree is given as the extreme limit. "Cases are only rarely met with in which a collateral more remotely related is recognized as having a preferential customary right over a daughter. More usually the 5th degree is found to be the customary limit." The view propounded in the judgment in C. A. No. 522 of 1895 is apparently based on the discussion of the subject in Tribal Law by Sir Charles Roe, as appears from the following extract from page 62 of the book:

"15. It is clear that under the general rule of agnatic succession, a daughter can never *inherit*. Whatever favours custom may allow to be shown her under the form of a gift, a daughter is not, and cannot be, one of the *warisan yakjaddi*, or group of agnates, amongst whom the estate of a sonless man is divided on his death, and who control his action during his life. This is the general principle laid down in all the *Riwaj-i-ams*, and the Settlement Officers of Ambala and Bannu say that even if there are no agnates at all, the estate would not pass to or through females, but would pass to the tribe or village community.

"It is unnecessary to give a list of the answers in which this principle is laid down but I will now notice all those in which a different custom is asserted."

Among these are—

"19. The descendants of the great-great-grandfather are given as the limit of excluding agnates in:—

"*Ambala* generally, but the Settlement Officer's opinion on this point has already been given.

"*Ludhiana* by a group of Hindu *Jats*, by the Muhammadan *Jats*, and the *Rajputs* of the Ludhiana *Tahsil*.

"20. Some limit, not clearly defined and not mentioned in any of the preceding paragraphs, is said to exist in the following districts:—

"*Bannu*—It is said that this agnate must be near (*karibi wa jaddi*) but the Settlement Officer's opinion as to the real custom has been given above."

A reference to the Customary Law of Ambala and the Settlement Report of Bannu does not fully bear out the observation that in the absence of agnates, females would be excluded from succession by the tribe and the village community. The view, at any rate, si opposed to the decision of this Court passed since the remark was written, *vide Kirpa Ram* v. *Ude Ram* (3).

It is true, as observed by the learned author of the Tribal Law, that a daughter has no place in the line of agnatic succession. "A daughter is not and cannot be one of the *warisan yakjaddi*." But it appears to have been assumed that in the absence of male issue and of a widow, the general rule of succession is necessarily that of agnatic succession as against the daughters, however distant in degree the agnate might be and whatever may be the creed and tribe of the parties concerned. There appears to be no foundation in Customary Law for a rule of succession so broadly stated. It is not supported by any judgment of this Court which can be traced excepting the judgment in C. A. No. 522 of 1895, which apparently quotes the rule *verbatim* from the work on Tribal Law.

Further, the Codes of Customary Law prepared for different districts and different tribes are full of answers in favour of a daughter in the absence of collaterals beyond a certain degree. These answers cannot be lightly passed over and being so numerous cannot be ignored as merely fanciful. They apparently indicate a general consensus of opinion that, excepting among certain tribes, daughters as a rule are not excluded from succession by collaterals however distant and remote. To say the least, the custom certainly varies and it appears to be altogether unsafe to lay down a general rule of Customary Law regardless of tribe and creed that daughters are excluded from succession by collaterals, however remote. In C. A. No. 522 of 1895, the daughter was a plaintiff in the case and it was found that the claim had been instigated by an enemy of the defendants who purchased the greater portion of the land decreed to plaintiff by the first Court for a consideration made up of sums said to have been expended on the litigation.

We are, therefore, not prepared to assent to the contention in this case that the *onus*

(3) 77 P. R. 1896.

lay on the defendant to prove that she was entitled to succeed to her father's property in preference to plaintiffs who are related in the 7th degree to her father. But, assuming that the *onus* lay on the defendant, we agree with the lower Court that the *onus* has been discharged.

According to Customary Law of Ambala District, the commonly received custom for all tribes of the district, except *Sayyads* and some Roras, is to exclude the daughter wherever collaterals can be traced up to the 5th degree. See Customary Law of the Ambala District, page 18, question 40. This view is amply supported by the answer to question 40 contained in the special volume prepared for Hindu and Muhammadan *Rajputs* of *Tahsil* Jagadhri.

Moreover, what is most significant is that the said *Riwaj-i-am* is attested by several *Lambardars* and *Biswadars* of the village in suit and among the signatories is Arjmand, one of the plaintiffs-appellants. It is still more significant that the rule in favour of successions of daughters in absence of collaterals in the fifth degree was stated by these *Rajputs* just about the time when Munir Khan, whose property is in dispute in this case, died leaving a widow and a married daughter who is defendant-respondent in this appeal.

The answer given, moreover, by the Muhammadan *Rajputs* of Jagadhri *Tahsil* in favour of succession of daughters is not an isolated provision. The same answer was given by Muhammadan *Rajputs* of the neighbouring District Ludhiana as well as by Muhammadan *Rajputs* of Pipli *Tahsil*, District Karnal, as quoted in C. A. No. 522 of 1895. And in *Ranjhi Khan* v. *Kamun* (4), a case of *Naru Rajputs* of Hoshiarpur District, 4th degree was found after inquiry to be the limit for excluding daughters from succession by agnatic relations.

It is thus clear that the custom embodied in question 40 of the *Riwaj-i-am* of Muhammadan *Rajputs* of Jagadhri *Tahsil* accords fully with the custom of the tribe as recorded in the neighbouring tracts and districts and in one case, *viz.*, *Ranjhi Khan* v. *Kamun* (4), the custom was found to prevail in the tribe after special inquiry directed for the purpose. It is, moreover, nowise an unusual and rare custom. So early as 1867, fifth degree was recognized as the limit of exclusion of daughters by collaterals, vide *Wazeera* v. *Haku* (5), and the rule was followed by the first Court at least in 1872 in a case of Muhammadan *Rajputs* of the district, when successions were disputed by daughters and by collaterals also related in the 7th and 8th degree. Moreover, the *Riwaj-i-ams* quoted at pages 63 and 64 of Tribal Law abound in instances where 5th even 4th degree is given as the limit of exclusion. The oral evidence adduced in the present case is not of much use or value, as the witnesses were unable to give requisite particulars in the instances quoted by them. But there are two mutation proceedings printed at pages 18—23 of the records which distinctly support the same view. In one case, dated 11th August 1893, the daughter succeeded along with the first cousin to an equal share and in the other case, she was permitted to succeed to the whole estate with consent of the collaterals. No instance of exclusion of daughters by collaterals related beyond the fifth degree was cited for the plaintiffs-appellants. Their Counsel referred to C. A. No. 522 of 1895, which has already been noticed and to *Musammat Sahib Jan* v. *Karm Bakhsh* (6) and *Rustam Khan* v. *Musammat Jio* (7). In the last mentioned case, the direct point in issue was a dispute between a *khanadamad* and collaterals. The degree of relationship of the collaterals to the deceased proprietor is not given in the judgment, but it is significant that even in that case, the daughter had actually succeeded to the estate so far back as 1857 after dispute with the collaterals, who finally agreed to her succession on a life-estate. *Sahib Jan* v. *Karm Bakhsh* (6) turned on an interpretation of the term "*karabatian*" which was construed to mean "next heir male." But this construction is directly opposed to the view taken of the same expression in *Ranjhi Khan* v. *Kamun* (4).

There is thus an entire dearth of proof and authority on the side of the plaintiffs and their sole reliance is on an assumed general presumption, that regardless of tribe and creed, agnates, however remote, exclude daughters from succession to ancestral property. We have already attempted to indicate that this assumption is not based on

(4) 179 P. R. 1889.

(5) 31 P. R. 1867.
(6) 80 P. R. 1875.
(7) 135 P. R. 1892.

any authority excepting the unreported judgment in C. A. No. 522 of 1895, which again has merely quoted *verbatim* the remark on page 62 of the Tribal Law. The contention is opposed to the rule embodied in para. 23 of the Digest of Customary Law by Sir William Rattigan. Whatever value or force might otherwise have attached to the so called general presumption, it is clear that in the present case the preponderance of proof is wholly on the side of the daughter defendant. Her case is supported by the tribal *Riwaj-i-am* attested by members of the village community including one of the plaintiffs, by two instances of actual succession and by tribal custom stated or found to prevail in the neighbouring tracts and districts, while there is absolutely no proof in rebuttal on the other side. We, therefore, hold that the plaintiffs-appellants have failed to prove that they are entitled to succeed in preference to the defendant, and that even if the initial presumption be conceded in their favour, it is of the weakest description and is amply rebutted by proof on the present record. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(S. C. 9 A. L. J. 67.)

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 283 OF 1911.

December 22, 1911.

Present:—Mr Justice Karamat Husain and Mr. Justice Chamier.

BALDEO SINGH AND ANOTHER—APPELLANTS

versus

HIRA LAL AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Civil Procedure Code (Act XIV of 1882), s. 318—Res judicata *—Point not decided in second appeal—Separate suit—Hindu Law—Joint family—Mortgage by father—Suit on the mortgage—Sale of property—Sons not made party—Son's right to redeem subsequent to auction-sale.*

An auction-purchaser applied under section 318 of the Civil Procedure Code, 1882, for possession of the property. It was objected that the application was barred by limitation. The first Court overruled the objection. An appeal was preferred to the District Judge who held that the application was barred by limitation. The auction-purchaser preferred a second appeal which was dismissed by the High Court on the ground that the application was barred by time. The High Court, however, did not go into the question whether the order of the first Court was an order under section 244 of the old Civil Procedure Code and so appealable to the District Judge:

Held, that the decision did not operate as *res judicata* so as to bar a subsequent suit brought by the auction-purchaser for possession of the property.

Per Chamier, J.—Where a decree for sale is obtained on a mortgage executed by a Hindu father, which is binding on his sons, and the property is sold in execution of the decree and purchased by the mortgagee, a son of the mortgagor, who is not made a party in the suit on the mortgage, cannot, subsequent to the auction-sale, be allowed an opportunity of redeeming the mortgage.

Balwant Singh v. *Aman Singh*, 33 A. 7; 7 Ind. Cas. 112; 7 A. L. J. 852, followed.

Per Karamat Husain, J.—A son who is not made a party to the suit, can redeem the mortgage after the Court sale even if the mortgage is binding on him under the Hindu Law.

The right to redeem a mortgage is quite distinct from the right to get back a share in a property sold in execution of a decree upon a mortgage.

A private sale by the father in a joint Hindu family or an auction-sale by a Court is binding upon his sons, because of their pious duty to pay their father's debts, and not because a sale has taken palce. As there is no pious duty to abstain from redeeming the mortgage made by the father, an aution-sale cannot extinguish the right to redeem. When they claim redemption, they in fact come forward to perform the pious duty cast upon them by the Hindu Law and an auction-sale cannot stand in their way.

Ram Prasad v. *Man Mohan*, 30 A. 256; 5 A. L. J. 267; A. W. N. (1908) 106, followed.

Debi Singh v. *Jia Ram*, 25 A. 214, explained.

Second appeal from the decision of the District Judge of Agra, dated the 6th of February 1911.

Mr *S. K. Dar*, for the appellant.

Dr. *Satish Chandra Banerji*, for the Respondent.

JUDGMENT.

CHAMIER, J.—This was a suit by the respondent, Hira Lal, for possession of *zemindari* property purchased by his father, Ranjit, at an auction-sale.

The facts are as follows:—In April 1884, two brothers, Baldeo Singh and Nand Kishore, mortgaged the property in suit to Ranjit in order to pay off debts incurred by their father, Indarjit. In 1893, the interest of Nand Kishore in the property was purchased by the respondent, Muhammad Raza, at a sale held in execution of a money-decree. In April 1894, Ranjit brought a suit on his mortgage against the two motrgagors and Muhammad Raza, and obtained a decree for sale, in execution of which

BALDEO SINGH v. HIRA LAL.

he purchased the property himself. The sale was confirmed in Jaunary 1898, but the certificate of sale was not issued to Ranjit till March 1906. In January 1907, he applied to the Court under section 318 of the Code of Civil Procedure, 1882, for possession of the property. Nand Kishore had died and his son, Roshan Singh, was not made a party to the proceeding. Muhammad Raza was a party but did not put in an appearance. Baldeo Singh resisted the application on the ground that it was barred by limitation. This plea having been overruled, he appealed to the Court of the District Judge. Ranjit there pleaded that no appeal lay. The District Judge held that an appeal did lie, because the order on Ranjit's application was one passed under section 244 of the Code. He held, also, that Ranjit's application was barred by limitation. The appeal was accordingly allowed and Ranjit's application was dismissed. Ranjit filed a second appeal in this Court. This Court did not touch the question whether the order of the first Court was appealable to the Court of the District Judge, but dismissed the second appeal on the ground that Ranjit's application, under section 318, was barred by limitation. Seven months later, a Full Bench of the Court, overruling several previous decisions, held that the question to be decided upon an application under section 318, was not a question between the parties to the suit or their representatives and could not be determined under section 244, in other words, that no appeal lies against an order passed upon an application under section 318. The majority of the Full Bench held that an auction-purchaser could claim possession, not only by means of an application under section 318, but also by a separate suit. That decision was pronounced on December 14th, 1908. The present suit was instituted on January 10th, 1909. One of the pleas taken by the defendants was that the matter was *res judicata*. It has been rejected by the Courts below. In my opinion, they were right. The final decision in the case, under section 318, was the decision of this Court. As already stated, this Court decided only that Ranjit's application was barred by limitation. It expressed no opinion whatover on the question whether an appeal lay against an order passed upon an application under section 318. Strictly speaking, this Court ought not to have taken up the question whether Ranjit's application was barred by limitation, without first deciding whether the question upon an application under section 318 was one arising under section 244, for, unless the question arose under section 244, no appeal lay to the Judge, and the decision of the first Court should have been restored. However, the fact remains that this Court did not decide that the question was one arising under section 244, and that no separate suit would lie.

I agree, therefore, with the Courts below that the present suit is not barred by the previous proceedings.

As the mortgage of April 1884 was made for the purpose of paying the debts of Indarjit, it was binding upon the present appellant, Roshan Singh. It is urged that as he was not made a party to the suit upon the mortgage, he should at least be given an oportunity of redeeming the mortgage. I dealt with this question at length in my judgment in the case of *Balwant Singh* v. *Aman Singh* (1), and I see no reason to alter the opinion which I there expressed, and with which my brother Tudball agreed.

For the reasons stated in that judgment, I hold that the appellant, Roshan Singh, is not now entitled to redeem the mortgage. Baldeo Singh, who was a party to the suit on the mortgage, is, of course, not now entitled to redeem the mortgage. I would dismiss the appeal with costs.

KARAMAT HUSAIN, J.—The facts necessary for the disposal of this appeal are fully set out in the judgment of my learned colleague and need not be repeated.

I agree with him that the present suit is not barred by the principle of *res judicata*. This Court in the ruling to be found in *Ranjit Singh* v. *Baldeo Singh* (2) did not decide that no separate suits would lie.

I regret, however, that I am unable to hold that Roshan Singh lost his right to redeem the mortgage, dated the 1st of April, 1884. I adhere to the rule laid down in *Ram Prasad* v. *Man Mohan* (3). The reasons given by my learned colleague in *Balwant Singh* v. *Aman Singh* (1) have not altered my opinion.

(1) 33 A. 7; 7 Ind. Cas. 112; 7 A. L. J. 852.
(2) A. W. N. (1908) 162; 5 A. L. J. 516; 30 A. 360.
(3) 30 A. 256 A. W. N. (1908) 106; 5 A. L. J. 297.

PARS RAM *v.* MUHAMMAD YASIN KHAN.

The right to redeem a mortgage is quite distinct from the right to get back a share in a property sold in execution of a decree upon a mortgage.

The former involves an admission that the mortgage debt is binding upon the person who seeks redemption, while the latter presupposes that the mortgage does not affect the share claimed. From the fact that a mortgage made by the father in a Hindu joint family is of a binding nature upon his sons who are joint with him, it cannot follow that their right to redeem the mortgage is lost simply because the property has been sold in execution of the decree upon the mortgage. The ruling of the Full Bench in *Debi Singh* v. *Jia Ram* (4) does not go that length. It simply lays down that when a sale in execution of a decree upon a mortgage by the father has taken place, his sons, if joint with their father, cannot succeed to recover their shares upon the sole ground that they were not made parties to the suit upon the mortgage. Their suit must be based upon some ground which, under the Hindu law, would free them from liability as sons in a Hindu joint family to pay their father's debts. Similarly, the fact that a private sale by the father in a joint Hindu family is binding upon his sons in certain cases, cannot lead to the conclusion that a mortgage of a joint family property which is binding upon his sons deprives them of their right to redeem after a sale in execution of the mortgage-decree. If the law laid down by this Court that a person entitled to redeem, who is not impleaded in the suit upon the mortgage, does not lose his right to redeem the sale of the property in execution of the mortgage is correct, a necessary corollary is that a Hindu son, in a joint Hindu family, whose father mortgaged the family property for a debt, which the son was bound to pay, is entitled to redeem even after the sale of property in execution of the mortgage-decree, provided that he was a necessary party and was not impleaded.

A private sale by the father in a joint Hindu family or an auction-sale by a Court is held to be binding upon his sons, because of their pious duty to pay their father's debt and not because a sale has taken place, and as there is no pious duty to abstain from redeeming the mortgage made by the father, an auction-sale cannot extinguish the right to redeem. When they claim redemption, they in fact come forward to perform the pious duty cast upon them by the Hindu law, and I fail to see how an auction-sale can stand in their way.

For the above reasons, I would allow the appeal so far as to give Roshan Singh an opportunity to redeem the mortgage, dated the 1st of April 1884. I give him his costs.

BY THE COURT.—The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

(4) 25 A. 214.

(S. C. 14 P. W. R. 1912.)

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1185 OF 1907.

July 24, 1909.

Present:—Mr. Justice Robertson and Mr. Justice Shah Din.

PARS RAM AND OTHERS—PLANITIFFS—APPELLANTS

versus

MUHAMMAD YASIN KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Declaratory suit—Partition in Revenue Court—Objection by co-sharer—Competency of Court to grant declaration when applicant not in possession of whole land—Possession of one co-sharer possession of all—Specific Relief Act (I of 1887), s. 42—Adverse possession—Burden of proof—Punjab Land Revenue Act (XVII of 1887), ss. 117 to 120.

An applicant directed, in the partition proceedings regarding land before a Revenue Court, to establish his right to a share of the land, is entitled to maintain a suit for a mere declaration of title if he can show that he was ever in possession of any part of the common holding as a co-sharer.

The possession of one co-sharer is possession of another co-sharer unless the former can show a clear adverse title, adversely asserted by 12 years' adverse possession.

Second appeal from the order of the Additional Divisional Judge, Delhi Division, dated the 20th July 1907, confirming that of the District Judge, Rohtak, dated the 31st January 1907, dismissing the claim.

The Hon'ble Rai Bahadur *Shadi Lal*, for the Appellants.

Mr. *Devi Dial*, for the Respondents.

JUDGMENT.—We have heard arguments at great length but our order need not be long.

FAKHRAN BIBI *v.* NAGESHAR RAM.

The appellant, on the ground of a sale alleged to have been made to him in 1875 by one Faujdar Khan, applied to the Revenue Authorities for partition. This was opposed, his ownership of any share in the joint undivided holding, of which he sought partition, having been denied. Though the purchase was alleged to have taken place in 1875, mutation in appellants' favour did not take place till 1895, but in 1895 mutation, albeit *ex parte*, the vendee's son most incorrectly not having been summoned, did take place. The appellant was referred to a civil suit to establish his title and sued for a declaratory decree that he was a co sharer in the holding, and also in respect of a separate transaction by way of mortgage from one Muhammad Mustajib Khan.

Both the lower Courts have held that a declaratory suit does not lie inasmuch as the appellant is not in possession of the land in respect of which he claims a declaration.

We may deal with the mortgage at once. We agree with the concurrent findings of the lower Court that the appellant is not in possession of the land mortgaged to him by Mustajib Khan and consequently as regards that property, his suit fails and the appeal is dismissed with costs.

But as regards the land purchased from Faujdar Khan, the lower Courts have, it appears to us, lost sight of a very material point. If it can be proved that plaintiff was ever in possession of any part of the common holding as co-sharer, then the possession of any other co-sharer is his possession unless the other co-sharer can show a clearly established adverse title, adversely asserted by 12 year's adverse possession. The mere fact that plaintiff has not had actual possession since 1903 is quite immaterial. If he had possession in 1902, the possession of his co-sharer is his possession and if he can establish his title, he can claim partition. If he had no title as co-sharer or has no title, the finding of the lower Courts would be right enough; if he has a title then for the purposes of a declaratory suit he can sue for a declaration, for the possession of his co-sharer is his possession.

As the case must, therefore, go back for decision of this question of title, we refrain from any comments on the merits.

The first Court, to whom the case must be returned for re-trial, will frame all necessary issues, which should include the following:—

1. Did the plaintiff make a *bona fide* purchase of the property? On plaintiff.

2. Has he ever at any time been in possession of it or any part of it as co-sharer under his purchase? On plaintiff.

Has the plaintiff any title as co-sharer in this land?—On plaintiff. If he ever had a title, has it been in any way extinguished?—On defendant.

The appeal is accepted under Order XLI, rule 23, and remanded for decision on its merits. Stamp on appeal to be refunded. Costs to be costs in the cause.

Appeal accepted.

(s. c. 9 A. L. J. 84.)

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 307 OF 1911.

December 19, 1911.

Present:—Mr. Justice Tudball.

FAKHRAN BIBI—APPELLANT

versus

NAGESHAR RAM AND ANOTHER—RESPONDENTS.

Pre-emption— Wajib-ul-arz— *Construction*—Rishtadar karibi—*Connection by marriage*—Rishtadar baid.

The *Wajib-ul-arz* of a village gave a prior right of purchase to a *rishtadar karibi* who owned a share in the same *patti*. Plaintiff, a co-sharer in the *patti*, who was a connection by marriage of a person connected with the vendor by marriage, brought this suit for pre-emption against the vendee who was not at all related to the vendor :

Held, that the relationship was too remote to give plaintiff a right of pre-emption within the meaning of the *Wajib-ul-arz*.

A connection by marriage of a connection by marriage is not even a *rishtadar baid*.

Gopal Singh v. *Gulam Hussain*, A. W. N. (1894) 58, referred to.

Second appeal from a decree of the District Judge of Ghazipur, confirming that of the Munsif of Muhammadabad.

Mr. *Mukammad Ishaq*, for the Appellant.

Mr. *Balram Chandra Mukerji*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought to enforce a right of pre-emption. The vendor is one Badi-ullah. The plaintiff is *Musammat* Fakhran Bibi, wife of Mir Riasat Ali. Badi-ullah's share

TULSI RAM *v.* KARM CHAND.

and the plaintiff's share lie in the same *patti*. The defendant-vendee, Nageshar Ram, is a co-sharer in several other *pattis* and also owns a share in the common land of the village. The *Wajib-ul arz* gives a prior right of purchase to a near relation (*rishtadar karibi*) who owns a share in the some *patti*. The second right of purchase goes to a distant relative, who is also a co-sharer either in the *patti* or in the *mahal*. The third right of purchase belongs to a co-sharer in the *mahal*. The plaintiff's case was that she was a distant relative and a co-sharer in the same *patti*, and, therefore, had a preferential right of purchase over the defendant-vendee, who is a Hindu and only a co sharer in the *mahal*. Both the Courts below have held that the plaintiff is not a "*rishtadar baid*" within the meaning of the *Wajib-ul-arz* and, therefore, has not a preferential right of purchase over the defendant. They based their decision to a certain extent on a ruling of this Court in *Gopal Singh* v. *Gulam Husain* (1). The words in the *Wajib-ul-arz* in that case were "*karabatdari baid*." It was therein held that the father of the wife of the vendor's brother or a person, whose mother's sister had married the son of the vendor, did not come within the category of "*karabatdari baid*." On appeal, it is urged that the word "*rishtadar*" includes not only a relation by blood, but also a relation by marriage, and attention is called to the decision in *Pandit Rudha Prasad* v. *Musammat Munna* (2), in which case the question was considered whether the word "*rishtadar*" included relations by marriage or not. As far as the ordinary meaning of the word "*rishtadar*" is concerned, I have no doubt that it frequently does include a connection by marriage. The only difficulty is to draw the exact line and to say who is a distant relation within the meaning of the *Wajib-ul-arz*. The connection in the present case is as follows:—Madar Bakhsh had two sons, Imam Ali and Subhan Ali. Subhan Ali married Alla Rakhi, daughter of Amir Ali. The vendor is the son of Amir Ali and, therefore, the brother of Alla Rakhi. Subhan Ali's brother, Imam Ali, had a son Riasat Ali. The plaintiff is the wife of Riasat Ali. The question is, whether the plaintiff, between whom and the vendor there are two marriage connections, can be called a distant relative within the meaning of the word "*rishtadar baid*." The question is by no means free from difficulty, and, in my opinion, considering that there are two marriages between the plaintiff and the vendor, it is difficult to say that she is a distant relation of the latter She is a connection by marriage of a connection by marriage and this, in my opinion, is too remote to give her a right within the meaning of the *Wajib-ul-arz*. In the circumstances of the case, I think, the lower Court's decision is correct. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) A. W. N. (1894) 58.
(2) L. P. A. No. 38 of 1910.

(s. c. 27 P. W. R. 1912; 36 P. L. R. 1912.)

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 3512 OF 1910.

November 27, 1911.

Present:—Mr. Justice Chevis.

TULSI RAM AND OTHERS—DEFENDANTS—PETITIONERS.

versus

KARM CHAND AND OTHERS—PLAINTIFFS—RESPONDENTS.

Payment to Agent—Accounts—Mode of proving item in a suit for accounts—Burden of proof.

Payment to an agent is payment to the principal.

In an account case, the plaintiff is bound to prove each item and the best mode of doing so is to ask the defendant what items in the account he disputes and plaintiff should be called on to prove those items.

Petition, under section 25 of Act IX of 1887, for revision of the order of the Judge, Small Cause Court, Lahore, dated the 9th November 1910, decreeing the claim.

Lala *Hukam Chand*, for the Petitioners.

Pundit *Jowala Pershad*, for the Respondents.

JUDGMENT.—Plaintiffs sue Tulsi Ram and Shib Dial saying defendants took goods to the extent of—

Rs. 2,313-8-3.

and have re-paid Rs. 2,277-2-9.

and owe Rs. 36-5-6 and Rs. 7-10-0 interest.

Total Rs. 43-15-6.

Defendants say they took goods to the extent of Rs. 3,300 and have re-paid Rs. 3,308 (with interest) and owe nothing and they produce a receipt signed by plaintiffs' *munim*,

Plaintiffs say this receipt relates to a separate account of Tulsi Ram. The *munim* corroborated. The receipt itself does not show whether it is given to both defendants or to one alone.

The Small Cause Court Judge has decreed claim, saying defendants can sue the *munim* for any sum paid to him, and not credited. This is quite wrong. Any sums paid to plaintiffs or their *munim* as their agent cannot be recovered again by plaintiffs. The defendants deny that Tulsi Ram had any separate account with the plaintiffs. The matter must properly be inquired into. Unless plaintiffs can prove that Tulsi Ram had a separate account, it seems clear that the receipt produced is a good answer to plaintiffs' claim. Even if plaintiffs show that Tulsi Ram had a separate account, they must prove the alleged balance on the account now sued on. Plaintiffs wanted to produce evidence in the lower Court but were not allowed to do so.

The defendants should be asked what items in the accounts they dispute and plaintiffs should be called on to prove those items. If defendants allege re-payments beyond the account admitted by plaintiffs, they should prove their allegations.

I accept this application and, setting aside the decree of the lower Court, I remand the case for re-decision after proper inquiry. Stamp on application to be refunded, other costs of this Court to be costs in the cause.

Petition accepted.

(S. C. 9 A. L. J. 103.)

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 223 OF 1911.

January 10, 1912.

Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.

KANHAYA LAL—DEFENDANT—APPELLANT

versus

GIRDHARI LAL—PLAINTIFF—RESPONDENT.

Minor—Contract—Misrepresentation as to age—Burden of proof—Estoppel.

In a suit brought on a promissory-note, the defendant pleaded that he was a minor at the date of the execution of the note:

Held, that the burden of proving that the contract was a valid one and not void *ab initio* lay upon the plaintiff.

The plaintiff should have proved that the defendant was not a minor at the time of execution.

Gaya Din v. *Musammat Dulari*, 6 A. L. J. 693; 2 Ind. Cas. 839, followed.

A minor is not estopped from pleading infancy by reason of the fact that he had been guilty of fraudulent misrepresentation regarding his age.

First appeal from a decree of the Additional Judge of Bareilly.

Mr. *M. L. Agarwala*, for the Appellant.

The Hon'ble Dr. *Sundar Lal*, for the Respondent.

JUDGMENT.—This was a suit for recovery of money on a promissory note, dated the 2nd March 1907, for Rs. 2,000, made by the defendant, Kanhaya Lal, in favour of the plaintiff, Girdhari Lal's father. The suit was resisted on the ground that Kanhaya Lal was a minor at the date of the note. The Court below, reviewing the evidence adduced by the parties, came to the conclusion that the oral and documentary evidence produced by Kanhaya Lal was not sufficient to establish that he was a minor on that date. But the burden of proving that the contract was a valid one and not void *ab initio* lay upon the plaintiff, see *Gaya Din* v. *Musammat Dulari* (1). The Court below found that the plaintiff had not adduced any satisfactory evidence that the defendant, at the date of the making of the promissory-note, was of full age. The Court, however, finding that the defendant, Kanhaya Lal, had misrepresented his age to the plaintiff's father at the time he borrowed the money and made the promissory note, decreed the claim in part.

In appeal it is contended by the learned Counsel for Kanhaya Lal, the defendant, that a misrepresentation of his age at the time of the making of the promissory-note does not render him liable under it. In support of this contention reliance is placed on S. A. 484 of 1910, decided on 2nd December 1910. In that case it was ruled that the defendant was not estopped from pleading infancy by reason of the fact that he had been guilty of fraudulent misrepresentation regarding his age. This ruling supports the contention of the learned Counsel for the appellant. The learned Advocate for the respondent supports the judgment of the Court below on the ground that the defendant, Kanhaya Lal, in his deposition, dated the 18th July, 1907, gave his age as 22 years, and that that admission, taken with the other circum-

(1) 6 A. L. J. 693; 2 Ind. Cas. 839.

stances of the case, shifts the burden of proof and renders it necessary for the defendant to prove that, on the date of the execution of the pro-note in question, he was a minor.

Kanhaya Lal has made conflicting statements about his age, and it is well known that a witness, when asked to state his age at the beginning of his examination, usually satisfies himself with stating it approximately.

We are not prepared to attach much importance to the age given by Kanhaya Lal in his deposition of 18th July 1907, and, having regard to all the circumstances of the case, we do not think that the statement amounts to an admission sufficient to shift the burden of proof from the plaintiff to the defendant.

For the above reasons, we allow the appeal, set aside the decree of the Court below and dismiss the plaintiff's suit. We make no order as to costs.

Appeal decreed.

(s. c. 26 P. W. R. 1912; 34 P. L. R. 1912).

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1010 OF 1911.

January 12, 1912.

Present:—Sir Arthur Reid, KT., Chief Judge.

BHAGTU AND OTHERS—DEFENDANTS—APPELLANTS

versus

BUA DITTA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Appeal by one plaintiff out of many—Decree in favour of all—Mutation entry, effect of.

Rule 33 of Order XLI of the new Civil Procedure Code (Act V of 1908) justifies an Appellate Court to decree in favour of all the plaintiffs, what they are entitled to get collectively, though only one of them has appealed.

The Revenue Courts in mutation proceedings look to possession in the first instance as a guide and a mutation order does not preclude title being set up by the losing party.

Second appeal from the decree of the Divisional Judge, Amritsar Division, dated the 22nd May 1911, reversing that of the Honorary Munsif, 2nd Class, Gurdaspur, dated the 21st January 1911, decreeing the claim in part.

FACTS.—One *F.* died leaving three sons, *H.*, *L.* and *S.* When the line of *H.* became extinct in 1909, $\frac{1}{4}$th of his estate was mutated in the names of the descendants of *L.* and $\frac{3}{4}$ths in favour of those of *S.* appparently with the consent of some of them who were present at the time of mutation. Shortly after this, the descendants of *L.*, sued the descendants of *S.* for possession of $\frac{1}{2}$ of the said estate. The defendants pleaded, *inter alia*, that by virtue of an agreement entered into between the parties at the time of mutation of names, plaintiffs were debarred from claiming more than $\frac{1}{4}$th. Accordingly, the first Court allowed only $\frac{1}{3}$rd. But on appeal by only one of the plaintiffs, the Divisional Court decreed their claim in full.

Mr. *Sham Lal*, for the Appellants.

Mr. *Nihal Chand Mehra*, for the Respondents.

JUDGMENT.—I see no reason for interference. *Sirdar Nuran Khan* v. *Nawab Imam Bakhsh Khan* (1), *Mehr* v. *Ohannu* (2) enunciate the well-known rule that Revenue Courts look to possession in the first instance as a guide in mutation of names proceedings, and the mutation order does not preclude title being set up by the losing party.

Order XLI, rule 33, of the Code of Civil Procedure, justified the lower Appellate Court's decree in favour of all the plaintiffs though one only had appealed, having regard to the finding that the plaintiffs were entitled to share the land in suit equally with the defendants. Counsel for the appellants has failed to establish the agreement at mutation in favour of his clients set up by him, and the lower Appellate Court has recorded cogent reasons for holding that the alleged agreement was not established and that there was no assent to the mutation order, and for holding that the parties were entitled to ancestral share in Hamza's *patti*.

I dismiss the appeal, but having regard to the fact that one plaintiff alone appealed, I leave the parties to bear their own costs of this Court.

Appeal dismissed.

(1) 6 P. R. 1883, Rev.
(2) 7 P. R. 1891, Rev.

JACKSON *v.* JACKSON.

(s. c. 9 A. L. J. 108.)

ALLAHABAD HIGH COURT.

MATRIMONIAL SUIT No. 6 OF 1911.

December 22, 1911.

Present:—Mr. Justice Chamier.

JACKSON—PETITIONER

versus

JACKSON—OPPOISTE PARTY.

Divorce Act (IV of 1869), s. 57—Decree nisi *for dissolution of marriage—Second marriage within 6 months of the dissolution and during life-time of the former wife —Null and void.*

The second marriage of a Christian, contracted during the life-time of the first wife and within 6 months of a decree *nisi* for the dissolution of the first marriage, is null and void.

The decree of a High Court dissolving a marriage referred to in section 57 of the Divorce Act is the decree absolute, not the decree *nisi*.

Warter v. *Warter*, 15 P. D. 152; 59 L. J. P. 87; 63 L. T. 250; 54 J. P. 631, referred to.

Matrimontial suit for a declaration that the marriage betwen the parties was void.

Mr. *R. R. Sorabji*, for the Petitioner.

JUDGMENT.—This is a suit by Esther Marie Jackson for a declaration that her marriage with Frederick Ormond Layland Jackson is null and void.

The parties, who are Christians, were married in Allahabad, on January 12th, 1910. The respondent, who had been married to another woman, had obtained in the Calcutta High Court a decree *nisi* for dissolution of that marriage, and the decree had been made absolute on December 6th, 1909. He believed that on the decree being made absolute, he was free to marry again, and he assured the present petitioner that all the necessary formalities had been complied with. I find it proved that respondent's former wife was alive when the parties were married.

On the above facts, the petitioner claims to be entitled to a declaration that her marriage with the respondent is null and void.

Section 19 of the Indian Divorce Act provides that such a declaration may be made at the instance of a wife on the ground that the former wife of the husband was living at the time of the marriage, and the marriage with such former wife was then in force. Section 57 of the Act provides that when six months after the date of a decree of a High Court dissolving a marriage have expired, and no appeal has been presented against such decree to the High Court in its appellate jurisdiction or when any such appeal has been dismissed, but not sooner, it shall be lawful for the respective parties to the marriage to marry again as if the prior marriage had been dissolved by death, provided that no appeal to His Majesty in Council has been presented against any such decree. There is no appeal to His Majesty in Council against a decree *nisi* for dissolution of a marriage (see section 56); therefore, there can be no doubt that the "decree of a High Court dissolving a marriage" referred to in section 57 is the decree absolute, not the decree *nisi*. The section was construed in this way by Sir James Hannen in the case of *Warter* v. *Warter* (1), where one Taylor had obtained in the Calcutta High Court a decree absolute for dissolution of his marriage on November 27th, 1879, and the divorced wife was married to Colonel Warter on February 3rd, 1880. Three days later, Colonel Warter made a Will in favour of his wife. In April 1881, on the advice of a Solicitor, Colonel and Mrs. Warter were re-married at a registry office. Colonel Warter having died without re-executing his Will or making another, the question arose whether the marriage of April, 1881, revoked the Will. It was held that the marriage of February 1880 was null and void, and, therefore, the marriage of April 1881 was valid and revoked the Will. Sir James Hannen said:—"The Indian Law, like our own, does not completely dissolve the tie of marriage until the lapse of a specified time after the decree. This is an integral part of the proceedings by which alone both the parties to the marriage can be released from their incapacity to contract a fresh one." Following this decision, I hold that the respondent's marriage with his former wife was still in force when he went through the form of a marriage with the petitioner.

I find on the issues that the petitioner professes the Christian religion, and that the marriage between her and the respondent is null and void. I make a declaration accordingly. The respondent will pay the petitioner's costs.

Marriage declared void.

(1) (1890) 15 P. D. 152; 59 L. J. P. 87; 63 L.T. 250; 54 J. P. 631.

GANGA PERSHAD SAHU *v.* IRSHAD ALI KHAN.

(s. c. 15 C. L. J. 54.)

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2826 OF 1908.

August 21, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Teunon.

GANGA PERSHAD SAHU AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

IRSHAD ALI KHAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Revenue Sale—Sale of larger share than one in default—Mistake of Collector's officers—Effect of sale on share not in default.

The officers of a Collectorate, under the erroneous impression that the share in default was much larger in extent than it really was, exposed for sale the plaintiffs' share of property in respect of which no default had been made:

Held, that the act of the Collector, in exposing for sale any share in excess of the share which was really in default, was wholly without jurisdiction, and, therefore, could not prejudice the rights of the plaintiffs.

Bal Kishen, Das v. *Simpson*, 25 I. A. 151; 25 C. 833; 2 C. W. N. 513; *Mahomed Jan* v. *Munshi Ganga Bishun Singh*, 15 C. W. N. 443; 10 Ind. Cas. 272; 13 C. L. J. 525; 38 C. 537; 9 M. L. T. 46; 8 A. L. J. 480; 13 Bom. L. R. 413; (1911) 2 M. W. N. 277 : 21 M. L. J. 1148; *Harkhoo Singh* v. *Bunsidhar Singh*, 25 C. 876; 2 C.W.N. 360 and *Jogendra Mohan* v. *Uma Nath*, 35 C. 636; 8 C. L. J. 41; 12 C. W. N. 646, relied upon.

Appeal from the decree of the District Judge of Gaya, dated the 10th September 1908, affirming that of the Subordinate Judge of Gaya, dated the 17th March 1908.

Messrs *A. Chaudhuri*, *Sultan Ahmad* and Babu *Chandra Sekhar Prosad Singh*, for the Appellants.

Babu *Umakali Mukherjee* and Moulvi *Muhammad Mustofa Khan*, for the Respondent.

JUDGMENT.—The subject-matter of the litigation which has given rise to this appeal is a share of four villages Padnia, Monaia, Chaduor and Dhudhwa. The case for the plaintiffs is that the lands of these villages appertain to five *taluks* or *mahals*, Khaira, Aramgarh, Maimechuck, Kendil and Tarwan, and that one-third or five annas four pies of the four villages appertains to *taluka* Khaira. The plaintiffs further assert that this share in Khaira was owned by two brothers, Jehangir Buksh and Nabi Buksh in equal halves and that they acquired a valid title to the moiety share of Jehangir Buksh, on the 26th February 1898. On the 5th December 1898, the plaintiffs had their names registered with respect to the share acquired by them. On the 5th March 1899, they applied, apparently under section 70 of the Land Registration Act, to have a separate account opened in respect of their share. This application was granted. Subsequently, on the 30th May 1904, the residuary share, called the *ejmali kalam*, was sold for arrears of revenue, and was purchased by the defendants. The defendants claimed before the Revenue authorities that they had acquired by their purchase a thirteen annas four-pies share of the villages as comprised in *taluka* Khaira, and were entitled to have their names registered in respect thereof. This contention was accepted as well-founded by the revenue authorities on the 10th April 1905. On the 27th September 1907, the plaintiffs commenced this action for declaration that the residuary share did not and could not represent any share beyond a half of the one-third included in *taluka* Khaira. The Courts below have refused to accept this contention and have concurrently dismissed the suit. The plaintiffs have appealed to this Court, and on their behalf it has been contended that upon the facts found, there is no answer to their claim. In our opinion, this argument is manifestly well-founded.

It is indisputable that only one-third share, described as five-annas four-pies share, of the four villages was included in *taluka* Khaira. The two brothers, Jehangir Buksh and Nabi Buksh, were entitled to this one-third in equal halves; in other words, if the entire interest in the villages was taken as the unit, each of the brothers had a two-annas eight-pies share; but if the share included in Khaira was taken as the unit, each of the brothers had an eight-annas share. The plaintiffs have, undoubtedly, acquired the whole interest of one of the brothers, Jehangir Buksh, which had been inherited by his son, Mahomed Buksh. When the plaintiffs applied to have their names registered in respect of the share acquired by them, they were registered as proprietors of a two-annas eight-pies share, but as is usual, it was not stated what was the standard of reference. It is indisputable, however, that the plaintiffs applied to have their names registered in respect of a two-annas eight-pies share in relation to the entire village treated as sixteen-annas. Subsequently, when they applied to have a separate account opened in respect of their share, they proceeded on the same basis. It now turns out, however, that the officers in the

BHOLA *v.* BRIJ LAL.

Collectorate made a mistake, and, through a misapprehension, assumed that the separate account was opened in respect of a two-annas eight-pies share out of the five annas four-pies share treated as sixteen-annas. It is incontestable that the plaintiffs did not in any manner contribute to this mistake. They have throughout uniformly and consistently claimed a half of the one-third share included in *taluka* Khaira; they have sought to get their names registered in respect of such share and to have a separate account opened in respect thereof. The officers in the Collectorate have committed a blunder, and have treated the residuary share not as two-annas eight-pies out of five annas four-pies but as thirteen-annas four-pies out of sixteen-annas, (*i.e.*, they have treated for this purpose the share included in Khaira as sixteen-annas). These are the facts as established beyond possibility of challenge. The only question is, what is the true legal position of the parties? The Courts below have held that the plaintiffs have lost the share which undoubtedly belonged to them, by reason of the blunder of the officials in the Collectorate. We are entirely unable to accept this view as well-founded. The Collector had no jurisdiction to expose for sale a share in excess of the share in default. The plaintiffs had paid the Government revenue payable in respect of the half share out of the one-third included in Khaira, which belonged to them. The share in default was the remaining half share. If the officers thought the share in default was a five-sixth share and not one-half, clearly the title of the plaintiffs could not be affected thereby. The act of the Collector in exposing for sale any share in excess of the half of the one-third share, which was really in default, was wholly without jurisdiction; and it is now firmly settled that an act of the Collector, if without jurisdiction, cannot affect the title of the owners: See *Bal Kishen Das* v. *Simpson* (1) *Mahomad Jan* v. *Munshi Ganga Bishen Singh* (2), *Harkhoo Singh* v. *Dunsidhur Singh* (3) and *Jogendra Mohan* v. *Uma Nath* (4). The cases of *Kalanand Singh* v. *Sarafat Hassein* (5) and *Rahimuddi Munshi* v. *Nalini Katna Lahiri* (6), upon which the learned Vakil for the respondents relied, are clearly distinguishable, as there the Court was called upon to consider the legal effect of a revenue sale held with jurisdiction; and the same remark applies to the decision in *Shyam Kumari* v. *Rameswar Singh* (7) and *Bhawani Koer* v. *Mathura Prasad* (8), to which reference was made in the course of the arguments at the Bar. Here, the officers in the Collectorate erroneously supposed that the share in default was much larger in extent than it really was, and under this impression, exposed for sale the share of the plaintiffs in respect of which no default had been made. In so far as the plaintiffs are concerned, the sale was clearly beyond the statutory authority vested in the Collector and could not prejudice their rights.

The result, therfore, is that this appeal must be allowed and the decrees of the Courts below discharged. The suit is decreed with costs in all the Courts. The plaintiffs will recover possession of the share claimed, but in the circumstances, we direct that no mesne profits be allowed before the date of this judgment. We may add that it has been stated to us that a question of redemption may possibly arise between the parties in their character as purchasers on the basis of mortgages; if any such question arises, it must be determined in a suit properly framed for the purpose.

Appeal allowed; Suit decreed.

(1) 25 C. 833; L. R. 25 I. A. 151; 2 C. W. N. 513.
(2) 13 C. L. J. 525; 15 C. W. N. 443; 9 M. L. T. 446; 8 A. L. J. 480; 13 Bom. L. R. 413; 38 C. 537; (1911) 2 M. W. N. 277; 21 M. L. J. 1148; 10 Ind. Cas. 272.
(3) 25 C. 876; 2 C. W. N. 360.
(4) 35 C. 636; 8 C. L. J. 41; 12 C. W. N. 646.
(5) 12 C. W. N. 528.
(6) 13 C. W. N. 407; 1 Ind. Cas. 81.
(7) 31 I. A. 176; 32 C. 27; 8 C. W. N. 786.
(8) 7 C. L. J. 1.

(s. c. 27 P. W. R. 1912; 32 P. L. R. 1912.)

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 1890 OF 1910.

November 21, 1911.

Present:—Mr. Justice Robertson.

BHOLA—PLAINTIFF—PETITIONER

versus

BRIJ LAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Burden of proof—Claim for a declaration that defendant's name has been entered in Revenue papers by mistake.

The *onus* of proving separate exclusive possession of certain land and that defendant's name has been wrongly entered in the Revenue papers as a joint owner thereof lies on the plaintiff.

Petition under section 70 (1) (*a*) and (*b*), Act XVIII of 1884, as amended by Act XXV of 1899, for revision of the order of the

Divisional Judge, Jullundur Division, dated 13th April 1910, reversing that of the Munsif, 1st class, Jullundur, dated 6th December 1909, decreeing plaintiff's claim.

Rai Sahib Pandit *Sheo Narain*, for the Petitioner.

Rai Bahadur Bakshi *Sohan Lal*, for the Respondents.

JUDGMENT.—The *onus* of proving that the plaintiff was in separate exclusive possession of the land in suit, and was entitled to a declaration to that effect, lay on the plaintiff.

The lower Appellate Court has found that he had failed to discharge that *onus*, and I cannot say that upon the record he could not come to that decision.

There is, therefore, no ground for revision. I reject the application with costs.

Application dismissed.

(s. c. 9 A. L. J. 148)

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 389 OF 1909.

December 21, 1910.

Present:—Sir Henry Richards, KT., K. C., Chief Justice, and Mr. Justice Tudball.

WILAITI BEGAM—DEFENDANT—APPELLANT

versus

FAZAL HUSAIN KHAN—PLAINTIFF—RESPONDENT.

Registration Act (III of 1877), s. 32—Presentation of document for registration—Presentation by father of executant in presence of executant.

A lady executed a bond, and went to the Registration Office where she was present in a *doli* while her father presented the document to the Sub-Registrar for registration. The lady there and then admitted execution and receipt of money: *Held*, that there was proper presentation of the document within the meaning of section 32 of the Registration Act.

First appeal from a decree of the Second Additional Judge of Aligarh.

The Hon'ble Nawab *Abdul Majid* (with him Mr. *Ghulam Mujtaba*), for the Appellant.

Mr. *Shafi-uz-zaman*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit on foot of a bond. The bond is dated the 20th of September 1897. It was executed by the defendant in favour of the plaintiff. The amount of principal was Rs. 500. The rate of interest was 2 per cent. per mensem, compound interest, at half yearly rests. Admittedly, Rs. 150 had been paid before the suit was instituted. The plaintiff sought to recover Rs. 6,500, principal and interest. In the Court below, the plaintiff, of his own accord, reduced the claim by Rs. 1,500. The defence was that the bond was really executed in favour of the defendant's father, that Fazal Husain Khan was merely *benamidar* for the defendant's father, that the defendant had paid her father the amount due on the bond, that after his death, the plaintiff got possession of the bond, and brought the present suit. There is a further plea that the bond was not duly registered. The Court below held that the plaintiff was not *benamidar* for the defendant's father, Wajihullah Khan, and that the bond was duly registered. It gave the plaintiff a decree for Rs. 5,000, principal and interest, *plus* costs.

We will take the plea of irregular registration first. There is no doubt on the evidence that the bond was presented and registered at the same time, and that the executant, Wilaiti Begam, was also present in a *doli*. The stamp for the bond was also purchased on the same day that presentation and registration took place. According to the certificate, the father of the defendant was the person who "presented" the bond for registration. Section 32 of the Registration Act provides as follows:—

"Except in the cases mentioned in section 31 and section 89, every document to be registered under this Act, whether such registration be compulsory or optional, shall be presented at the proper Registration Office, by some person, executing or claiming under the same, or, in the case of a copy of a decree or order, claiming under the decree or order, or by the representive or assign of such person, or by the agent of such person, representative or assign, duly authorised by power-of-attorney executed and authenticated in manner hereinafter mentioned."

It must be admitted that the defendant's father was not duly authorized by power-of-attorney within the meaning of the section, and if we are bound to hold that the presentation was in fact made by the father, the presentation would be irregular, and, therefore, under the authorities, void. No definition is given in the Act of the expression "presented," and the question is whether we are entitled to hold that when the lady went herself to the Registra-

tion Office, was present in a *doli* when the document was handed to the Registrar by her own father, and that she there and then admitted execution and receipt of the money, she in fact presented the document within the meaning of the section. In our opinion, the action of the lady amounted to presentation within the meaning of the section, and we accordingly hold that the learned Judge was right on this point.

The next question is whether or not the plaintiff was merely *benamidar* for the defendant's father, and whether the bond was paid off. The witnesses are about evenly balanced. The defendant says that she borrowed the money from her father, and that the principal was paid off, that there never was any intention by her father to charge interest, and that the bond remained with her father with whom she was living until the plaintiff gained possession of it. Ata-ullah Khan supports her evidence. So does Ghafoor Muhammad Khan and Gopal Sahai to some extent. The plaintiff distinctly states that it was he himself who lent the money, that he was in Government service, and that he was a cousin of the husband of the defendant. He is supported by Sakhawat-ullah Khan, Hidayat-ullah and Jagannath. Two of these are attesting witnesses to the document, and the third is a man who identified the *Musammat* at the time of registration. There can be no doubt that the onus lies upon the defendant. *Prima facie* the true owner of the bond is the person in whose favour it was made. The defendant's own account is rather in favour of the plaintiff when carefully examined. She says, in giving an account of how the money came to be borrowed, as follows:—

"Since I became a widow, Haji Wajih-ullah Khan spent his own money. When I spoke to Haji Ji about the amount of the decree, he said that he had already spent a considerable sum. I then went to Nawab Ata ullah Khan, Ghafoor Muhammad Khan, Ghaus Muhammad Khan and Hamid-ullah Khan. Nawab Ata ullah Khan said that he would get money advanced to me. Fazal Husain Khan was the elder cousin of my husband. He used to take all proceedings on my behalf. This was why the bond was executed in his favour. Upon the oath of Haji Wajih-ullah Khan—this is the same bond which was executed in his favour."

This translation is not good. We had the original read. The meaning is that her father had been spending a lot of money on her, prior to the borrowing of Rs. 500, that he had refused to spend any money, and that the defendant then went to Nawab Ata-ullah Khan, Ghafoor Muhammad Khan, Ghaus Muhammad Khan and Hidayat-ullah Khan, evidently to negotiate a loan for her, that Nawab Ataullah Khan promised to negotiate a loan, and that the loan was thereupon negotiated. Now, if her father was ready and willing to advance money on being duly secured, it was quite unnecessary for her to go and seek the assistance of the persons she mentions. If she wanted to persuade her father to lend her money, it would also be unnecessary for her to consult outsiders. Ata-ullah Khan says nothing about this consultation in his evidence. We feel that we would not be justified under the circumstances in overruling the decision of the Court below upon this question of fact, particularly as the Court below has had the advantage of seeing the witnesses who were examined before it.

As to the plea of payment, it follows that if we cannot accept the story of the defendant that the money was advanced by her father, we cannot accept her story about payment.

The interest is very high, particularly having regard to the fact that the defendant is a *Musammat*. But the plaintiff, to this credit be it said, voluntarily waived his claim to the extent of Rs 1,500 in the Court below, and has further waived a sum of Rs. 1,000 in this Court. Therefore, we modify the decree of the Court below by giving the plaintiff a decree for Rs. 4,000, instead of Rs. 5,000, principal and interest. We also modify it in that we allow the plaintiff simple interest at the rate of 5 per cent. per annum pending the suit and also simple interest at the same rate until realization. The plaintiff will have his costs in all Courts.

We extend the time for payment to six months from this date.

Decree modified.

THAKAR DAS *v.* PERMA NAND.

(s. c. 95 P. R. 1911.)

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 641 OF 1911.

July 6, 1911.

Present:—Sir Arthur Reid, Kt., Chief Judge.

THAKAR DAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

PERMA NAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLIII, r. 1 (k)—Abatement order—No application to set aside abatement—Appeal—Revision—Punjab Courts Act (XVIII of 1884), s. 70 (1) (a).

No appeal lies under Order XLIII, rule 1 *(k)*, Civil Procedure Code, 1908, where there has been no application to the Court to set aside an abatement.

The failure of a person to apply to the Court to set aside abatement precludes interference with the order of abatement by way of revision under section 70 (1) (*a*) of the Punjab Courts Act.

Second appeal from the order of the Divisional Judge, Rawalpindi Division, dated the 22nd February 1911.

Pandit *Kishori Lal*, for the Appellants.

Mr. *Pestonji Dadabhai*, for the Respondents.

JUDGMENT.—A preliminary objection that no appeal lies, has force.

The appeal purports to be under Order XLIII, rule 1 (*k*), which provides an appeal from an order under rule 9 of Order XXII, refusing to set aside the abatement or dimissal of a suit. Here there was no application to the Court to set aside the abatement, and an appeal consequently does not lie. The value of the suit is Rs. 250, and the suit is unclassed. A further appeal, therefore, does not lie

The appellant's remedy was by application to the Court to set aside the abatement. His failure to avail himself of this remedy precludes interference under section 70 (1) (*a*), for which his Pleader prays.

The appeal fails and is dismissed with costs.

Appeal dismissed.

HABEEBULLAH *v.* ABDUL HAMID.

(s. c. 9 A. L. J. 131.)

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 607 OF 1910.

January 11, 1912.

Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.

Sheikh HABEEBULLAH AND OTHERS—DEFENDANTS—APPELLANTS

versus

Sheikh ABDUL HAMID AND OTHERS—PLAINTIFFS AND OTHERS—DEFENDANTS—RESPONDENTS.

Interest—Mortgagor's right to interest on profits—Bengal Regulation (XV of 1793), s 10 - Mortgage redeemed and cancelled—Limitation Act (XIV of 1859), s. 1 (12) & (15)—Limitation—Suit for redemption more than 12 years after satisfaction of mortgage—Right of mortgagor to take accounts from mortgagee for surplus profits—Rate of interest allowed to mortgagee—Mortgagee's possession after mortgage-debt is paid off—Adverse possession—Redemption—Usury Laws Repeal Act (XXVIII of 1855).

A usufructuary mortgage was executed while Bengal Regulation XV of 1793 was in force. In the mortgage-deed, it was provided that the mortgagee should enter into possession, collect the rents and pay the Government revenue and, after defraying all collection charges, should retain the surplus in lieu of his interest. At the time of redemption, no account was to be taken. The mortgage was subject to Bengal Regulation XV of 1793:

Held, that the mortgagee was not entitled to more than 12 per cent. per annum interest on the principal debt and was liable to account for the surplus collection and profits to the mortgagor at the time of redemption, the provisions in the mortgage-deed to the contrary notwithstanding.

Samar Ali v. *Karimullah*, 8 A. 402, followed.

Sudarshan Das Shastri, v. *Ram Prasad*, 7 A. L. J. R. 963; 7 Ind. Cas. 385; 33 A. 97; *Shafi-un-nissa* v. *Fazal-rab*, 7 A. L. J. 787; 7 Ind. Cas. 293, distinguished.

The possession of a mortgagee does not become adverse to the mortgagor merely because the mortgagee remains in possession after the mortgage-money has been satisfied out of the usufruct or has been otherwise paid off. The provision in section 10 of Regulation XV of 1793 that a mortgage shall be deemed to be *cancelled and redeemed* does not mean redeemed in the full sense of the word.

Sudarshan Das Shashtri v. *Ram Prasad*, 7 A. L. J. 963; 7 Ind. Cas. 385; 33 A. 97, followed.

On the passing of the Limitation Act, XIV of 1859, a mortgagor's right to redeem became subject to section 1 (15) of the Act and a suit for redemption of a mortgage effected before the passing of that Act is within time if brought within 60 years of the mortgage.

The mortgagor is entitled to interest on the annual surplus profits. A rate of 12 per cent. per annum is a fair rate to allow in such cases.

Bechoo Singh v. *Rai Sheo Sahoy*, 1 N. W. P. H. C. R. 56 and page 111 (Ed. of 1873), referred to.

Second appeal from the decision of the District Judge of Azamgarh, dated the 2nd of February 1910.

HABEEBULLAH *v.* ABDUL HAMID.

Dr. *Tej Bahadur Sapru* (with him Mr. *M. Ishaq*), for the Appellants.

Mr. *Abdul Raoof*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit by respondents Nos. 1, 2 and 3, for redemption of a mortgage made in the form of a *zur-i-peshgi* lease on February 12th, 1852, by one Muslima Bibi, in favour of the appellants and respondents Nos. 4 to 48 or their predecessors-in-title. The deed provided that the mortgagees should enter into possession and collect the rents and pay the Government revenue and defray collection charges, &c., therefrom, and retain the balance in lieu of interest. There was to be no accounting on either side and the mortgagors were to be entitled to redeem on payment of the principal sum Rs. 252. The case of the plaintiffs-respondents was that the mortgage was subject to the provisions of Bengal Regulation XV of 1793, therefore, the mortgagees were not entitled to more than 12 per cent. per annum on the principal sum notwithstanding the provisions of the deed, and that if an account were taken of profits received by the mortgagees, it would be found that the principal sum and interest had been satisfied many years ago, and that a large sum was due to the plaintiffs-respondents. The Subordinate Judge gave them a decree for possession of the property and for Rs. 3,305-8-9 on account of surplus profits and interest thereon up to the date of the suit and directed an inquiry as to the profits during the suit and up to the delivery of possession. That decree was confirmed on appeal by the District Judge. In second appeal, it is contended, in the first place, that the suit is barred by limitation. Dr. Tej Bahadur argues that if Regulation XV of 1793 applies, as the plaintiffs-respondents say, the mortgagees were not entitled to more than 12 per cent. per annum on the principal sum notwithstanding the terms of the deed, and an account must be taken of what the mortgagees have received and the mortgage must be considered to have been in the words of section 10 of the Regulation "virtually and in effect cancelled and redeemed" as soon as the principal sum with simple interest at 12 per cent. per annum had been realised from the usufruct of the property, and thereafter the mortgagee's possession must be deemed to have been adverse. Consequently, the mortgagor's right to recover the property was barred under section I (12) of the Limitation Act, XIV of 1859, on the expiry of 12 years from the date on which the principal and interest were satisfied out of the usufruct. There can be no doubt that the mortgage was originally subject to Regulatin XV of 1793, which was made applicable to the Azamgarh district by Regulation XVII of 1806 and that, as held in *Samar Ali* v. *Karimullah* (1), it remained subject to the former Regulation notwithstanding the passing of the Usury Laws Repeal Act XXVIII of 1855. Therefore, the plaintiffs were entitled to an account of the profits received by the mortgagees. But we cannot accept the argument that the right of the mortgagors to recover the property became barred by limitation upon the lapse of twelve years from the date on which the principal and interest were satisfied out of the usufruct. Prior to the passing of Act XIV of 1859, there was no limitaion for a suit for redemption of a mortgage. Section I (15) of that Act provided that the period of limitation, applicable to a suit against a mortgagee for the recovery of immoveable property mortgaged, should be sixty years from the date of the mortgage, and there are similar provisions in the Limitation Acts of 1871, 1877 and 1908. The possession of a mortgagee does not become adverse to the mortgagor merely because the mortgagee remains in possesion after the mortgage-money has been satisfied out of the usufruct or has been otherwise paid off. Much more is required to set time running against the mortgagor. We agree with the decision in *Sudarshan Das Shastri* v. *Ram Prasad* (2), that the provision in section 10 of the Regulation of 1793 that a mortgage shall be deemed to be cancelled and redeemed, does not mean redeemed in the full sense of the word. It appears to us that on the passing of Act XIV of 1859, the mortgagor's right to redeem became subject to section I (15) of that Act and a suit for redemption could be brought at any time within sixty years of the mortgage. In our opinion, the suit is not barred by limitation.

The next point taken is that the plaintiffs-respondents are not entitled to an account of the profits received by the mortgageees. As already stated, we are of opinion that the mortgage has all along been subject to the

(1) 8 A. 402.

(2) 7 A. L. J. 963; 33 A. 97; 7 Ind. Cas 385.

provisions of Regulation XV of 1793; therefore, the plaintiffs-respondents are entitled to an account of the profits. Dr. Tej Bahadur relied upon the decision in *Shafi-un-nissa* v. *Fazalrab* (3), but the mortgage in that case was made in January 1866, and, therefore, was never subject to the Regulation of 1793. He relied also on the case of *Badri Prasad* v. *Murlidhar* (4), but that case is clearly distinguishable from the present case. The sum to be received by the mortgagee was a fixed sum, not as here a fluctuating amount, and their Lordships were careful to point out that they did not decide that if the amounts received by the mortgagee had been fluctuating, it would not have been necessary to take an account against him.

The third and last point taken is, that the Courts below were wrong in allowing the plaintiffs-respondents interest at 12 per cent. per annum on the annual surplus profits. In allowing interest at the above rate, the Courts below relied upon the judgment of this Court in *Bechoo Singh* v. *Rai Sheo Sahoy* (5), in which it was said that it was an established practice in cases of this kind to allow the mortgagor interest on the surplus profits at the rate allowed to the mortgagee on the mortgage-debt. It is not contended that no interest should have been allowed and, in the circumstances, we think, that 12 per cent. is a fair rate.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(3) 7 A. L. J. 787; 7 Ind. Cas. 293.
(4) 2 A. 593; 7 I. A. 51.
(5) 1 N. W. P. H. C. R. p. 56; p. 111 (Ed. of 1873).

(s. c. 16 C. W. N. 362.)

PRIVY COUNCIL

APPEAL FROM THE JUDICIAL COMMISSIONER OF THE CENTRAL PROVINCES.

January 16, 1912.

Present:—Lord Macnaghten, Lord Shaw, Lord Mersey and Mr. Ameer Ali.

BIR BIKRAM DEO—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

Central Provinces Zemindars—*Exercise of Police and Excise functions by sufferance or delegation—Resumption of those functions by Government—Act under sovereign power —Maintenance of private cattle-pounds, whether compatible with Cattle Trespass Act—Maintenance of cattle-pounds under control of Government officials —Act of Executive Government—Jurisdiction of Civil Court to interfere.*

Where in the Central Provinces certain *zemindars* in exercising Police and Excise functions were not acting as of right, but were so acting either by sufferance or by delegation :

Held, that the resumption of those functions by the Government was a thing done by the Government in exercise of its sovereign powers, and that a suit to question the resumption was not maintainable in a Civil Court.

Held, also, that the maintenance of private cattle-pounds was incompatible with the provisions of the Cattle Trespass Act and that the establishment and maintenance of cattle-pounds in the present case, under the superintendence and control of Government officials, empowered to obtain the assistance of the Police when required, might be considered essential for the maintenance of law and order and the peace and good government of the country, and, therefore, an act of the Executive Government with which a Civil Court was not competent to interfere.

Consolidated appeals and cross-appeals from the judgment and decrees of the Judicial Commissioner of the Central Provinces, dated May 14th, 1907, partly affirming, partly varying and partly reversing the judgments and decrees of the District Judge of Raipur, dated August 6th, 1906.

The following is the judgment of the Judicial Commissioner appealed from:—

"This and the cross-appeal (No. 61 of 1909) arise out of a suit (No. 6 of 1904) brought by the *zemindar* of Khariar in the Raipur District against the Secretary of State for India in Council. The object of the suit was to obtain cancellation of certain clauses in the *wajib-ul-arz* sanctioned for the *zemindari* in Revenue Secretariat letters No. 2390, dated the 25th April 1902, and No. 1244, dated the 18th March 1903. A copy of this document will be found printed as Ap. XIII to the 'Report on the Land Revenue Settlement of the *zemindari* Estates in the Raipur District effected during the years 1899—1902.'

"The plaint begins by alleging that before the advent of British Rule, the plaintiff's ancestors were sovereign rulers and that when the *zemindari* was transferred to the Central Provinces in 1862, the *zemindar* was still in active enjoyment of various rights and privileges detailed in a separate list. In 1865, the British Government, when deciding the status of many important landholders, divided them into two classes, namely, Feudatory Chiefs and Non-feudatory Chiefs,

The *zemindar* of Khariar fell into the latter and inferior class, but he was not otherwise interfered with. On the 25th November 1874, a *sanad* recognizing the *zemindar's* proprietary rights was issued with the permission of the Government of India. The *zemindar* continued to exercise the aforesaid rights and privileges till the 1st September 1892, when the British Government took over the right of managing the local Police and levied from him an annual sum of Rs. 1,656 on account of maintaining the necessary force. On the 1st April 1894, the same Government took over the administration of all excise matters, proposing to pay as compensation the inadequate sum of Rs. 3,000 yearly. The *wajib ul arz** framed at Carey's Settlement (1885—1889) contained nothing inconsistent with the *sanad* of 1874 or incompatible with the continued enjoyment of the aforesaid rights and privileges; but the corresponding document of 1902 is of a very different character, being inconsistent with the *sanad* of 1874. Further, the clauses complained of are invalid because they prevent or tend to prevent the enjoyment of the aforesaid rights and privileges and are such as could not legally be prescribed without an express enactment in that behalf. The serial numbers and the subjects of these clauses are as under,—

IN PART I.

3. Removal of *zemindar* and forfeiture of privileges.

6. Provision that the *zemindar* be given reasonable compensation, if it is considered expedient at any time to assume the management of ferries and pounds.

7. Provision that the forest *mahals* shall be managed in accordance with rules framed by the Chief Commissioner under section 1024 A, Land Revenue Act.

10. Declaration that all minerals are the property of Government.

IN PART II.

2. Direction that the *zemindar* shall discontinue the practice of levying *nazarana* on grant or renewal of leases.

7. Declaration that the appointment, suspension and removal of village watchmen (*kotwars*) are governed by the rules framed under section 147 A, Land Revenue Act.

11 (*i*). Direction that forest lands not included in forest *mahals* be managed in accordance with any rules which may be made by the Chief Commissioner.

15. Declaration that the hides and carcases of dead cattle are the property of the respective owners of the cattle.

"The defence and other pleadings are set out at length in the lower Court's judgment, and I think it unnecessary to recapitulate them here in detail. The gist of the defence seems to be that the British Government were not bound to, and did not on acquiring the *zemindari*, recognize the *zemindar* permanently and indefeasibly as possessing the rights and privileges mentioned in the annexure to the plaint; that those rights and privileges were in fact exercised on sufferance or by delegation and subject to the pleasure of Government as declared from time to time; that the *zemindar* is bound by terms identical with those of a document known as the "Chanda Patent" (modified in a detail not material for present purposes); that the *sanad* of 1874 was expressly granted subject to those terms, and that none of the clauses complained of were invalid either as being illegal or as infringing any indefeasible right of the plaintiff.

"No fewer than 33 issues were framed, but the evidence to be considered is wholly of a documentary nature and the lower Court came to a decision on issues 9—12, 14—20 and 23—29 only. The decree passed declared clauses 3 and 7 in Part I and clause 2 in Part II of the *wajib-ul-arz* of 1902-03 not to be enforceable against or binding upon the plaintiff and directed their deletion. For the rest the claim was dismissed. Both sides have come up in appeal.

"Dealing first with the aplaintiff's appeal I observe, to begin with, that the 11th ground was not pressed in argument. Khariar is a Scheduled District appearing as serial No. 1 in Part VI of the first Schedule to Act XIV of 1874. As originally framed, the second sentence of section 1, Land Revenue Act, included the words and figures 'except those specified in Part VI of the first Schedule of the Scheduled Districts Act, 1874,' which were repealed by the amending Act, No. XVI of 1889. It follows that since the 29th October 1889, when the last-mentioned Act came into force, the Land Revenue Act 1881, has been running in Khariar.

*Pages 183—185 of the printed report as first published in 1891.

BIR BIKRAM DEO v. SECRETARY OF STATE.

"*4th, 16th and 17th grounds.*—Following the order of the arguments advanced by the plaintiff's learned Counsel, I take up next the 4th, 16th and 17th grounds of appeal. The argument here is that the *wajib-ul-arz* or administration paper referred to in section 77 (*d*) of the Land Revenue Act is identical with the record-of-rights prescribed by section 79 *ibid.*; that the entries complained of do not represent the outcome of inquiries made under Chap. VI of the Act; that no rules of the kind contemplated by section 79 (*b*) *ibid.* have been made; that consequently the clauses in question could not legally be included in the *wajib-ul-arz*; and that the form of Chaps. III—VI indicates that the procedure therein laid down was not intended to apply to *zemindaris*. I do not think there is any substance in the last part of this contention. For Settlement purposes, a *zemindari* is treated simply as an aggregate of villages; the assets of each village are determined and made the basis of a *kamil jama*, *i.e.*, the revenue which would be payable if the village were an ordinary *malguzari* one; and finally a certain share of the aggregate of these *kamil jamas* is made payable by the *zemindar* in the shape of what is technically called a *takoli*: see para. 157 of Carey's and para. 3 of Scott's Settelement Reports. The term "*mahal*" as defined in section 4 (7) of the Land Revenue Act, is a perfectly general one and may, therefore, be applied to a *zemindari* as a whole. In the absence then of anything to indicate that the Settlement of 1899—1902 was not effected under the Land Revenue Act, I would assume that it was so effected. That the administration paper and the record-of-rights are not identical seems clear from section 80 of the Act read with paras. 278, 279, 280 and 266 of the Settlement Code, and also from the fact that two such different expressions are used in sections so close together. The results of inquiries prescribed by sections 68—70 and 72 must find place in the record-of-rights, which, moreover, is to consist of papers, not of only one paper, but it is certainly not the practice to include in the *wajib ul arz* the results of enquiries under those sections, the obvious place for recording those particular results being the *khewat*, *khasra*, *jamabandi*, etc. The fact, however, remains that there is no section, except No. 79, which gives the Settlement Officer power to make entries in any part of the record-of-rights. Rules under section 79 or section 80 to have the force of law must be published as required by section 162 and admittedly no such rules have yet been so published: see in this connection para. 2 of the preface to the Settlement Code. On the 27th issue, the lower Court treated section 77 as giving power to prepare the administration paper, whereas it does no more than authorise the determination of certain disputes. On the 28th issue, the view taken seems to be, that inasmuch as the Chief Commissioner sanctioned the *wajib-ul arz* in the Secretariat letters above cited, all entries in it were legally made. I am unable to concur in this view, and I hold that, failing effective rules of the kind contemplated by section 79 (*b*), no clause in the *wajib ul-arz* can be justified unless it embodies a result of the kind covered by section 79 (*a*). This conclusion does not, however, help the plaintiff; for unless his suit relates to entries as to matters referred to in section 78 and so comes within the scope of section 83, it is incompetent, inasmuch as section 152 (*b*) (8) deprives the Civil Court of jurisdiction over the formation of the record-of-rights. In short, as I understand the position, the plaintiff's suit would have to be dismissed altogether, if it were once conceded that the clauses in the *wajib-ul-arz* of which he complains do not embody decisions as to matters referred to in section 78. He certainly did not plead in the lower Court that the clauses were not the outcome of inquiries, and it is too late for him to raise such an objection now.

"*14th ground.*—The 14th ground seems to me to state what the law is, without thereby furnishing much aid to the decision of the present dispute. If a particular right was expressly or impliedly granted by the British Government to the *zemindar*, it certainly could not be taken away otherwise than by legislation or by agreement. And it is a rule of interpretation that when an enactment changes or takes away rights it is not to be construed as affecting existing rights, unless there are express words to that effect: *Doolubdas* v. *Ramloll* (1), *Papa Sastrial* v. *Anuntarama* (2), *Javanmal* v. *Muktabai* (3). See also Maxwell on the Interpreta-

(1) 5 M. I. A. 109 at p. 126.
(2) 3 M. 93 at p. 101.
(3) 14 B. 516 at p. 525.

tion of Statutes, page 427 (4th edition). But in respect of each right in dispute, the question will be—has there been an express or implied grant? And, in answering this, the Court will have to bear in mind that the British Government is not to be necessarily regarded as having maintained the *zemindar*, after cession of his territory in 1826, in the enjoyment of all the rights allowed him by the Mahrattas: *Secretary of State in Council of India* v. *Kamachee* (4), *Cook* v. *Sprigg* (5).

'In dealing with the rest of the plaintiff's appeal, I will assume—for a reason already stated—that the Chief Commissioner was competent to order insertion in the *wajib-ul-arz* of all the clauses to which the plaintiff objects, subject, however, to the power of the Civil Court to cancel or amend any entry under section 83 of the Land Revenue Act.

"*1st, 2nd and 3rd grounds.*—The three opening grounds relate to clause 6 in Part I of the *wajib ul arz* which runs thus:—

'If at any time it is considered expedient to assume the management of ferries and pounds, the *zemindar* shall receive reasonable compensation in respect of any loss of income resulting from such transfer.'

"The plaintiff, in connection with this and all the other clauses he objects to, repudiates altogether the Chanda Patent. He points to the *sanad* of the 25th of November 1874 (Exhibit P-2) as recognising that absolute proprietary rights over his *zemindari* were already vested in him. He urges that the concluding words—'and (subject) to the conditions specified in the administration paper and other settlement records'—should be altogether ignored as there are no such papers embodying any conditions in the case of his *zemindari*. It is admitted* by the defendant that no administration paper for Khariar existed in 1874 and also that any settlement records there may have been then contain nothing relevant to the matter in hand. Would it in these circumstances be reasonable to treat the *sanad* as recognizing all that the *zemindar* now claims in respect of pounds and ferries? I think not. Reading together the letters of August and September 1874, copies of which form the defendant's Exhibits 13, 14 and 15, it seems clear that the plaintiff was intended to receive not only a copy of the ordinary *malguzari sanad* modified by substituting the word '*zemindari*' for the word '*mouzah*,' but also one of a *wajib-ul-arz* similar to that issued to each Bilaspur *zemindar*. That intention was, for some reason not now ascertainable, left unfulfilled. But I cannot think that the plaintiff is entitled to take the *sanad* as it stands alone, for it does not convey the real intention of the grantor. If it is not to be regarded as subject to the Chanda Patent (slightly modified), on what principle is it to be construed as recognizing a right to control ferries and pounds? No reference to such rights is ever made in the *wajib-ul-arz* of the ordinary *malguzari* village, and it is significant that even in the Chanda Patent, the rules obtaining in the *khalsa* tracts are expressly cited as applicable to the levy of fees at ferries and pounds. I would, therefore, treat the *sanad* of 1874 as doing no more than vest the formal and legal title to the villages of the *zemindari* in the then *zemindar*: see *Loknath* v. *Bissessarnath* (6). Nor do I see sufficient *prima facie* reason to hold that in 1874 the plaintiff was not governed as to ferries by the Saugor and Nerbudda Rules applied in 1855 to the Nagpur Province (pages 92 and 324, Nicholl's Law of the Central Provinces) or as to pounds by the Cattle Trespass Act, 1871. The latter Act undoubtedly extended to Khariar, for the preamble excluded from its operation only 'the Presidency Towns and such districts or tracts of country as the Local Government, with the sanction of the Governor-General in Council, may exclude from its operation.' With these exceptions, the Act was in character general and applicable to the whole of British India. Further, it was not included in the first Schedule of the Laws Local Extent Act, 1874. Consequently, there was no need for the Chief Commissioner to issue a declaration under section 3 (*a*) of the Scheduled Districts Act, 1874, in order to keep it in force. In this connection, I have further to remark that when the *sanad* of November 1874 was given, the Scheduled Districts Act had not

(4) 7 M. I. A. 476; 4 W. R. (P. C.) 42.

(5) 68 L. J. P. C. 144; (1899) A. C. 572; 81 L. T. 281; 15 T. L. R. 515.

* See the remarks on Raipur District in Fuller's "Translations of specimen forms of *wajib-ul arz*" (1885).

(6) 27 C. 103 at p. 114; 26 I. A. 268.

received the assent of the Governor-General. The Northern India Ferries Act, 1878, came into force in the Central Provinces on the 1st April 1879 (Notification No. 1457, dated 26th March 1879) : section 4 (*b*) expressly empowers the Local Government to take possession of any private ferry, and section 5 requires compensation to be paid. Assuming that all ferries in Khariar were private ferries in 1903 and that they belonged to the *zemindar*, his rights may under this express provision be taken away, and so far as clause 6, part I of the *wajib ul-arz*, contemplates this and the grant of reasonable compensation, I hold that the clause cannot be interfered with. With regard to cattle-pounds, the position is to my mind appreciably different. Act I of 1871 followed and repealed Act III of 1857 *in pari materia* ; yet we find that the modified Patent, approved in 1874 by Exhibit D-13 for the Raipur *zemindars*, allowed them to levy pound-fees under the rules obtaining in the *khalsa* tracts, while it is nowhere suggested that the pounds in the *zemindaris* were established as required by the later Act (section 4). Clearly, therefore, the pounds in Khariar were both established and managed by the *zemindar*. The Act does not expressly provide for confiscating private rights, nor does it lay down that there shall be no pounds save those established by the District Magistrate. In the face of these facts, I am unable to see how the action of the Government in 1874 is explicable except as a recognition of rights vested in the *zemindar*. To say that the *zemindari* is a rugged and remote tract where it would have been difficult for the District Magistrate to make and enforce such arrangements as are contemplated by sections 4, 5 and 6 of the Act, is to furnish a reason for allowing the *zemindar* to take the District Magistrate's place, not to show that this course was the outcome of something other than an admission that the *zemindar* had a right to occupy that position. Nor till 1892 were any steps taken indicative of a denial that the Khariar pounds had been placed permanenly under the *zemindar* and even then the denial took the shape of a clause in a *wajib ul-arz* which the *zemindar* has not at any time accepted as binding upon him. I hold that there was an implied grant to the *zemindar* of the right to manage the pounds established by him and to receive the fees therefrom and that there is nothing in the Cattle Trespass Act to affect that grant. The words 'and pounds' will accordingly be deleted from clause 6 of the *wajib-ul-arz* as prayed.

"*6th, 7th, 8th, 9th and 10th grounds.*—I come next to five grounds of appeal relating to clause 10 of the *wajib-ul-arz* of which the terms are these:—

'All minerals are the property of Government which has a right of free access and egress thereto and therefrom.'

'The lower Court has found on its 17th issue that section 151, Land Revenue Act, gives the minerals to Government, that the *zemindar* had no proprietary rights of any kind till November 1874 when he received his *sanad*, and that the *sanad* cannot be regarded as even giving at its date the mines and minerals. In this Court, the plaintiff relies again upon *Sriram* v. *Hari Narain* (7) and cites also *Megh Lal* v. *Girdhari Singh* (8). In my opinion, section 151, Land Revenue Act, is by itself a sufficient answer to this part of the claim. That the section was intended to operate on records and grants already made is indicated by the fact that in any other view the commencement of its operation would have been long postponed. Settlements in the Central Provinces ran for the most part for 30 years from 1865 or thereabouts and, had it been desired to provide only for the future, executive orders would have amply met the object in view. That the general policy of Government was everywhere to retain the right to mines and minerals appears from the *wajib ul araiz* in Fuller's Collection (1885) and from the Chanda Patent issued in 1868 (Exhibits D-7 and D-8).

"*12th ground.*—The 12th ground of appeal is directed against the following clause (No. 7) in Part II of the *wajib-ul-arz*:—

'The appointment, suspension and removal of village watchmen are governed by the rules framed under section 147-A of the Central Provinces Land Revenue Act.

"With this may be compared the corresponding clause in the *wajib-ul-arz* originally issued with Carey's Settlement which was reproduced *verbatim* in the revised form of November 1892:—

(7) 33 C. 54; 3 C. L. J. 59; 10 C. W. 425.
(8) 4 C.L. J. 208

'The *zemindar* may, subject to appeal to the Deputy Commissioner, dismiss a *kotwar* for continued misconduct or failure to perform his duties, and may appoint a man in his stead. The Deputy Commissioner may call upon the *zemindar* to dismiss a *kotwar* offending in any such way, and if the *zemindar* fails to comply, the power of dismissal is vested in the Deputy Commissoner.'

"The issue in this connection is No. 19 worded thus:—

'No. 19. Is the provision relating to *kotwars* made in Part II, clause 7 of the *wajib-ul arz*, in accordance with the provisions of section 147-A of the Land Revenue Act and the rules made thereunder? Is it binding on the *zemindar*?'

"The lower Court held that these rules, being binding on the plaintiff and framed on the lines of Carey's original *wajib ul-arz*, have properly been entered in the new *wajib-ul-arz*. As to this part of the claim I do not think there is any proof of an express or implied grant empowering the *zemindar* to appoint and dismiss *kotwars* at his pleasure, which is the position he contends for. It is true that Carey's *wajib ul arz* (Exhibit D-19), which appears to have been signed by the plaintiff on the 6th March 1891, was prepared after section 147-A was added to he Land Revenue Act. On the other hand, no rules were framed till August 1891. R. 5 is the one which chiefly prejudices the plaintiff:—

'The appointment of village-watchmen shall rest with the Deputy Commissioner. Provided that in *zemindaris* the *zemindar* may nominate to a vacancy, and the Deputy Commissioner shall appoint the person so nominated if he be qualified in accordance with r. 4.'

"R. 8, moreover, gives a *zemindar* no power of dismissal:—

'A village-watchman may be suspended or removed by the Deputy Commissioner on the report of the *mukaddam* or of his own motion, etc., etc.'

"The plaintiff then is worse off than under the *wajib-ul-arz* of 1891, and unless it can be held that section 147-A of the Land Revenue Act empowers the Government to alter such an arrangement as the one embodied in that document, the plaintiff will, I think, be entitled at least to some amendment of the clause in question. On the whole, I incline to hold that the section does give the necessary power. To take the opposite view would land one in the admission that each land-holder, who till 1891 appointed and dismissed his *kotwars*, would be entitled to continue doing so, the result being a large exception to the scope of what, to be of real use, ought to have a general application. I conclude that the plaintiff must submit to the rules, though they reduce his authority below even what it was from 1891 to 1903.

"*5th ground.*—The 5th ground of appeal attacks the finding on the 16th issue which was in the following terms:—

'Is the provision relating to forest made in Part I, clause 7, and Part II, clause 11, sub-clause (*i*) of the *wajib-ul-arz*, in accordance with the amended patent and the Land Revenue Act and is it binding on the *zemindars*?'

"The lower Court has deleted clause 7 of Part I. Clause 11 (*i*) of Part II has been retained on the ground that it merely re-produces *verbatim* clause 10 (*i*) of Carey's original *wajib-ul-arz*. There appears to have been some confusion in the Judge's mind for he deals with waste as distinguished from forest land, though the issue has no relation to the former. The plaintiff contends that he is not concluded by the agreement of 1891, inasmuch as it was for the period of Carey's Settlement only. I do not see my way to accepting this view of the agreement. By it the plaintiff admitted that he held forest within village-boundaries subject to any rules the Chief Commissioner might make, and the effect of the admission cannot reasonably be restricted, like the period of the assessment, to a limited time in the future.

"*13th ground.*—Clause 15 of Part II is word for word the same as clause 14 in the *wajib ul-arz* of 1891. I agree with the lower Court in holding that the plaintiff cannot go behind what he accepted as binding in the former Settlement. In this instance, to allow him to do so would affect injuriously the rights of others.

"*15th ground.*—I need not separately consider the 15th ground of appeal. It is concerned with the lower Court's findings on issues 23—26 and particularly with the effect of the Scheduled Districts Act upon (*i*) the Land Revenue Act, (*ii*) the Cattle Trespass

Act. I concur generally with the District Judge on these points with which I have also dealt already to some extent in connection with the first three grounds of this appeal.

"The plaintiff's appeal having now been disposed of, I turn to the cross-appeal (No. 61 of 1906). Here the main contention is that the plaintiff must be regarded as bound by the Chanda Patent as modified in 1874 for application to all the Raipur *zemindars*. This is rested on three grounds:—

(*i*) that in paragraph 8 of the plaint in a cognate suit (No. 27 of 1904) brought by the plaintiff, he admitted that Government intended to apply the Chanda Patent to him;

(*ii*) that in paragraphs 9 to 13 of a petition (Exhibit D-20) addressed in 1897 to the Secretary of State for India, the plaintiff indicated his acceptance of the said Patent;

(*iii*) that, as a matter of law, it suffices for the validity of a grant that the Government sh uld determine on its terms, acceptance by the grantee not being essential.

"Paragraph 8 of the plaint in suit No. 27 of 1904 runs thus:—

'That, on the other hand, these (*quasi*-sovereign) rights (to maintain Police and control Excise monopolies) were further ratified and confirmed by the Government of India who issued fresh *sanads* the terms of which were similar to those issued and delivered to the Chanda Chiefs. But it appears, and so the plaintiff has been informed, that the *sanads* issued for the *zemindars* of Chhattisgurh were owing to some accident or mistake never delivered to them. Nevertheless, the Government of India had expressly ordered that the Chanda Patent shall be taken as a general model for continuing the existing arrangements in respect to the non-feudatory *zemindars* of Chhattisgurh.'

"I am clearly of opinion that this paragraph contains no sort of admission which can help the defendant, who, moreover, does not appear to have relied on it in the lower Court. From paragraphs 5—8 of the plaintiff's written reply in suit No. 27 of 1904, the extent of his reliance on the Chanda Patent may be gathered, namely, that it shows the minimum of rights which must be conceded to the plaintiff. As to the effect of the passages in Exhibit D-20, I concur entirely with the lower Court. They describe the terms of the Chanda Patent as wrongly held applicable to Khariar, but use them as an argument to prove that in 1874 the plaintiff was treated as entitled to manage his own Police and administer Excise in his *zemindari*. The position taken was this—as ruler of Khariar the plaintiff's ancestor enjoyed a position superior to that of the *zemindars* of Chanda, yet they were allowed to maintain Police and administer Excise: *a fortiori* those rights must have been and were recognized as vested in the plaintiff's ancestor. That the terms of the Chanda Patent were not communicated to the plaintiff in 1874 as attaching to the *sanad* (Exhibit P.2) given him in that year, seems perfectly clear. By 1897 his position had been minutely examined, the inquiry having begun at least as far back as 1891. In any view, then, of the language used in the petition, it would be unsafe to use it as proving acceptance of the Patent which the defendant cannot prove to have been delivered. Then as to the point of law, I am not shown any authority for the position that a grantee from the Crown can be bound by conditions which were never communicated to him. In *In re Antaji* (9), the following is quoted from a judgment of Westropp, C. J:—

'In respect to Crown grants upon a question of the meaning of words, the same rules of common sense and justice must apply whether the subject-matter of construction be a grant from the Crown or from a subject, and it is always a question of intention, to be collected from the language used with reference to the surrounding circumstances.

"It is—I venture to think—a requirement of the same rules of common sense and justice that a person should not be bound by conditions which have never been brought to his notice. Under section 122, Transfer of Property Act, acceptance by or on behalf of the donee is necessary to the validity of a gift, and in *Sheo Singh* v. *Raghubans Kunwar* (10), their Lordships of the Privy Council appear to have assumed (at page 650 of the report) that a *sanad* to be binding must be accepted.

"I hold then that the plaintiff is not bound by any term of the Chanda Patent. What he got in 1874 was a recognition or conferral—for present purposes it matters not which—

(9) 18 B. 670.

(10) 27 A. 634; 15 M. L. J. 352; 9 C. W. N. 1009; 2 C. L. J. 194; 8 O. C. 317.

of proprietary right. The devolution of that right would—in the absence of stipulation to the contrary—be governed by the ordinary law and the Government cannot legally alter that without express legislation If the Government could alter the terms of its grant at pleasure, it could also revoke the grant likewise. To a gift divesting a private donor of all his interest in certain proprety, a condition cannot afterwards be attached: *Husain Khan* v. *Nateri Srinivasa* (11), *Ram Sarup* v. *Bela* (12). And Government cannot, by issuing a subsequent proclamation, resume a grant made by a previous proclamation, inasmuch as it cannot, any more than a private person, without the consent of the donee, revoke a gift actually made: *Collector of Ratnagiri* v. *Vyankatrav* (13). It follows that the lower Court has rightly deleted clause 3 from Part I of the *wajib-ul-arz*: to depose a *zemindar* would obviously be to derogate from the original grant to his predecessor.

"*4th ground*—It remains to deal with a contention that the lower Court was wrong in deleting clause 7 of Part I which runs thus:—

'The Forest *mahals* shall be managed in accordance with the rules which may from time to time be framed by the Chief Commissoner under sections 124-A of the Land Revenue Act.'

"In dealing with this, the District Judge entirely ignored clause 10 (*i*) of Carey's original *wajib-ul-arz*, wherein it is expressly stipulated that the forest lands in the estate will be managed in accordance with any rules which may be made by the Chief Commissioner. I hold that the plaintiff cannot resile from this agreement merely because the term of Carey's Settlement has expired. The direction to delete this clause will, therefore, be reversed.

"The net result of the two appeals is that the lower Court's decree will be modified by—

(*i*) adding a direction that the words 'and pounds' be deleted from clause 6, Part I of the *wajib-ul-arz*;

(*ii*) substituting for the words and figures 'clauses 3 and 7 of Part I' the words and figures 'clause 3 of Part I.'

(11) 6 M. H. C. R. 356.
(12) 6 A. 313; 11 I. A. 44.
(13) 8 B. H. C. R. A. C. J. I (1871).

"The success of the plaintiff being insignificant I direct that he pay the entire costs of his own appeal. In the defendant's appeal, success has been equally divided: each side will bear half the total costs. In the lower Court, each party will bear his own costs as already ordered."

Sir *R. Finlay*, *K. C.*, Mr. *L. De Gruyther*, *K. C.*, and Dr. *Gour*, for the Plaintiffs-Appellants and Respondents.

Sir *E. Richards*, *K. C.*, and Mr. *Dunne*, for the Defendant, Secretary of State, Appellant and Respondent.

JUDGMENT.

LORD MACNAGHTEN.—These are consolidated appeals and cross-appeals from judgments and decrees of the Judicial Commissioner of the Central Provinces in part affirming, in part varying, and in part reversing judgments and decrees of the District Judge of Raipur.

The *zemindar* of Khariar in the district of Raipur, and other *zemindars* in that district, proprietors of estates varying in extent and importance, have sued the Secretary of State for India in Council, complaining that they have been illegally deprived of rights to which they were indefeasibly entitled from time immemorial, and that by the requirement of Government officials, they have been compelled to execute *wajib-ul-araiz* or administration papers containing provisions in derogation of their undoubted privileges. Their contention is that the provisions of which they complain are illegal and ought to be expunged or annulled, and that the rights of which, as they allege, they have been improperly deprived, ought to be restored by the Civil Court.

It was agreed between the parties to this group of litigation that decisions in the suit brought by the *zemindar* of Khariar should govern all the rest of the cases.

The status of the *zemindar* of Khariar and the plaintiffs in the other suits is simply the status of an ordinary British subject. That matter was determined by the Government in 1864 after an exhaustive inquiry into the position of the petty Chiefs of the Central Provinces. A few were recognised as feudatories having some of the attributes of sovereignty. The rest were classed as non-feudatories and declared to be ordinary British subjects.

Before these petty Chiefs came under British rule, they held their possessions at the will and pleasure of the ruler for the time being in power. When their country became British territory, whether by conquest and cession, as in the case of Khariar and in the case of Bindra Nawagurh in Chhattisgurh, or by lapse as in the case of the other *zemindaris* in Chhattisgurh, they were left much in the position they occupied before. The district was wild and for the most part uncultivated, thinly populated, and very difficult of access. They paid to the paramount Government the tribute they had been in the habit of paying to their native rulers, reduced in some cases on account of the poverty of the district. They managed their estates as best they could, binding themselves to use rightly the judicial and administrative powers entrusted to them or left in their hands as a matter of convenience or economy of administration. In no case were they recognised as entitled to independent power or as possessing any sovereign rights.

In 1867, the Government determined to confer upon the non-feudatory *zemindars* in an adjoining district known as the Chanda District proprietary rights in the soil on certain terms and conditions which were embodied in a document referred to in these proceedings as the Chanda Patent. It was the intention of the Government at that time that *sanads* should be granted to other non-feudatory *zemindars* in the Central Provinces, including the Raipur *zemindars*, framed on the model of the Chanda Patent, with such variations as the circumstances of the case might require. However, it seems that when *sanads* were issued to the Raipur *zemindars* in the year 1874, the matter was overlooked or forgotten, and proprietary rights in the soil were vested in them, expressed in the *sanad* to be "subject to the payment of such land revenue and other cesses as may, from time to time, be assessed according to the terms of settlement and to the conditions specified in the administration paper and other settlement records." In point of fact, these *sanads* were not accompanied by any administration papers or any other records. This mistake or omission has given rise to much argument. The Government contended that the plaintiffs had recognised and were bound by the terms of the Chanda Patent. The plaintiffs, while relying on the terms of the Chanda Patent which were to their advantage, maintained that the terms of the Chanda Patent in their entirety, and so far as they tended to their disadvantage, were not binding upon them. In the result, both Courts below have held that the Chanda Patent is not to be treated as embodied in or affecting the *sanads* granted to the Raipur *zemindars*. In this conclusion their Lordships agree. For the purposes of these cases, they think that the Chanda Patent may be disregarded.

In 1888, the Government decided that Police administration in the non-feudatory *zemindaris* in the Chhattisgurh division, including those belonging to the plaintiffs other than the *zemindars* of Khariar and Bindra Nawagurh, should be withdrawn from the *zemindars*, and that an addition should be made to the *takolis* or revenue payable by the *zemindars* when thus relieved of Police duties.

In March 1891, the *zemindar* of Khariar accepted a fresh assessment of the *takoli* or revenue payable by him to Government under section 54 of the Central Provinces Land Revenue Act (XVIII of 1881), for 11 years, from the 1st of July 1890 to the 30th of June 1901, or until a fresh settlement should be made. He then agreed to be bound by all the conditions laid down in the *wajib-ul-arz* of his *zemindari* and duly executed that document.

In September 1892, the Police administration of the *zemindaris* of Khariar and Bindra Nawagurh was assumed by the Government, and on that account an addition was made to the *takolis* of the two *zemindaris*.

In November 1892, a new form of *wajib-ul-arz* applicable to the case of the non-feudatory *zemindars* was approved by the Government. It was not, however, brought into use until some years later.

In 1893, the Chief Commissioner, with the sanction of the Government, determined to assume the administration of Excise. At the same time, it was proposed to pay compensation for loss of income and for the present to farm out to the *zemindars* the Excise Administration, the *takolis* to run with their Land Settlements.

Some of the *zemindars* accepted compensation and took farms of the Excise. Some, including the *zemindar* of Khariar,

and others of the plaintiffs refused both offers.

In May 1903, the Chief Commissioner of the Central Provinces decided to assume the administration of cattle-pounds in the case of the non-feudatory *zemindars* in the Chhattisgurh Division, including the plaintiffs, paying compensation for the withdrawal of this source of revenue.

In 1903, in connection with the new assessment, the non-feudatory *zemindars* in the Chattisgurh Division, including the plaintiffs, were required to execute *wajib-ul-arz* in the form sanctioned by Government in November 1892 with some further amendments.

The proposed *wajib-ul-arz* was executed by the *zemindar* of Khariar and the other plaintiffs, in compliance with the requirement of the Government. It was, however, executed under protest. It bears date the 6th of August 1903. After an ineffectual appeal to Government, this litigation was commenced.

The principal ground of complaint relates to the withdrawal of Police and Excise administration. That head of complaint in the case of the *zemindar* of Khariar is the subject of Suit No. 27 of 1904.

The withdrawal of cattle-pounds is the subject of complaint in suit No. 31 of 1905.

The clauses in the *wajib ul-arz* of the 6th of August 1903, to which objection is taken, are the subject of Suit No. 6 of 1904. One of those clauses deals with cattle-pounds.

Suits No. 6 of 1904 and No. 27 of 1 04 were heard together. It was agreed that the decision in those suits should govern the decision in Suit No. 31 of 1905.

On the 6th of August 1906, the District Judge delivered separate judgments and made separate decrees in the three suits.

In Suit No. 27 of 1904, the District Judge held that the Raipur *zemindars* in exercising Police and Excise functions were not acting as of right, but were so acting either by sufferance or by delegation, and that the resumption of those functions by the Government was a thing done by the Government in exercise of its sovereign powers, and consequently that the suit was not maintainable.

On appeal, the Judicial Commissioner held that powers of administration in respect of Police and Excise must be deemed to have been granted to the plaintiff, and that the plaintiff was entitled to maintain his own Police and administer Excise in his *zemindari*.

On this question, their Lordships agree with the view of the District Judge.

The District Judge dismissed Suit No. 31 of 1905. The Judicial Commissioner reversed his judgment and made a decree in favour of the plaintiff.

In Suit No. 6 of 1904, which relates to the *wajib-ul-arz* of the 6th of August 1903, the following are the clauses objected to:—

In Part I,—

"3. Removal of *zemindar* and forfeiture of privileges.

"6. Resumption and management of ferries and pounds.

"7. Provision that forest *mahals* shall be managed in accordance with rules framed by the Chief Commissioner under section 124A, Land Revenue Act.

"10. Declaration that all minerals are the property of Government".

In Part II.

"2. Discontinuance of *nazrana* on grant or renewal of leases.

"7. Appointment, suspension, and removal of *kotwars* (village watchmen) to be governed by rules framed under section 147A, Land Revenue Act.

"11.—(1). Forest land not included in forest *mahals* to be managed in accordance with any rules made by the Chief Commissioner".

"15. Hides and carcases of dead cattle to be the property of the owners of the cattle."

The District Judge was in favour of the Government on all these questions except Part I, No. 3 and No. 7, and Part II, No. 2.

On appeal to the Judicial Commissioner, the decree was varied by adding a direction that the words "and pounds" be deleted from Clause 6, Part I., and by substituting the words and figures "Clause 3 of Part I," for the words and figures "Clauses 3 and 7 of Part I."

On appeal to this Board the objection to Part II, No. 15, was not pressed.

The case was very fully and ably argued;

but, after carefully considering the arguments adduced, the *wajib-ul-arz* of 1892 and the Acts of the Legislature to which attention was called, their Lordships are of opinion that there is no ground for disturbing the judgment of the Judicial Commissioner in Suit No. 6 of 1904 except as regards cattle-pounds.

Their Lordships are disposed to think that the maintenance of private cattle-pounds is incompatible with the provisions of the Cattle Trespass Act, and they are of opinion that, under the circumstances, the establishment and maintenance of cattle pounds, under the superintendence and control of Government officials empowered to obtain the assistance of the Police when required, may be considered essential for the maintenance of law and order and the peace and good Government of the country, and, therefore, an act of the Executive Government with which it is not competent for the Civil Court to interfere.

Their Lordships will humbly advise His Majesty that in Suits No. 27 of 1904 and No. 31 of 1905, the decree of the Judical Commissioner should be discharged, and the decree of the District Judge restored, but without costs; that in Suit No. 6 of 1904, the decree of the Judicial Commissioner should be varied by omitting the words "and pounds."

Their Lordships do not think fit to make any order as to costs.

Solicitors for the Appellants: Messrs. *T. L. Wilson and Co.*

Solicitor for the Respondent: *The Solicitor, India Office.*

(s. c. 9 A. L. J. 152.)

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 468 OF 1911.

January 6, 1912.

Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.

AHMAD SAID KHAN—PLAINTIFF—APPELLANT

versus

MASI-ULLAH KHAN—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 166, 201—Lessee recorded as such in revenue papers—Right to sue or profits—Presumption.

A lessee of a proprietary right, who continues to be recorded as such in the revenue papers even after the expiry of his lease, is entitled to maintain a suit for profits under Chapter XI of the Agra Tenancy Act. Under section 201 of the Act the Court is bound to presume that he had such right.

Durga Prashad v. *Hazari Singh*, 8 A. L. J. 1025; 33 A. 799; 11 Ind. Cas. 116, referred to.

Second appeal from a decree of the Subordinate Judge of Aligrah.

Mr. *Muhammed Ishaq* (with him Dr. *Satish Chandra Banerji*), for the Appellant.

Mr. *Rahamt ullah* (for Mr. *Ghulam Mujtaba*), for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the appellant for an 8 annas share of the profits of a *mahal* of which the defendant-respondent is the *lambardar*. The owner of a 6 annas share mortgaged it to one Muhammad Yusuf Khan, who sub-mortgaged it to Zohra Begam who was herself the owner of a 2 annas share in the *mahal*. Zohra Begam gave a lease of the whole 8-annas share to the appellant, and it is on the strength of that lease that the appellant in the present case has claimed a share of profits as against the *lambardar*. One of the defences to the suit was that the lease was not in force during 2 of the 3 years in question. It appears that the mortgage was redeemed in August 1906, that is to say, at the end of 1313 *Fasli*. It is contended that the lease must have come to an end when the mortgage was redeemed. The lower Appellate Court accepted that argument and gave the appellant a decree for only a 2-annas share of the profits for the years 1314 and 1315 *Faslis*. In second appeal, it is contended that this decision is erroneous, and that the case is governed by section 201 of the Tenancy Act. It has been found by the lower Appellate Court, that notwithstanding the redemption of the mortgage, the appellant continued to be recorded as lessee of the whole 8-annas share. The suit is brought under Chapter XI of the Tenancy Act. The appellant is a co sharer within the meaning of that Chapter, for it is provided by section 166 of the Act that the word "co-sharer" includes the heirs, legal representatives, executors, administrators and assigns of a co-sharer. It is as an assignee of a co-sharer that the appellant has brought this suit. For

the time being, he is to be treated as proprietor of a share as between himself and other sharers for the purpose of the settlement of the profits. It seems to me that he is a person who, within the meaning of section 201 of the Act, is recorded as having a proprietary right entitling him to institute this suit. Under sub-section (3) of that section, the Court is bound to presume that the appellant has a right entitling him to institute this suit. It was so held by the Full Bench of this Court in *Durga Prishad* v. *Hazari Singh* (1). The appellant is entitled to an 8-annas share of the profits for the years 1314 and 1315 *Faslis*, and it is not now disputed that he is entitled to an 8-annas share of the profits for the year 1313 *Fasli*.

The next point taken by the appellant is that the lower Appellate Court ought to have allowed him interest on the profits up to the date of the suit at the rate of 12 per cent. per annum and not at the rate of 10 per cent. as it did. In the circumstances of the case, we think that the appellant has no ground for complaint in respect of the rate of interest allowed to him.

The 3rd and last point taken by the appellant is that the lower Appellate Court is wrong in calculating the profits on 90 per cent. of the recorded rental in the years 1313 and 1314 *Faslis* and is wrong in calculating profits for 1315 *Fasli* on the actual collections. The learned District Judge has given his reasons for declining to calculate profits on more than 90 per cent. of the recorded rental for the years 1313 and 1314 *Faslis*, and we need only say that we see no reason to differ from him. The year 1315 *Fasli* was a very bad year. The collections were Rs. 2,077-0-0, out of the recorded rental of Rs. 3,305-0-0. It is clear that in such a year as that, the whole of the rental could not have been recovered, and we are not prepared to say that the learned Judge was wrong in calculating the profits on the actual collections.

The result is, that we allow the appeal and, modifying the decrees of the Courts below, give the appellant a decree for Rs. 2,664-13-8, with interest, from the date of the institution of the suit to that of realization, at the rate of 6 per cent. per annum. The parties will pay and receive proportionate costs in all three Courts. Interest will not be calculated upon costs.

Decree varied.

(1) 8 A. L. J. 1025; 33 A. 799; 11 Ind. Cas. 116.

[s. c. 16 C. W. N. 338; 11 M. L. T. 145; (1912) 1 M. W. N. 183; 9 A. L. J. 215; 15 C. L. J. 270.]

PRIVY COUNCIL.

APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.

Janurary 16, 1912.

Present:—Lord Macnaghten, Lord Robson, Sir John Edge and Mr. Ameer Ali.

MATA DIN—DEFENDANT—APPELLANT

versus

Sheikh AHMAD ALI—PLAINTIFF—RESPONDENT.

Muhammadan Law—Guardian of minor—Brother, whether guardian—Unauthorised guardian—De facto *guardian—Power to sell minor's property—Limitation Act (XV of* 1877), *Sch II, Art.* 44, 144—*Suit to set aside sale by guardian—Sale by unauthorised persons.*

According to Muhammadan Law, in the absence of duly appointed testamentary guardians, the care of a minor's property would devolve first on the father and his executor, next on the paternal grandfather and his executor, and failing these, the right of nominating a guardian would vest in the ruling power and its administration. The brother of a minor has no right whatever to act except under the authority of an appointment by the Court.

The situation of an unauthorised guardian is not bettered by describing him as a "*de facto*" guardian. He may, by his *de facto* guardianship, assume important responsibilites in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it.

Article 44 of the Limitation Act of 1877 prescribes a period of 3 years within which a ward who has attained majority may set aside a sale made by his guardian, the time running from the date of the ward's majority. But this provision has no application to a case where the sale is effected, not by a guardian, but by a wholly unauthorised person. In such a case, a suit for possession of the property by the ward would be governed by Article 144.

Appeal from the decree of the Judicial Commissioner of Oudh, dated August 7th, 1907, affirming that of the District Judge of Lucknow, dated March 9th, 1907, which affirmed that of the Sub-Judge of Lucknow, dated May 28th, 1906.

Messrs. *M. K. Brown* and *A. P. Sen*, for the Appellant.

Messrs. *L. De Gruyther, K. C.*, and *B. Dube*, for the Respondent.

JUDGMENT.

LORD ROBSON.—In this case, the appellant has been unsuccessful, first, before the Subordinate Judge at Lucknow, next, before the District Judge of Lucknow, and, lastly, before the Court of the Judicial Commissioner of Oudh. The Court of the Judicial Commissioner granted a certificate for an appeal to their Lordships' Board on the ground that the case raised a question of law as to whether the transfer of a Mahomedan minor's property by a person who was not his natural guardian should be upheld, if made to discharge a debt payable by the minor.

The fact of the case are these:—

Sheikh Ahmad Ali, the respondent, was the grandson of Amir Haider, who, in his life-time, was possessed of two villages, Kabirpur and Karora. Amir Haider mortgaged a 15-annas share in Kabirpur to the defendant-appellant on the 2nd December 1885, and, on the 7th August 1886, he executed another mortgage in favour of the same creditor of a 4-annas share in Karora. The mortgages provided that the mortgagee should take (and he duly took) immediate possession of the mortgaged property for the purpose of realizing the agreed interest out of the annual profits, making over the surplus, if any, to the mortgagor. The terms of the said mortgages were for ten and seven years respectively.

Amir Haider died on the 12th August 1887, leaving a Will dated the 7th December 1886, by which he bequeathed his entire estate to his four grandsons equally. The plaintiff was about 12 years old when his grandfather died. Afterwards, on the 15th June 1889, the three elder grandsons on their own behalf, and one of them, Ashraf Husain, purporting to act also as the guardian of the plaintiff, sold the village at Kabirpur to the appellant in consideration of the discharge by him of the debts secured thereon and on Karora, together with certain other smaller sums, making up a total of Rs. 18,500. The effect of this sale, if held good, was that the plaintiff lost his interest altogether in the village of Kabirpur, which was the large and more important property, while the smaller village Karora was thenceforth free of the mortgage.

The plaintiff, on attaining his majority in 1892 or 1893, made no attempt to impeach this transaction, though he knew of it, but in September 1905, he tendered to the defendant the amount of mortgage-money necessary to redeem his share of the mortgage property, and the defendant refusing to accept it, he brought this action for redemption.

He contends that the sale-deed of the 15th June 1889 is void as against him, on the grounds that his brothers had no authority under the grandfather's Will to act as executors or to sell his share, and that Ashraf Husain, who purported to represent him in that transaction as his guardian, was not entitled so to act. The appellant contends that the four grandsons were entitled to act as executors under Amir Haider's Will, but their Lordships agree with the Courts below in finding that there is nothing in the Will justifying that view.

The testator left the whole of his property (with certain unimportant exceptions) to his four grandsons in equal shares, and subject to equal obligations in respect of his debts and expenses, but he did not expressly appoint any executors of his Will or guardians of his minor grandchildren. It was argued that an express appointment was not necessary if the testator had clearly shown by his Will an intention to entrust its administration to particular individuals, but on a fair construction of this Will, no such intention can be gathered from it. He left his property to his grandsons so that each share thereof vested at once in the devisee, subject to the obligations attaching thereto, and there appears to be no necessity for any act of an executor to complete the operation of the Will. No doubt, the testator contemplated a partition by the grandsons themselves of the property devised to them, and in that case it would be necessary for his grandson, if still an infant, to have a guardian, but there is nothing whatever to show that he intended all or any one of the brothers to act in that capacity. So far as his intention is concerned, it may well have been that if, and when, the necessity for a guardian arose, the selection should be made by the Court.

The family were Muhammadans and were governed by the Muhammadan Law relating to guardianship. According to that law, in the absence of duly appointed testamentary guardians, the care of Ahmad Ali's property would devolve first on the father and his executor, next on the paternal grandfather and his executor, and failing these, the right of nomination of a guardian

would "rest in the ruling power and its administration." (Macnaghten's "Principles of Muhammadan Law," 5th Ed., p. 304). The brothers had, therefore, no right whatever to act except under the authority of an appointment by the Court. Both they and the appellant seem to have had that fact in their minds when they executed the deed of the 15th June 1889 effecting the sale of Ahmad Ali's share in the land, for they stipulated that if Ahmad Ali at any time brought a claim on the ground of minority, and any dispute thereby arose in respect of Mata Din's possession, the three elder brothers should be answerable for the same together with costs.

It is urged on behalf of the appellant that the elder brothers were *de facto* guardians of the respondent, and as such were entitled to sell his property, provided that the sale was in order to pay his debts and was, therefore, necessary in his interest. It is difficult to see how the situation of an unauthorised guardian is bettered by describing him as a "*de facto*" guardian. He may, by his *de facto* guardianship, assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it.

There has been much argument in this case in the Courts below, and before their Lordships, as to whether, according to Muhammadan Law, a sale by a *de facto* guardian, if made for necessity, or for the payment of an ancestral debt affecting the minor's property, and if beneficial to the minor, is altogether void or merely voidable. It is not necessary to decide that question in this case. To begin with, the appellant has not succeeded in showing that the disputed sale of 1889, although made for the payment of an ancestral debt, was made for necessity or was beneficial to the minor. On the contrary, the Courts below have all found on the evidence that it was unnecessary and cannot be said to have been beneficial so far as Ahmad Ali was concerned.

It is next found as a fact, (and their Lordships see no sufficient reason to find otherwise), that the plaintiff on coming of age never acquiesced in the transaction which he now seeks to impeach, and that there was nothing in his conduct on which the defendant's plea of estoppel could be justified against him. Unless, therefore, the plaintiff's remedy is barred by the Indian Limitation Act IX of 1908, he is now entitled to the relief prayed for, as modified by the judgment of the Court of the Judicial Commissioner.

As to the plea of limitation, the appellant-defendant placed reliance on Articles 44 and 144 of the Indian Limitation Act, 1877.

Article 44 prescribes a period of 3 years within which a ward who has attained majority may set aside a sale made by his guardian, the time running from the date of the ward's majority. This provision has no application to the present case, for the sale here was effected, not by a guardian, but by a wholly unauthorised person.

Article 144 deals with immoveable property not otherwise specially provided for by the Act, and prescribes a period of 12 years from the time when the possession of the defendant becomes adverse to the plaintiff. In this case, the appellant was entitled under his mortgage to full possession of Kabirpur and receipt of its rents and profits for 10 years from the 2nd December 1885. The respondent came of age on some date in 1892 or 1893. He was then certainly entitled to treat (and by his subsequent tender of the mortgage-money it is shown that he has in fact treated) the mortgage as subsisting so far as he was concerned. Under these circumstances, the possession by Mata Din of Kabirpur did not become adverse to the respondent until the 2nd December 1895, and as this action was begun in 1905, it was well within the period of limitation.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondent: Messrs. *Barrow, Rogers & Nevill.*

TAJAMMAL HUSAIN *v.* RAUNAK ALI.

(s. c. 15 O. C. 25.)

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 399 OF 1910.

October 11, 1911.

Present:—Mr. Evans, J. C.

TAJAMMAL HUSAIN—PLAINTIFF—APPELLANT

versus

RAUNAK ALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Construction of document—Sale of share, excluding sir bila lagan, *construction of—Covenant by vendor to pay rent, if subsequently assessed—Contract to indemnify—Limitation Act (IX of* 1908), *Sch. I, Art.* 83.

Where a person made a sale of his two-annas share "*ba istisnae sir* 30 *bigha kham nambarhai zail bila lagan*" and it was admitted that the purchaser paid the revenue for the whole two-annas share: *Held*, that the reservation of rent excluded the notion that the vendor remained proprietor of the *sir* plots and the stipulation was merely a contract between the parties that the vendor was to remain in possession of the land free of rent.

Where the vendor in a sale-deed in respect of certain lands held free of rent makes a covenant agreeing to pay rent in case any rent is subsequently assessed on it and decreed against the vendee, a claim by the vendee to recover the rent assessed on the land and decreed against him is a claim upon a contract to indemnify and is governed by Article 83, Schedule I, of Act IX of 1908.

Appeal against the decree of the District Judge, Fyzabad, dated 12th July 1910, upholding that of the Subordinate Judge, Barabanki, dated 20 h July 1908.

Mr. *Ishwari Prasad*, for the Appellant.

Mr. *J. N. Chak*, for the Respondent No. 1.

JUDGMENT.—The appellant instituted this suit on 11th March 1908, against five persons. It is convenient to consider his claim in two portions as it is in the alternative. The first claim was against Raunak Ali, defendant No. 1 only, in which he asked for a declaratory decree to the effect that he was the proprietor and not an under-proprietor of certain specified land in the village Nehrol in the Barabanki district. His claim against the remaining defendants was that they should be directed to make up the deficiency in land bearing annual rent of Rs. 15-12-0 out of the land held by them in that village or other villages. The two claims are practically separate although connected with the same series of transactions.

I deal first with the claim against Raunak Ali. The facts in connection with this part of the claim may be shortly stated. One Ghulam Nabi was the owner of a four-annas share in this village out of which he sold two annas to Daim Ali by a document registered on the 10th November 1877 (Exhibit 1), reserving to himself certain plots of land 10 *bighas* 18 *biswas* in area (*pukka*). The actual words under which this reservation is secured are as below: *Ba istisnae sir* 30 *bigha kham nambarhai zail bila lagan.* It is admitted that under this document the vendee Daim Ali would be liable for revenue of the whole of the two-annas share conveyed to him. After this on the 2nd March 1883, Khadim Ali, son of Daim Ali, sold the above two-annas share to the defendant Raunak Ali and in this document Khadim Ali describes himself as the proprietor of the two-annas with the exception of certain *sir* lands in the following terms:—

"*Ba istisnae 30 bigha arazi kham nambarhai zail jo* Mir Daim Ali *muris man-muqir ne ba haqq* Ghulam Nabi *biya bila lagan bar waqt kharidari hissa mazkur waqe panchwin mah Satambar san 1877 Iswi hasb tahrir bai-nama musadika registri waguzar kar di hai*" (Exhibit No. 2).

After this, certain transactions took place in consequence of a sale-deed of the above-mentioned 10 *bighas* 18 *biswas* by the heirs of Ghulam Nabi on the 2nd March 1883, the result of which was that the present appellant acquired whatever title the heirs of Ghulam Nabi could convey under a document, dated 25th January 1898. Sometime in 1897, the Settlement Officer assessed rent upon this land and Raunak Ali demanded rent from the appellant and obtained a decree from the District Judge on the 12th April 1901. This decision was confirmed by this Court under order dated 13th March 1902. The judgment was delivered by Mr. R. Chamier and in his judgment he states that, according to the facts before him, the Settlement Officer assessed the rent according to law after due notice to all concerned and there was no contract binding upon Raunak Ali under which the present appellant may be exempted from his liability to pay rent for the land. The case now set up by the appellant is that the documents referred to above, under which the two-annas share held by Ghulam Nabi passed to Raunak Ali, show that this 10 *bighas* 18 *biswas* was never sold at all and, therefore, he is full proprietor of the same, his title being derived

from the heirs of Ghulam Nabi and he is entitled to a declaration to this effect together with a refund of the rent which was only decreed against him by the Revenue Court. Pleader for Raunak Ali, respondent, has urged several legal pleas in answer to this claim. One is that the suit is barred by limitation, having been instituted more than six years after the date on which rent was assessed by the Settlement Officer, and there are other minor pleas which it is not necessary to notice. I do not propose to discuss these pleas because I am satisfied that on the merits, the appellant is not entitled to any declaration that he is full proprietor of this land. The sale deed of 1877, under which Ghulam Nabi sold a two-annas share to Daim Ali, contains a stipulation which is very common in these Provinces. A vendor frequently wishes to reserve a certain portion of property sold for maintenance and in some cases the land reserved bears a rent nominal or otherwise and in some cases the land reserved bears no rent as in this case. The land was described in the sale deed executed by Ghulam Nabi as *arazi bila lagan*. I have been referred on behalf of the respondent to a decision of this Court, *Jadunandan Prasad* v. *Brij Bhukan* (1), where all the rulings material to transactions of this kind are discussed. In the case then before the Court, the vendor reserved certain plots of land. A portion was to carry rent at the rate of one rupee a *bigha* and this portion was described as *bila lagan*. Upon a consideration of the provisions of the deed in this case, Mr. Chamier held that, although the vendor is described as selling the whole share except certain plots, he was satisfied that the reservation of rent excludes the notion that the vendor remained proprietor of the plots. In discussing other cases of this kind, which have been decided by this Court, Mr. Chamier remarked that the decision in all these cases depended upon the special terms of the deed before the Court and I have only to decide whether in this case Ghulam Nabi ever intended not to sell proprietary title in this 10 *bighas* 18 *biswas*. It is true that the agreement arrived at was that the vendor should pay no rent for the excepted plots and in the case decided in *Jadunandan Prasad* v. *Brij Bhukan* (1), there was a rent reserved for a portion of some of the plots left in possesson of the vendor. But to my mind the fact that these plots are described as *bila lagan* clearly indicates that it was not the intention of Ghulam Nabi to carve out for himself a separate property exclusive of the two-annas share which he then sold to Daim Ali. If he had intended to do this, it would have been clearly stated that the proprietary title in 10 *bighas*, 18 *biswas* specified in the deed was not conveyed to the purchaser. This was not done. It was merely a contract between the parties to the effect that Ghulam Nabi was to remain in possession of this land free of rent and as it is admitted that the purchaser paid the revenue of the whole two-annas share, it follows that he remained the proprietor of these plots subject to the rights of Ghulam Nabi to hold this land free of rent. A similar view of the law has been taken by the Board of Revenue in *M. Govind Prasad* v. *Suraj Bakhsh* (2). With respect to this part of the case, I hold that the decision of the Court below was correct and the appellant is not entitled to any relief against the respondent Raunak Ali.

I have now to deal with the second part of the appellant's claim. This claim is directed against three sets of defendants: *first*, defendants Nos. 2 and 3, heirs of Ghulam Nabi; *secondly*, defendant No. 4 Zamin Ali; and *thirdly*, *Musammat* Sarfaraz-un-nissa, wife of Zamin Ali (defendant No. 4). This claim arises under the following circumstances:—I have already stated in the earlier part of my judgment that 10 *bighas* 18 *biswas* of *sir* land, which are referred to in the deed of sale, dated 10th November 1877, came into the possession of the present appellant under a document dated 25th January 1898. It is necessary to explain how this happened. On the 16th July 1896, defendants Nos. 2 and 3, the heirs of Ghulam Nabi, transferred whatever title they had in this land to one Madho and others. Zamin Ali instituted a suit for pre-emption with respect to this land and obtained a decree in 1897. On the 25th January 1898, he in his turn conveyed this land to the appellant. In the deed of sale executed in favour of Madho on the 16th July 1896, certain covenants were inserted. The vendors agreed to indemnify the vendees if certain events happened. They agreed, *first*, that if any rent was realised from the vendee

(1) 5 O. C. 70.

(2) Selected Decision No. 4 of 1903.

on account of the property sold they would pay the rent; and *secondly*, if at any time the property sold went out of the vendee's possession, they would make up the deficiency from their own *zemindari* property, and if they failed to carry out this agreement, the vendee could realise the rent from the share still in their possession. After this, when Zamin Ali sold this land to the present appellant, he made a similar covenant but it was not clearly worded. He agreed, *first*, that if, during the continuance of the vendee's possession, any claim arose or any disturbance was created, he would pay any costs and damages incurred in defending the claim; *secondly*, he agreed that if at any time the land sold went out of the vendee's possession, he would make good the deficiency from his own property. There was a subsequent document executed by Zamin Ali, dated 14th August 1906, in favour of the appellant. It has been found that this document was executed without consideration and it is not relied upon in the present appeal. The apppellant's claim now is this:—He says he has been compelled to pay rent for this land under a decree of the District Judge, dated 12th April 1901, and this decision was confirmed by this Court on 13th March 1902. Therefore, under the covenants recited above, the heirs of Ghulam Nabi and Zamin Ali are jointly and severally liable to make good any loss he has sustained. The amount of this loss he has fixed at Rs. 41-14 0 in his plaint. He also asks that the defendants be directed to make up the deficiency in the land whatever that may be and that they should place him in possession of land of the annual value of Rs. 15-12-0, this apparently being the annual rent he was compelled to pay under this Court's order, dated 13th March 1902.

He also has impleaded the wife of Zamin Ali because he says Zamin Ali fraudulently conveyed all his property to her under a deed dated 24th August 1906. It is perfectly clear to me that the appellant cannot compel any of the defendants to give him any other land in lieu of the 10 *bighas* 18 *biswas* which he purchased on the 25th January 1898. It is conceded that he is still in possession of this land although he has been compelled to pay rent for it. The covenant that he should be placed in possession of other land could only be enforced if any portion of the land sold went out of his possession and it is conceded this event has not occurred. Therefore, there remains only the claim for damages. The first covenant, dated the 16th July 1896, made by the first vendors, heirs of Ghulam Nabi, in favour of Madho whose place was subsequently taken by Zamin Ali, is certainly a covenant agreeing to pay rent if any rent is subsequently assessed on the lands, but the sale-deed dated 25th January 1898, is not so clear. It simply states that if any claim arises, or if any disturbance is created, the vendor would be responsible for costs and damages. No doubt, it is true that some kind of disturbance has arisen in consequence of which the appellant has been put to some expense and has been compelled to pay rent. It may be that the payment of rent by him under order of the Court may possibly be construed as costs and damages within the meaning of this covenant, but in this view of the case, it appears to me that the claim is *prima facie* barred by limitation. The claim is, in my judgment, a claim upon a contract to indemnify. Under Article 83, Schedule I, Act IX of 1908, limitation is three years running from the date when the plaintiff is actually damnified. The decision of the Judge is dated 12th April 1901. This decision was confirmed by this Court on the 13th March 1902. As that decision merely declared that the decision of the District Judge was a correct decision it follows that limitation should run from the 12th April 1901. But whether the limitation runs from the 12th April 1901, or from the 13th March 1902, this suit appears to be barred as it was instituted in the Court below on the 11th March 1908. My decision, therefore, on the whole case is that the appellant is not entitled to any relief as against any of the defendants. The appeal, therefore, fails and is dismissed with costs.

Raunak Ali, defendant No. 1, and Zamin Ali, defendant No. 4, and his wife *Musammat* Sarfaraz-un nissa, defendant No. 5, are entitled to separate costs; that is to say, one set of costs payable to defendant Nos 1 and one set of costs payable to defendants Nos. 4 and 5 jointly.

Appeal dismissed.

BAPU v. TEMSA.

(S. C. 8 N. L. R. 29)

NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE No. 669 OF 1907.

July 7, 1908.

Present:—Mr. Drake-Brockman, J. C.

BAPU—APPELLANT

versus

TEMSA—RESPONDENS.

Occupancy-holding—Mortgage by co-tenants—Subsequent surrender by heirs of one tenant—Mortgage with consent of one landlord—Suit by both landlords to eject mortgagee—Surrender, effect of—Central Provinces Tenancy Act (IX of 1883), ss. 41, 43 (2)—Limitation Act (XV of 1877), Sch. II, Art. 91.

A, *B*, *C*. mortgaged their occupancy-holding to *D*. in 1896 with the consent of *E*., one of the two co-sharers in the village. *D*. obtained a decree for sale on the basis of his mortgage and purchased the holding at a Court-sale in execution of the decree. Subsequently *A*. *B*. and *C*. died. Two years after his father's death, *F*., the minor son of *A*., left the village with his mother in 1900 or 1909. *F*'s title was not denied prior to his departure by the landlord or by his co-tenants. On 16th March 1903, *C*.'s heirs alone surrendered the holding. In February 1905, *D*. obtained physical possession of the land and in the following August, the *lambardar* sued to eject him on the strength of the surrender. *E*. was joined as a co-plaintiff after trial of a preliminary issue:

Held, (1) that the consent of *E*. precluded the two landlords from acting together to avoid the transaction.

Ramji v. *Syed Nur*, 4 N. L. R. 45, followed.

Gopal v. *Govind*, 13 C. P. L. R. 113, referred to.

(2) That the surrender was bad so far as *F*. was concerned.

Bukharia v. *Jugal Kishore*, 2 C. P. L. R. 6; *Kisan* v. *Kunbi Raghunath*, 2 N. L. R. 101 distinguished.

Obiter dictum.—It is not necessary for a landlord, before he can sue for the ejectment of a tenant, to have a mortgage by the tenant declared void within the period prescribed by Article 91 of the Limitation Act.

Bijoy Gopal v. *Krishna*, 34 C. 329; 9 Bom. L. R. 602; 11 C. W. N. 424; 5 C. L. J. 334; 2 M. L. T. 133; 17 M L. J. 154; 4 A. L. J. 329, referred to.

Appeal against the decree of the District Judge, Bhandara, dated 19th August 1907, confirming that of the Subordinate Judge, Bhandara, dated the 31st January 1907.

Mr. *Atmaram Bhagwant*, for the Appellant.

Rao Bahadur *V. R. Pandit*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by Temsa, *lambardar* of *mouza* Belhati, to eject Bapu from a certain occupancy-holding of which the original tenants seem to have been Sambhu, Narayan and Hiraman. Bapu took a mortgage of the holding from the tenants in 1896 and in the following year obtained against them a conditional decree for sale. Eventually, Bapu bought the holding at a sale held in execution of the decree absolute. In the meantime, the tenants had died, Sambhu first, then Hiraman in 1898 or 1899 and finally in December 1902, Narayan. Hiraman left a widow named Dharmi (P. W. No. 8) and an infant named Ganu. Dharmi left Belhati 2 years after her husband's death taking Ganu with her and married again. On the 16th March 1903, Bhiora, Narayan's widow, executed a deed surrendering the holding on behalf of her sons, Tihalu and Nathu, to the *lambardar*. Bapu obtained physical possession of the land in February 1905, and Temsa sued in the following August to eject him on the strength of the surrender. Bapu raised a number of pleas alleging, *inter alia*, that both Temsa and his co-sharer Sadasheo, had consented to his mortgage. Sadasheo, who admittedly signed the mortgage-deed as an attesting witness, was joined as a co-plaintiff after trial of a preliminary issue.

Bapu attacked the surrender on the grounds that Tihalu was a major when it was executed and that Ganu was not a party. He also alleged that the tenants had not abandoned the holding and that the claim was time-barred because the plaintiffs became aware of the existence of the mortgage more than 3 years before the suit was instituted. The issues with which we are concerned were:—

No. 1. Whether Sadasheo consented to the mortgage-deed at the date of its execution and whether Temsa consented to it subsequently?

No. 3. Whether Tihalu had attained majority at the date of surrender?

No. 4. Whether Ganu had disclaimed all interest in the holding, and what is the effect of his not having joined in the deed of surrender?

No. 6. Whether the connection of the original tenants with the land in question has not ceased, and whether the plaintiffs cannot claim possession as against the defendant?

No. 7. Is the claim barred by time?

Both the lower Courts have decreed the claim. The defendant has preferred this second appeal.

The first contention is that the surrender

BAPU *v.* TEMSA.

is bad because Ganu was not represented in the transaction. The document (Exhibit P. 4) purports to affect the entire holding and makes no mention of Ganu. That Ganu as son of Hiraman became a co-tenant was impliedly admitted by the plaintiffs; for they pleaded that "Ganu had disclaimed all interest in the land and was not, therefore, a necessary party to the surrender." The lower Appellate Court, however, has adopted a view inconsistent with this plea, namely, that Ganu is bound by the surrender because his mother and guardian quitted Belhati leaving the land first in Narayan's and then in Bhiora's hands. This view is rested on the decision of Crosthwaite, J. C., in *Bukharia* v. *Jugal Kishore* (1). In that case the tenancy was never taken up on behalf of the minor, whereas here Ganu and his mother did not leave the village till some time after Hiraman's death and there is nothing to show that, prior to their departure, either the landlord or Narayan denied Ganu's title. Both in *Bukharia* v. *Jugal Kishore* (1) and in the similar case *Kisan Kunbi* v. *Raghunath* (2), the landlord obtained a decree for ejectment against the major tenant in possession. The circumstances, therefore, are readily distinguishable. No disclaimer by Ganu's mother has been made out, and in March 1903 she had only been away from the village two or three years. Inasmuch, then, as the surrender does not expressly cover Ganu's rights, Bhiora cannot be regarded as having dealt with more than the rights of Tihalu and Nathu. If Ganu, Tihalu and Nathu were joint tenants, the rule of law applicable will be that "every act done by one joint tenant for the benefit of himself and his companion binds the other, but not those acts which prejudice the other:" per Lord Ellenborough, C. J., in *Right* v. *Cuthell* (3). If they were tenants-in-common, Bhiora was a mere agent whose authority to surrender would have to be made out. Before the plaintiffs had been two years in possession, they were ousted by the defendant, and since then Tihalu has come again upon the holding as a sub-lessee of part of it. Altogether, the case is one in which the question of abandonment was raised in the pleadings by both sides, although the tenants were not parties, and the burden was consequently on the plaintiffs to show that the tenants have abandoned their holding: *Bhola* v. *Fathu* (4). They rested their case on a surrender by two tenants and a disclaimer by the third prior to the surrender; but they failed to prove the disclaimer and without it the surrender is bad so far as the third tenant is concerned. Their suit should, therefore, have been dismissed.

Secondly, it is urged that on the evidence, Tihalu should have been held to be a minor on the 16th March 1903. The scribe (P. W. No. 1) and one attesting witness (P. W. No. 2) deposed positively that Tihalu was below 18, and the former added that a special inquiry was made on the point, so that there might be no mistake. The District Judge has also laid stress on the fact that Tihalu was present and raised no objection to being treated as a minor. There was thus evidence proper for consideration on which to base the finding arrived at. This Court is consequently powerless to interfere.

Thirdly, a new plea is raised to the effect that in 1896 Sadasheo was managing the affairs of the village and so his consent bound Temsa. This is inconsistent with the defence that each co-sharer gave a separate consent and no more need be said about it.

Fourthly, it is contended that the suit is barred by limitation, inasmuch as the plaintiffs knew of the mortgage more than three years before the suit was instituted. In this connection, the pleadings are imperfect and the Courts below have not considered at any length the specific question whether Article 91 of the Limitaton Schedule applies or not. As I have already held that the claim must fail, I prefer to leave this contention undecided. It may, however, be remarked that there is a serious difficulty in the way of applying Article 91 to any case of a mortgage by a tenant until the mortgagee finally supplants the tenant in possession and the latter abandons the holding. The landlord's rights are practically unaffected so long as the tenant retains his connection with the holding, and a mere declaration that the mortgage is void as against him would serve his purpose very little, if at all. The tenant's position is analogous to a Hindu widow's to the extent that under section 43 (2) of the Tenancy Act of 1883, which

(1) 2 C. P. L. R. 6. (2) 2 N. L. R. 101.
(3) 7 R. R. 752 at p. 754; 5 East 491; 2 Marsh 83; 5 Esp. 149.
(4) 15 C. P. L. R. 17 at p. 20.

governs the present case, he could alienate subject to a condition. And in declining in the very recent case, *Bijoy Gopal* v. *Krishna* (5), to apply Article 91 to a suit by a reversioner to recover property of which a widow had granted a lease for a term extending beyond her own life, their Lordships of the Privy Council said:—

"A Hindu widow is not a tenant for life, but is owner of her husband's property subject to certain restrictions on alienation and subject to its devolving on her husband's heirs upon her death. But she may alienate it subject to certain conditions being complied with. Her alienation is not, therefore, absolutely void, but it is *prima facie* voidable at the election of the reversionary heir. He may think fit to affirm it, or he may at his pleasure treat it as a nullity without the intervention of any Court, and he shows his election to do the latter by commencing an action to recover possession of the property. There is, in fact, nothing for the Court either to set aside or cancel as a condition precedent to the right of action of the reversionary heir."

Till the tenant disappears, the landlord has no indefeasible right of re-entry, and so long as the mortgagee holds as a licensee, the mortgage could neither be cancelled nor set aside: the landlord is merely entitled to ask for a declaration that the transaction does not affect his rights,— *Kashiram* v. *Behari* (6).

In conclusion, I think the suit should be dismissed upon the principle applied in *Ramji* v. *Syed Nur* (7) in view of the finding that Sadasheo consented to the mortgage. That consent precludes the two landlords from acting together to avoid the transaction, and such an act of avoidance is one which section 41 of the Tenancy Act, 1883, authorised "the landlord" to do: see *Gopal* v. *Govind* (8).

The decrees of the lower Courts are set aside and the claim is dismissed. The plaintiffs will pay all costs except one-half of the travelling and other expenses paid for the defendant's witnesses.

Decree set aside.

(5) 34 C. 329; 9 Bom. L. R. 602; 11 C. W. N. 424; 5 C. L. J. 334; 2 M. L. T. 133; 17 M. L. J. 154; 4 A. L. J. 329.

(6) 4 C. P. L. R. 49.

(7) 4 N. L. R. 45.

(8) 13 C. P. L. R. 113.

(s. c. 15 O. C. 22.)

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 94 OF 1911.

December 21, 1911.

Present:—Mr. Piggott, J. C.

WALIULLAH—PLAINTIFF—APPELLANT

versus

EJAZ ALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Res judicata—*Appeal against only one out of two decrees.*

Where two decrees have been passed and both of them require to be set aside in order to give the dissatisfied party the relief which he seeks, but an appeal is filed against only one decree while the other is allowed to become final, the latter operates as *res judicata* in appeal against the former.

Appeal against the decree of the Subordinate Judge, Barabanki, dated 14th December 1910, reversing that of the Munsif of Fatehpur, dated 2 th October 19 0.

Mr. *Samiullah Beg*, for the Respondents.

JUDGMENT.—This was a suit for possession of one *biswa* of land containing a masonry well. There was a reference to arbitration, and finally the Court of first instance decreed the plaintiff's claim for 15 *biswansis* of land out of one *biswa* claimed, and allowed the plaintiffs Rs. 11-10 costs to be paid by the defendants. Both parties appealed in respect of the order as to costs. Incidentally, a question arose as to whether the decree had been correctly framed in view of the fact that the arbitrator's award covered two distinct suits. On this latter point, the parties agreed before the lower Appellate Court that the decree in this particular suit should simply give the plaintiff possession of a certain well, with the *pahri*, or bullock run, appertaining to the same, and should contain no specification as to area. The decree of the first Court was amended accordingly and this point is not now in dispute before me. On the question of costs, the plaintiff contended before the lower Appellate Court that the learned Munsif of Fathepur had been quite right in holding that the question of costs was not included in the reference to arbitration and that he had full jurisdiction to deal with the same, but that the aforesaid Munsif had exercised that discretion wrongly and upon unsound principles in merely allowing the plaintiff Rs. 11-10 instead of a considerably larger sum. The decision of the lower

Appellate Court was that the entire question of costs between the parties was concluded by the award of the arbitrator, which is interpreted as meaning that the whole costs of the suit should lie upon the parties which incurred the same. It accordingly dismissed the plaintiff's appeal, and on the appeal of the defendants set aside that portion of the first Court's order by which the defendants were ordered to pay Rs. 11-10 on account of the costs of the plaintiff. As a matter of fact, two decrees were drawn up and in each of these it is provided that the parties shall bear their own costs in the Court of first instance and in the lower Appellate Court. The plaintiff has come before me in second appeal against the decree dismissing his appeal but has neglected to contest the other decree passed by the learned Subordinate Judge of Barabanki which allowed the appeal of the defendants and set aside the order of the first Court allowing the plaintiff Rs. 11-10 costs. Under these circumstances, I feel constrained to hold that the decision of the learned Subordidate Judge on the appeal presented to him by the defendants has become final and has the effect of *res judicata* in respect of the appeal now before me. It is out of the question that there should be in existence two decrees, both final and conclusive between the parties, one by the learned Subordinate Judge directing the parties to bear their own costs and another by this Court directing the defendants in this case to pay either the whole or any portion of the costs incurred by the plaintiff in the Court of first instance. The point is clear on the provisions of the law as they stand, and the principle was laid down by this Court in the case of *Gajadhar Prasad* v. *Musammat Lachmin* (1). The practice of this Court has always been uniform in requiring a party to file two distinct second appeals where there have been two decrees passed by the lower Appellate Court and both of them require to be set aside in order to give the dissatisfied party the relief which he seeks.

I must, therefore, dismiss this appeal with costs.

Appeal dismissed.

(1) 5 O. C. 384.

(S. C. 22 M. L. J. 49.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 949 OF 1910.

October 30, 1911.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

VENKADAM NARAYANA IYER AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SIVA SUBRAMANIA IYER AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Marriage—Orphan girl—Guardianship abandoned by paternal ralations—Maternal uncle celebrating girl's marriage—Right to recover expenses from parental family—Marriage during period of pollution.

A maternal uncle of a Hindu girl of marriageable age, whose parents are dead and whose paternal grandfather and paternal uncle have abandoned her guardianship, is justified in giving the girl in marriage and is entitled to recover the expenses, incurred by him in connection with the marriage, from the family property in the hands of the girl's paternal grandfather and paternal uncle.

The fact that the marriage is celebrated while the paternal family of the girl is in a state of pollution owing to the confinement of a lady in the family, does not disentitle the maternal uncle from recovering the expenses of the marriage.

However improper it may be, according to the Hindu ceremonial law, to celebrate a marriage during a period of pollution, the marriage is not on that account invalid.

Second appeal from the decree of the Subordinate Judge of Tinnevelly, in A. S. No. 103 of 1908, presented against the decree of the Additional District Munsif of Tinnevelly, in O. S. No. 52 of 1907 (O. S. No. 233 of 1906) on the file of the District Munsif of Srivaikuntam.

FACTS—A Hindu Brahman girl, whose parents had died, was living with her maternal uncle. Her paternal grandfather and paternal uncle had practically abandoned her guardianship. The maternal uncle arranged for a match for the girl when she was over 11 years and wrote to her paternal relations to provide funds for the marriage. They said they would celebrate her marriage in proper form but their assurance was not sincere. A lady of the girl's family was at the time confined. The maternal uncle celebrated the girl's marriage and then sued her paternal relations for expenses incurred by him in the marriage.

Mr. *C V. Anantakrishna Aiyar*, for the Appellants.

Mr. *S. Srinvasa Aiyar*, for the Respondents.

JUDGMENT.—We are of opinion that, under the circumstances mentioned in the

judgment of the Subordinate Judge, the plaintiff was justified in giving the girl Meenakshi in marriage. The grandfather and the paternal uncle had practically abandoned guardianship of the girl, and, as found by the Subordinate Judge, their assurance that they would celebrate her marriage in proper form was not sincere. It is then urged by Mr. C. V. Anantakrishna Aiyar that, as the marriage was celebrated within two days of the confinement of the 2nd defendant's wife, we must disallow the plaintiff the expenses incurred by him in connection with the marriage. It might be that it was not proper on the part of the plaintiff, accrding to the Hindu ceremonial law, to celebrate the marriage during a period of pollution, as to which, however, we express no decided opinion. But it is not contended that the marriage would be invalid on that account, and we do not think we are called upon to punish the plaintiff by making him bear the expenses of the marriage.

The Subordinate Judge has, however, given a personal decree against the defendants. It will be modified by directing the decretal amount to be paid out of the family property in the hands of the defendants. Otherwise the decree is confirmed and the second appeal dismissd with costs.

(S. C. 15 O. C. 7.)

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 190 OF 1910.

November 27, 1911.

Present:—Mr. Piggott, J. C., and Mr. Lindsay, A. J. C.

NAZIR AHMAD—PLAINTIFF—APPELLANT

versus

Seth RAGHUBAR DAYAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan (Hanafi) *Law—Donor, ownership of—Gift, validity of—Gift invalid if right in abeyance.*

In the case of a Muhammadan, subject to the *Hanafi* Law, present ownership on the part of a donor is an essential condition precedent to a valid gift by him. Such a person cannot make a valid gift of a right which at the time is in abeyance.

Appeal against the decree of the Subordinate Judge, Tahsil Biswan, District Sitapur, dated 26th February 1910, reversing that of the Munsif, Biswan, dated 28th August 1909.

Mr. *Wazir Hasan* for the Appellant.

The Hon'ble Rai Bahadur *Sri Ram* and Babu *Ishwari Prasad*, for Respondents Nos. 1 and 2.

Mr. *Muzaffar Husain*, for Respondent No. 3.

JUDGMENT.—These are two connected appeals in a suit for redemption arising out of a mortgage, dated August 12th, 1851. This transaction has led to much litigation, and most of the essential facts are to be found set forth in the reported case of *Chaudhri Ahmad Bakhsh* v. *Seth Raghubar Dayal* (1). The mortgage in question was by a landholder, named Husain Bakhsh, in favour of Seth Raghubar Dayal, and possession was given over seven villages in return for a loan of Rs. 4,000. In the year 1856, after the annexation of Oudh, Husain Bakhsh obtained a decree for redemption on payment of the principal only and actually deposited the sum in Court. An appeal was, however, pending on behalf of the mortgagee on the question whether the latter was not entitled to interest in addition to the principal; and before this point had been finally decided, the Mutiny broke out and the Government Treasury in which the principal sum of Rs. 4,000 had been deposited by Husain Bakhsh was looted, so that the mortgagee never received the money. At the second Summary Settlement, the seven villages in question were settled with the mortgagee as proprietor and they were included in the *taluqdari sanad* subsequently received by him. In consequence of this, a suit for redemption, or for recovery of possession on again depositing the sum of Rs. 4,000 which was brought by Husain Bakhsh in the year 1862, was dismissed. In the month of March 1869, Muhammad Bakhsh, the eldest son of Husain Bakhsh, brought a fresh suit for redemption of the entire mortgaged property; he got decrees in two Courts, but his suit was dismissed by the Judicial Commissioner on second appeal. It was not denied that the objection which had proved fatal to the suit brought by Husain

(1) 28 A. 1; 15 M. L. J. 407; 10 C. W. N. 115; 2 A. L. J. 813; 2 C. L. J. 413; 7 Bom. L. R. 912; 9 O. C. 7; 32 I. A. 229.

Bakhsh in 1862 had been removed by the provisions of Act XIII of 1866 and Act I of 1869; but it was held by the Judicial Commissioner that after the redemption decree in favour of Husain Bakhsh in the year 1856, and the deposit of Rs. 4,000 by the latter in the month of April 1857, the mortgage lien had come to an end, there was nothing left to redeem, and Husain Bakhsh, or his descendants after him, could not claim the benefit conferred upon mortgagors by the subsequent litigation. Muhammad Bakhsh had a younger brother, Ahmad Bakhsh, who was a minor at the time of the suit brought by the former and was not made a party to the same. Having attained majority in the year 1879, and having effected a partition with his brother of the family property in their possession, by which he obtained a 7/16ths share of the same, the said Ahmad Bakhsh, in the year 1895, brought a suit for redemption of a 7/16ths share in the seven villages on payment of a proportionate amount of the mortgage-debt. The Court of first instance decreed the suit subject to payment of a proportionate share of the principal of the mortgage-debt with interest thereon at the rate of 12 per cent. per annum. This decree, however, was reversed on appeal by the District Judge of Sitapur, and the decision of the latter was affirmed by the Judicial Commissioner's Court on the 9th of August, 1900. The reported case in *Chaudhri Ahmad Bakhsh* v. *Seth Raghubar Dayal* (1) gives the result of the appeal brought by Ahmad Bakhsh to His Majesty in Council against the decision of this Court. Their Lordships of the Privy Council expressly held that the suit brought by Muhammad Bakhsh in 1869 had been dismissed on insufficient grounds and ought to have succeeded. They held, further, that Ahmad Bakhsh was entitled to maintain the suit brought by him for redemption on payment of a proportionate amount of the mortgage-debt and, setting aside the decree of this Court and that of the District Judge, Sitapur, they restored that of the Subordinate Judge.

In order to explain how the present suit was brought, it is necessary to set forth the pedigree of Chaudhri Husain Bakhsh. We may remark at once that we are now concerned only with the children of this gentleman by his first or principal wife. It appears that he had also a second or inferior wife, who bore him one son; but so far as the case before us now is concerned, we may take it settled by the decisions of the Courts below that this second widow and her son were not heirs of Husain Bakhsh and took no share in the estate left by him at the time of his death. This was probably the result of some family custom relating to unions with women of inferior social status and to the fact that provision was made for this second wife and her son by Husain Bakhsh in his life-time. Setting aside, therefore, the question of this second marriage, we find that Husain Bakhsh left a widow, named Munni Begam, two sons (Muhammad Bakhsh and Ahmad Bakhsh aforesaid) and two daughters, Wazir Begam and Taj Bibi. The former has died leaving a daughter, named Ahmadi Begam, while the latter has left a son, named Nazir Ahmad, who is the plaintiff in the present case. Nazir Ahmad claims that the devolution of the estate of Husain Bakhsh, in so far as it relates to the equity of redemption in the seven villages which were the subject of the mortgage of 1851, should be treated as governed by ordinary Muhammadan Law, according to which the entire estate being treated as a unit of 16 annas, Munni Begam would succeed to a share of 2 annas, the two sons to a share of 4-annas 8-pies each and the two daughters to a share of 2-annas 4-pies each. He himself claims to have succeeded by inheritance to a share of 1 anna $11\frac{1}{3}$-pies out of the 2-annas 4-pies inherited by his mother, and he sues for redemption of this share on payment of a proportionate amount of the mortgage-debt with such interest as the Court may see fit to award. The defendants in the case are, *first*, the representatives-in-interest of the original mortgagee, *secondly*, Ahmad Bakhsh, the successful plaintiff in the suit decided by their Lordships of the Privy Council, and *thirdly*, *Musammat* Ahmadi Begam, daughter of Wazir Begam. The last mentioned was a *pro forma* defendant only and has put in no appearance throughout the proceedings. The mortgagees resist the claim on various grounds, but principally on the ground that the entire estate of Husain Bakhsh was divided in his life-time between his two sons Muhammad Bakhsh and Ahmad Bakhsh, that nothing passed at the death of Husain Bakhsh to

either of his daughters and that the plaintiff has consequently no rights in the property in suit on the strength of which he can claim to redeem any portion of the mortgage. Ahmad Bakhsh resisted his nephew's claim on various grounds, but we are at present concerned only with his plea to the effect that, if redemption is decreed of any share of the mortgaged property in favour of the present plaintiff, that share should be taken entirely out of the 9/16ths now in possession of the mortgagees and not from the 7/16ths share which he himself has succeeded in redeeming. The Court of first instance, the learned Munsif of Biswan, decreed the plaintiff's claim as against all the defendants for redemption of a share of 1-anna 11 $\frac{1}{3}$rd-pies on payment of Rs. 496-5 4, being a proportionate share of the mortgage-debt, together with interest on the above at 1 per cent. per mensem calculated from certain dates as set forth in the decree. There were two appeals to the Court of the Subordinate Judge, one by the mortgagees and one by Ahmad Bakhsh. That Court has reversed the findings of the Munsif on the principal issues in the case and has dismissed the plaintiff's suit altogether. Hence, we have now before us two appeals by the plaintiff Nazir Ahmad arising out of one and the same suit.

It seems almost worth while at the outset to say one word regarding the broad equities of the case, because the decision of the lower Appellate Court seems to have been largely influenced by a feeling on the part of the learned Subordinate Judge that the present suit was something of an afterthought, that the widow and daughters of Husain Bakhsh never in their life time set up any claim to succession by way of inheritance to any portion of his estate and that the plaintiff Nazir Ahmad is trying to upset the long established possession of the mortgagees on the strength of something little better than a mere quibble. If the case is to be looked at from this point of view, it seems advisable to bear in mind that their Lordships of the Privy Council have distinctly held that the suit for redemption of the entire mortgaged property brought by Muhammad Bakhsh in 1869 ought to have been decreed, so that the family of the original mortgagor has suffered injustice through the acquiescence of the plaintiff in the decree of this Court dismissing his suit. If, therefore, the present plaintiff can make out any valid case in law, there seems no good reason for regarding his claim as bearing hardly on the defendants-mortgagees from the point of view of equity.

The principal issue which we have to determine is whether or not the rights of Husain Bakhsh in the property now in suit, that is to say, in the equity of redemption in respect of the seven villages mortgaged in 1851, descended to his heirs according to the ordinary rules of Muhammadan Law. The presumption is that they did so descend unless and until something to the contrary is proved. In so far as the present claim is resisted, either by the mortgagees or by Ahmad Bakhsh, on the ground of any family custom excluding the daughters or the widow from their rights of inheritance under the personal law of the parties, the case is concluded in favour of the plaintiff by the findings of the Courts below, and the appeal has not been resisted before us upon any such ground. The case for the defendants-mortgagees is that Husain Bakhsh in his life-time gifted away his entire estate to his two sons, Muhammad Bakhsh and Ahmad Bakhsh, in the proportion of 9/16ths to the former and 7/16ths to the latter, and the disposition so made included the equity of redemption in respect of the mortgage in suit. This is the main point on which the Courts below have differed. The learned Subordinate Judge has found that Husain Bakhsh did so divide his property in his life-time by way of gift, that the gift thus made in favour of Muhammad Bakhsh and Ahmad Bakhsh included the aforesaid equity of redemption and that there is no reason why the said gift should not be held to be valid and enforceable by reason of any special provision of the Muhammadan Law on the subject of gifts, which this Court is expressly bound to enforce where the parties are Muhammadans by reason of section 3 of the Oudh Laws Act (XVIII of 1876). Against this finding, the appellant urges in the main three pleas:—

(1) that the evidence regarding the gift or disposition of his property made by Husain Bakhsh in his life-time falls short of proving that the latter did in fact gift away to his son his rights of redemption in respect of the villages in suit;

(2) that at the time when the said gift is,

alleged to have been made, Husain Bakhsh in fact possessed no rights whatever, whether of redemption or otherwise, in respect of the seven villages mortgaged in 1851, so that he could make no valid gift of the same, more particularly in view of the requirements of Muhammadan Law which make actual ownership or possession on the part of the donor a condition indispensable to the validity of any transfer by way of gift;

(3) that in any case, a gift of the mere equity of redemption in mortgaged property would not be valid under the personal law of the parties, they being *Sunni* Muhammadans, inasmuch as the thing gifted would be incapable of actual seizing by the donee.

Although we allowed this third point to be argued before us, and it was in fact argued at considerable length, we have come to the conclusion that its determination is unnecessary to the decision of the present suit, and that it is not advisable that we should in this place commit ourselves to any expression of opinion on the subject which after all would have the force merely of an *obiter dictum*.

The second contention put forward by the appellant is, in our opinion, well-founded and sufficient in itself to determine the point in issue in the appellant's favour. We have already pointed out in dealing with the history of the case that at the second Summary Settlement, the villages in suit were settled with the mortgagee as proprietor, and his *talukdari* rights in respect of the same were confirmed by *sanad*. It was expressly on this ground that the suit brought by Husain Bakhsh in 1862 for recovery of possession over the same was dismissed, and their Lordships of the Privy Council deciding the suit brought by Ahmad Bakhsh have nowhere expressed any doubt as to the correctness of the decision in respect of this suit of 1862. The rights of all proprietors of land in Oudh had been confiscated and this confiscation swept away for the time being whatever right or title Husain Bakhsh himself or his mortgagee possessed in respect of the villages in suit. The grant which followed in favour of the mortgagee conferred upon the latter full proprietary title in respect of these villages and, apart from the subsequent legislation, Husain Bakhsh, or his heirs after him, would have had no right of redemption. The obstacle in their way was only removed by the passing of Acts XIII of 1866 and I of 1869, section 6 of which latter Act provided, as to lands which were in the possession of mortgagee at the time of the Mutiny, that a *sanad* should not necessarily be a suit for their redemption. Now, Husain Bakhsh died on the 17th May 1862, and it follows that from the date of the confiscation to the date of his death, he actually possessed no right of redemption, no right which he could successfully enforce in law, in respect of the said villages. It is true that he died during the actual pendency of the suit, which had been filed by him on the 24th of February 1862, for redemption of the mortgaged villages, or for recovery of possession of the same on payment of Rs. 4,000 in accordance with the decree which he had previously obtained on the 19th of May 1856; but that suit was itself dismissed after the plaintiff's death, and it cannot reasonably be suggested that Husain Bakhsh possessed during the pendency of that suit any rights which would not have appertained to him if that suit had never been brought. Under Muhammadan Law, at any rate, it appears beyond question that present ownership on the part of the donor of the thing gifted is an essential condition precedent to a valid transfer by way of gift. If, therefore, Husain Bakhsh possessed during the years 1858 to 1862 no rights enforceable in law in respect of the villages in suit, it appears to us impossible to hold that he could make a valid transfer by way of gift in respect of the same. The two authorities principally relied on by the appellant in respect of this part of the case, *Imdad Husain* v. *Aziz un nissa* (2) and *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (3), seem to us in point and in no way controverted by any authorities to which we were referred on the other side. The learned Advocate for the respondents-mortgagees was unable in the course of argument to put the case for his clients any higher than this, that the rights of Husain Bakhsh as mortgagor were in abeyance from the date of the confiscation, and revived in favour of his descendants in consequence of the legislation of 1866 and 1869. Even if we accepted this as a correct statement of the case, we would only say that we know

(2) 23 C. 483; 23 I.A. 8.

(3) 28 A. 439; 10 C. W. N. 706; 3 A. L. J. 405; 8 Bom. L. R. 387; 9. O. C. 106; 1 M. L. T. 106; 4 C. L. J. 295.

NAZIR AHMAD *v.* RAGHUBAR DAYAL.

of no authorty for holding that a valid gift of a right which is at the time in abeyance can be made by a Muhammadan subject to the *Hanafi* Law.

The point becomes even clearer in favour of the appellant when we consider the evidence bearing upon the disposition of his property which Husain Bakhsh did, undoubtedly, make shortly before his death. The main piece of evidence on this point consists of a petition, Exhibit A1, dated 21st of April 1862, which was presented by Husain Bakhsh to the Revenue authorities. The petition itself relates directly and exclusively to the villlages then in the possession of the said Husain Bakhsh and has in itself no connection with the mortgaged villages now in suit. In respect of the property then in his posssession Husain Bakhsh states that on account of old age and continued illness he finds himself unable to look after his property or to carry out the orders of Government in respect of the same. In view of these facts, he goes on to say that he has made a certain disposition of his property of which he asks the Revenue Court to take notice, so that appropriate entries may be made in the revenue registers in respect of the same. He mentions that he has made provision for his son by his second or inferior wife, whom he speaks of as "*nikahi*" as distinguished from the first wife who is described as "*zauja byahta*", the said provision conisting of the gift of a single village by way of maintenence. The whole of the rest of his property "(*kul ilaka*)" the petitioner states that he has divided between his two sons by the aforesaid "*zauja byahta*", in the proportion of 9/16ths to the elder son, Muhammad Bakhsh, and 7/16ths to the younger son, Ahmad Bakhsh. The latter being still a minor, the petitioner desires that the *lambardarship* and management of the property should remain with Muhammad Bakhsh, and that the name of Ahmad Bakhsh be entered in the registers as a co sharer entiled to his share of profits. There is abundant evidence that this petition was acted upon, that the widow Muni Begam and the two daughters Wazir Begam and Taj Bibi never questioned the validity of the arrangement thus made in favour of the two sons, and that Muhammad Bakhsh and Ahmad Bakhsh eventually divided the property in their possession amongst themselves according to the shares specified in this petition. We find it difficult, however, to see how the whole of this evidence can be treated as proving that Husain Bakhsh did in fact give away to his sons his rights in the mortgaged villages which are now in suit. It has been pressed upon us in argument that the finding of the learned Subordinate Judge on this point is one of fact and so binding upon us in second appeal. Apart, however, from the point of law which we have discussed in dealing with the second of the contentions put forward on behalf of the plaintiff-appellant, there seems to us considerable difficulty in accepting this so-called 'finding' of the learned Subordinate Judge regarding the gift itself. He appears to have treated this petition, Exhibit A 1, as if it were a deed of gift, that is to say, a document of title by which the transfer in favour of the sons was actually effected. Looking at it from this point of view, he discusses the intention of the donor and infers from the use of words "*kul ilaka*" and from the absence of any evidence to the contrary that the gift must have been intended to include any immoveable property of which Husain Bakhsh was possessed at the moment, and, therefore, also whatsoever rights he might have in respect of the mortgaged villages now in suit. His actual finding seems to be embodied in the following words:—"Holding that Husain Bakhsh did actually divide the remainder of his property, I must also hold, in the absence of anything to the contrary, that he intended to divide also his rights in the mortgaged villages." Now, this is obviously not the point. This petition, Exhibit A 1, is not itself a deed of gift; it is a piece of evidence in respect of a transfer by way of gift alleged to have been previously effected. A mere finding that Husain Bakhsh intended to divide also the seven villages—as, for instance, in the event of his succeeding in obtaining possession of the same—might be perfectly correct, and yet would be quite irrelevant to the question in issue in the present suit. It must be remembered that the suit brought by Husain Bakhsh on February 24th, 1862, for recovery of possession of those seven villages on payment of Rs. 4 000, was actually pending when this petion, Exhibit A1, was presented before the Revenue Court. It so happens that on a date subsequent to that of this Exhibit, namely, on the 7th of May 1862,

Husain Bakhsh did actually present a petition to the Civil Court before which his suit regarding the mortgaged villages was pending. In that petition he does not state that he has gifted away his rights in respect of the seven mortgaged villages to his two sons, nor does he ask that their names may be brought on the record as plaintiffs in place of his own; he simply asks that the trial of the suit may be expedited and a speedy decree given in his favour. It appears to us that whatever the intentions of Husain Bakhsh at the time may have been, there is no good evidence that he actually did make any gift in favour of his sons in respect of the seven villages. The mere fact that the widow and daughters, as well as the two sons of Husain Bakhsh, accepted as final the disposition made by the latter of the property actually in his possession, can scarcely be said to have any direct bearing on the question whether any disposition was in fact made in respect of the villages now in suit. The suit brought by Muhammad Bakhsh in 1869 was one for redemption of the entire mortgaged property; and we may reasonably suppose that after the failure of this suit, and until Ahmad Bakhsh won his appeal to the Privy Council in the year 1905, the rest of the family did not look upon their rights in the seven mortgaged villages as a matter of any particular interest to them.

For these reasons, we are of opinion that the main issue in this case must be decided in favour of the plaintiff. We hold that there was no valid disposition by way of gift on the part of Husain Bakhsh in favour of his two sons in respect of the equity of redemption in the mortgaged villages. It follows, under the circumstances of this case, that those rights must be held to have devolved upon the heirs of Husain Bakhsh in accordance with the rules of Muhammadan Law. This finding disposes of the main question in issue in the case; we have only to determine certain matters of detail, which may be stated as follows:—

(1) We see no reason for holding that the present suit is barred by limitation. Once it be found that the plaintiff has acquired by inheritance a right to a share in the equity of redemption in respect of the mortgaged property, his case falls within sixty years' rule of limitation and the suit as brought is within time. The finding of the lower Appellate Court on this point merely amounts to saying that if the plaintiff be held to have failed to establish his right as mortgagor, then the suit must necessarily be dismissed.

(2) With regard to the extent of the share claimed by the plaintiff, we find that this was in issue in the Courts below and that the point is raised in the memorandum of appeal to this Court. It appears, however, from a consideration of the evidence and of the judgment of the first Court that the case for the respondents-mortgagees in Courts below was that the share of the plaintiff Nazir Ahmad in the estate left by his mother's father should be diminished because of the existence of the second or inferior wife and of her son Fakir Bakhsh. This point we have already held to be concluded in favour of the plaintiff. The argument before us on behalf of the respondents was based upon the statements made by Nazir Ahmad himself when examined as a witness, from which it was sought to show that at the time of the death of Taj Bibi (the mother of the plaintiff), she left surviving her a husband and two other sons besides the plaintiff Nazir Ahmad. It seems to us that this point does not fairly arise on the pleadings, and that it cannot in any case be supported merely on the strength of statements made by Nazir Ahmad with reference to facts alleged to have occurred, and to circumstances said to have existed, at a time when he was himself four years of age. The first Court recorded an express finding on the evidence that the plaintiff was shown to be the only surviving son of Taj Bibi, and that his share in the property in suit would amount to 1-anna $11\frac{1}{3}$-pies as claimed. This finding has not been disturbed by the lower Appellate Court, and we do not think that, as the case stands, we ought either to reverse it or to remit an issue on the subject for further trial.

(3) There remains the question of interest. On the terms of the mortgage contract of 1851, it would appear that the mortgagees were entitled, not only to the usufruct of the property, but also to receive in addition simple interest on the mortgage debt at the rate of Rs. 3-2-0 per cent. per mensem The Court of first instance has been content to follow the precedent set by the learned Subordinate Judge who tried the suit brought by Ahmad Bakhsh in the year 1895, and whose decision was affirmed (though without any specific

discussion of this particular point) by their Lordships of the Privy Council in the case reported as *Choudhri Ahmad Bakhsh* v. *Seth Raghubar Dayal* (1). We think we are justified in doing the same and in restoring, on this point, the decree of the Court of first instance.

(4). There remains only the question, which is really one between the two sets of respondents, namely, whether the 7-annas share already redeemed by Ahmad Bakhsh should be altogether exempted from the present decree or should be made proportionately liable under the same. Now it may be that at the time when he brought his suit in 1895, Ahmad Bakhsh would not have been entitled to so large a share as 7/16ths of the mortgaged property except under the terms of the disposition made by Husain Bakhsh in his life-time which we have declined to enforce. We find, however, that he has now acquired by inheritance from his father and from his mother a share which exceeds 7/16ths of the total estate left by Husain Bakhsh. Under the circumstances, we think that he should be left in the enjoyment of the 7-annas share acquired by him under the decree of the Privy Council and that he is not bound to make over any portion of the same to the present plaintiff.

The result is that we accept the appeals of the plaintiff and set aside both the decrees of the lower Appellate Court. In place thereof, we restore the decree of the Court of first instance, except that we decree the plaintiff's claim as against the share in the possession of the mortgagees-respondents, exempting from the operation of the decree the 7-annas share at present in the possession of the defendant-respondent, Ahmad Bakhsh. We allow the plaintiff three months from the date of this decree in which to deposit the required amount in Court, and in the event of his doing so, we direct that the mortgagees-respondents do pay the costs of the plaintiff-appellant throughout. If payment be not made as directed, the suit will stand dismissed with costs and the plaintiff's right of redemption will be extinguished. The plaintiff will, in any event, pay the costs of the defendant Ahmad Bakhsh in both Courts.

Appeal accepted.

(S. C. 207 P. L. R. 1911.)

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No 1383 OF 1911.

July 29, 1911.

Present:—Mr. Justice Chevis.

NARSHING DAS—DEFENDANT—PETITIONER

versus

SHAMAS DIN—PLAINTIFF—RESPONDENT.

Contract—Sale of goods—Lien for unpaid purchase-money—Consideration agreed to be paid at a future date.

The defendant in this case sold certain goods to the plaintiff receiving a part of the consideration at the time of sale and agreeing to receive the balance by instalments; the goods were agreed to be delivered, some on demand and the rest on a date before the date of payment of the first instalment. The defendant having failed to deliver the goods, the plaintiff claimed damages:

Held, that the defendant was liable.

Petition, under section 25 of Act IX of 1887, for revision of the order of the Judge, Small Cause Court, Lahore, dated the 5th April 1911. decreeing plaintiff's claim.

Rai Sahib Lala *Sukh Dial*, for the Petitioner.

Lala *Dharm Das Suri*, for the Respondent.

JUDGMENT.—Rai Sahib Sukh Dayal argues that defendant was justified in refusing to hand over the goods until plaintiff had given him some surety or satisfaction for the payment. I cannot agree. The terms of receipt clearly show that the goods were bought for Rs. 350, that Rs. 50 was paid in advance, and that the goods were to be delivered some on demand and the rest on 15th December 1909, that the rest of the sale money was to be paid by instalments beginning from 28th December 1909.

If defendant had sold on condition that plaintiff was to execute a bond before the goods were delivered, the case would have been different.

I see no good cause for revision.

Dismissed with costs.

Petition dismissed.

KHIRODE CHANDER ROY CHOWDHURY *v.* EMPEROR.

(s. c. 15 C. L. J. 151.)

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 945 OF 1911.

November 17, 1911.

Present:—Mr. Justice N. Chatterjea.

KHIRODE CHUNDER ROY CHOWDHURY—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 292—Obscene book—Test of obscenity, what is—Religious publication—Doings of divine persons—Religious book Natu Churi, *whether obscene—Not taking notice of obscene book previously, no ground to justify publication.*

The test in determining the obscenity of a publication is, whether the tendency of the matter charged as obscenity is to deprave and corrupt those into whose hands such a publication might fall.

Reg. v. *Hicklin*, 3 Q. B. 360; 37 L.J.M.C. 89; 18 L. T. 395; 16 W. R. 801; 11 Cox. C. C. 19, followed.

If in fact a work is one of which it is certain that it would suggest to the minds of the young of either sex or even to persons of more advanced years thoughts of a most impure and libidinous character, then its sale is a criminal offence, and it is immaterial that the accused has in view an ulterior object which is innocent or even laudable.

Steele v. *Brannan* L.R.7 C. P. 261; 41 L.J.M.C. 85; 26 L. T. 509; 20 W. R. 607, *Queen-Empress* v. *Prashram*, 20 B. 193, *Emperor* v. *Hari Singh*, 28 A. A. 100; A. W. N. (1905) 203; 2 Cr. L. J. 25 and *Empress* v. *Indarman*, 3 A. 837 at p. 843, relied upon.

As the tendency of a religious publication is not to deprave or corrupt the morals of persons, it is not obscene within the meaning of section 292 of the Indian Penal Code.

But if the objectionable passages contained in a religious book are extracted and printed separately and such passages deal with matters which are to be judged by the standard of human conduct and the tendency of such publication is to deprave and corrupt those whose minds are open to immoral influences, such publication may not be justified on the ground that the passages formed part of a religious book.

The *Urya* book *Natu Churi* is not an obscene publication, as it is an old religious work and the incidents described in the book would not suggest immoral thoughts in those who believe in the divinity of Krishna and Radha.

Criminal Revision against the order of the Deputy Magistrate of Cuttack, dated the 13th May 1911, confirmed by that of the Sessions Judge of Cuttack on the 15th June 1911.

Messrs. *S. Roy* and *J. Eorooah* with Babu *Suresh Chandra Chakravarty*, for the Petitioner.

Mr. *B. C. Mitter* (Officiating Advocate-General), for the Crown.

JUDGMENT.—The petitioner has been convicted by the Deputy Magistrate of Cuttack under section 292 of the Indian Penal Code for having printed for sale an obscene book called "Natu Churi" or the "Theft of Tops" and sentenced to pay a find of Rs. 50.

The book, or rather booklet, consists of 7 small pages and purports to be the composition of one Dina Sundari, said to be an Urya poetess. It purports to deal with an incident in the lives of Radha and Krishna taken from the Urya Haribans, a sacred book of the Uryas. It passed through several editions in print and is said to have been in palm leaf Mss. for about a hundred years. It was registered 15 or 20 times previously without objection and appeared in the Bengal Library Catalogue of books in the *Calcutta Gazette* as a mythological publication. It was printed in the Star Press of which the petitioner is the proprietor.

The plea of the accused was that the book is not obscene within the meaning of section 292 of the Indian Penal Code and that he is not guilty. He was tried summarily by the Deputy Magistrate of Cuttack who, however, recorded the evidence in full. The learned Deputy Magistrate held that the book was obscene and convicted and sentenced him as stated above. A Rule was granted by this Court to show cause why the conviction and sentence should not be set aside, on the ground that the publication complained of is a recognised religious work which has been published in its present form for the last hundred years, and it, therefore, does not fall within the meaning of section 292, Indian Penal Code.

The officiating Advocate-General, who appeared to show cause on behalf of the Crown, has contended, in the first place, that the finding of the learned Deputy Magistrate that the book is obscene is a finding of fact and that this Court should not, therefore, interfere. The learned Counsel for the petitioner, on the other hand, strongly urged that as a question of considerable importance was involved in the case, the Court should look into the facts. Having regard to the importance of the case, Counsel on both sides were allowed to argue the case on the merits.

The principles upon which the obscenity of a publication are to be determined are well-established. In the leading case of *Reg.* v. *Hicklin* (1), Cockburn, C. J., stated: "The test of obscenity is this, whether the tendency of the matter charged as obscenity is to

(1) 3 Q. B. 360; 37 L. J. M. C. 89; 18 L. T. W. R. 801; 11 Cox. C. C. 19.

deprave and corrupt those whose minds are open to such immoral influences and into whose hands such a publication might fall." If in fact the work was one of which it was certain that it would suggest to the minds of the young of either sex or even to persons of more advanced years thoughts of a most impure and libidinous character, then its sale was a criminal offence and it was immaterial that the defendant had in view an ulterior object which was innocent or even laudable. See also *Steele* v. *Brannan* (2). The principles laid down in the above cases have been followed in this country in several cases; see *Queen-Empress* v. *Parashram* (3), *Emperor* v. *Hari Singh* (4) and *Empress* v. *Indarman* (5).

These priciples are not disputed on behalf of the petitioner and cannot be disputed, but what is contended on his behalf is that the publication is a religious work, that the incident is taken from Haribans, a sacred work among the Uryas, and deals with a love story of Radha and Krishna which has a deep allegorical meaning and which it is a sacrilege to call obscene, that similar passages occur in various other religious works of the Vaishnabs such as Srimat Bhagabat, Gita Gobinda and in many classical w rks in Sanskrit and Bengali and Urya. The learned Counsel for the Crown contended, on the other hand, that though a religious or classical work is not obscene merely because it contains some obscene passages and although Haribans may be a sacred book with the Uryas, the publication of some obscene passages from such a book divested from the book itself cannot be justified and would fall within the purview of section 292 of the Indian Penal Code. It was contended that "Natu Churi" was not itself a recognised religious work and though there might be objectionable passages in the Haribans, there is no reason why the obscenity of it should be brought out in an aggravated form in a cheap work (priced at 2 pice only) where only a few passages had been extracted dissociated from their context for the depravation of those people whose state of mind was such as would easily fall a prey to depraved and corrupt thoughts contained therein.

(2) L. R. 7 C. P. 261; 41 L. J. M.C. 85; 26 L. T. 509; 20 W. R. 607.
(3) 20 B. 193.
(4) 28 A. 100; A. W. N. (1905) 203; 2 Cr. L. J. 520.
(5) 3 A. 837 at p. 843.

The defence did not examine any witnesses but cross-examined the prosecution witnesses and put in certain books in evidence such as the Gita Gobinda (in Urya), the Sanskrit Gita Gobinda in Bengali character, Raghuvansa, the Bible, the Urya Haribans and several other editions of the "*Natu Ohuri.*" Some of the books and certain passages in others were marked Exhibits. The publication in question is a poem in the Urya language consisting of 28 stanzas and ends with a Sanskrit sloka. The incident described in the book is borrowed from the Urya Haribans, but the book is not an extract of certain passages from the Haribans. The inicdent, so far as it goes, is complete in itself. The language of the book is the author's own and differs from that of the Urya Haribans, but the story and the sentiments are the same. The original Haribans in Sanskrit was not produced in evidence and I have not been able to find the story in the Sanskrit Haribans. But one of the witnesses for the prosecution, Narain Prasad Mahanti, Deputy Inspector of Schools, says that the story of "*Natu Churi*" will be found in Vaishnab literature and that he has read it elsewhere. Whatever that may be, it is certainly contained in the Urya Haribans which is on the record and which, the evidence for the prosecution shows, is a very sacred work of the Urya Hindus. English translations of the "*Natu Churi*" and of the portion of the Urya Haribans dealing with the incident (together with the Urya poems in Bengali character) were furnished to the Court and to the Counsel for the Crown on behalf of the petitioner. They are annexed to this judgment. The translation was not objected to (except as to the meaning of the word *Rati* with which I will deal later on) by the learned Counsel for the Crown who admitted that the language in which the story is described in the Haribans is as objectionable as that of "*Natu Churi.*"

The objectionable passages are contained in stanzas 6 to 11, where Krishna is described as touching the left breast of Radha and asking her questions about it and also asking Radha for caresses and for *Rati*, and in stanzas 23—26, where Radha is described as removing the cloth from her breast when two tops and string miraculously dropped to the ground and Krishna looked at her breast. The word *Rati* was held by the learned Deputy Magistrate to mean carnal

intercourse. Exception was taken to the above by Counsel on behalf of the petitioner, who translated it as love and who contended that *Rati* means spiritual union in the love stories of Radha and Krishna. The word *Rati* in the love stories of Radha and Krishna is, no doubt, used in a spiritual sense but in the ordinary acceptation of the word, it means carnal intercourse, and I think it may be so understood by ordinary people. The story, however, as related in the book, shows that it could not relate to human beings. In the Urya Haribans as also in "*Natu Churi*" Krishna is described as a boy of 5 years of age. He is described in the objectionable passages themselves as *Jagannath* (Lord of the world), *Achyuta* (the unfallen), *Pitabas* (the yellow-robed), *Deb Murari* (God Murari), all being names of the divine Krishna. There can be no doubt (and the witnesses for the prosecution admit) that the dropping of the tops and string out of nothing when Radha's cloth was shaken are supernatural acts, and a body of 5 years can have no carnal knowledge. These go to show that it was not a description of Radha and Krishna as human beings and must have a spiritual meaning.

The love stories and dalliances of Radha and Krishna have a deep allegorical meaning. Madhu Sudan Rao, a retired Inspector of Schools and a witness for the prosecution, says: "Krishna is an incarnation of the supreme soul and Radha is the human soul and their dalliance is an allegorical representation of the dealings of the supreme soul with the human soul *i.e.*, 'God's quest of man.' Ayan Ghosh, the husband of Radha, is a representation of the world trying to tie the humam soul to it. *Bansi* (pipe) is inspiration." But I do not think the deep allegory and the spiritual significance of the love stories of Radha and Krishna can be fully understood by persons who have not a certain degree of spiritual culture. But the Hindus generally and Vaishnabs in particular do not look upon Radha and Krishna as human beings and do not judge their doings by the standard of human conduct or as in any way improper. They are worshipped as deities. Even a school boy or an ignorant Hindu, who has neither the learning nor the spiritual culture for appreciating the esoteric meaning of the *lilas* (mystrious deeds) of Radha and Krishna, would look upon them as divine persons and all the incidents in their lives including the amorous incidents as divine, and the latter would not, therefore, raise impure thoughts in the minds of Hindus who believe in the divinity of Radha and Krishna. Hindus from their infancy see Radha and Krishna worshipped in temples and some have the images of Radha and Krishna in their own houses and they learn to look upon Radha and Krishna as deities from their infancy.

Eight witnesses were examined for the prosecution of whom one is a formal witness; of the remaining seven witnesses, one is a Christian, another a Muhammadan and the rest are Hindus. The evidence of the witnesses is generally to the effect that there are passages in the book which are obscene or offensive to purity and decency, that a perusal of the book may produce impure thoughts in the minds of readers and that school boys ought not to read the book, but it also appears from their evidence (though I do not think any evidence is necessary on the point) that Krishna and Radha are believed by Hindus to be a god and goddess, that their doings are not considered as improper, and that those who believe in their divinity would not take immoral ideas from a story such as is described in the book. The Hon'ble Mr. M. S. Das, a Christian gentleman, an Urya by birth and a Vakil of 30 years' standing, in cross-examination says that he knows Krishna believed by a large sect of Hindus to be an incarnation of God, that the author of "Natu Churi" professes to describe one of the *Balya-lilas* of Krishna. He also says—"Those who believe Krishna to be a god and consider incidents like those described in the "*Natu Churi*" or Haribans for divine achievements, would not take immoral ideas from them." Girish Chandra Bhattacharjee, a Bengali domiciled in Orissa and Head Clerk, Registration Office, says in cross-examination that he regards Krishna and Radha as a god and goddess and the story about them as mythological and that Hindus never consider the doings of Krishna and Radha as improper. He says that he would have never refused to pass the book for registration on the ground of its being obscene and that he calls the book obscene only because he cannot read it before his mother and other elder

superiors and has no other reason to call it obscene. Madhu Sudan Rao, a retired Inspector of Schools, says that if the book is claimed to be a religious book, he cannot deny that, for religious people of whose creed the love of Radha and Krishna is a part, he does not consider it objectionable. He says he has read similar thoughts in other works, that the obscene passages in Gita Gobinda, which is considered by the Vaishnabs to be a religious book, are not considered by some classes of Hindus to be depraving to morals. He says Krishna is believed by Hindus as an incarnation of Vishnu and Radha as that of Lakshmi and that his own idea of purity is different from that of ordinary Hindus. Narain Prasad Mahanti, B.A., Deputy Inspector of Schools, says that "Natu Churi" is a religious book treating of Radha and Krishna, that Haribans is a very sacred work, and that if "Natu Churi" was in the Haribans it would be a religious work and that there are many passages in Sanskrit or other classical works which are obscene.

Gobind Nath (who was, however, declared hostile by the prosecution), says that such books are never considered to be offensive to morality. Purusottam Tarkalankar considers "Natu Churi" as obscene but does not consider the *Bastraharan* in Bhagabat as obscene. But the *Bastraharan* is not obscene only if it is looked at from the spiritual point of view. The Muhammadan witness Abdul Samad's idea is that Radhika was "the illegal wife of Krishna" and that she was "a married woman who eloped with Krishna." Considering Krishna and Radha as a man and woman and ignoring the fact that Krishna is described as a boy of 5 years of age, as a divine person and as performing supernatural acts, the incident described in the "*Natu Churi*" may be called obscene, but Hindus generally and Vaishnabs in particular do not consider Radha and Krishna as human beings or any of their doings immoral.

There are may religious or classical works which contain objectionable passages. The Hon'ble Mr. M. S. Das says: "I have read in books more obscene passages than these in "*Natu Churi*." In the Bible there are records of facts of incests having been committed. This, Exhibit L, (Bible, Genesis, Chapter XIX, verses 31-38), is an invitation to a sister to have sexual intercourse with a father. This is very obscene. This passage by itself would suggest immoral thoughts to people, other than Christians, who are immorally inclined.

No one would, of course, think of condemning a religious book because it contains some objectionable passages and the reason why religious or classical works are not condemned on that ground, are well understood. The exception to section 292 of the Indian Penal Code appears not to apply to religious books. The exception runs as follows: "This section does not extend to any representation sculptured, painted or otherwise represented on or in any temple or on any car used for the conveyance of idols or kept or used for any religious purpose." But I think the reason why religious books are not included in the exception is that the tendency of a religious publication is not to deprave or corrupt the morals of persons, and, therefore, a religious work is not obscene within the meaning of section 292. But if the objectionable passages contained in a religious book are extracted and printed separately and such passages deal with matters which are to be judged by the standard of human conduct, for instance where they relate to immoral acts of human beings, and the tendency of such publication is to deprave and corrupt those whose minds are open to immoral influences, such publication may not be justified on the ground that the passages formed part of a religious book. Where, however, a story (which looks objectionable) is taken from a religious book and printed separatly, but it relates to beings whose conduct is not to be judged by the standard of human conduct, it cannot be condemned as obscene because being looked upon as sacred they would not raise immoral thoughts in people who believe in the divinity of the beings whose acts and conduct are described in such story. The *Bastraharan* incident in the Srimat Bhagabat, the most sacred book of the Vaishnabs, when not looked at from the spiritual point of view, may be considered objectionable by people who do not believe in the divinity of Krishna or do not understand the spiritual significance of it. The same observations would apply to passages in the Gita Gobinda and other works of Vaishnab literature. But they cannot be

called obscene because they are descriptive of the doings of persons considered divine and would not raise immoral thoughts.

As I have already pointed out, "*Natu Churi*" is not an extract of certain isolated passages from the Haribans. It is a complete story in itself so far as it goes. It will be obvious to a Hindu that the book describes one of the *Balya lilas* of the god Krishna (mysterious deeds of the infant Krishna). It would not raise immoral thoughts in them because they believe in their divinity and consider their doings sacred.

The book is in the Urya language. The vast majority of the Uryas are Hindus who believe in the divinity of Krishna and Radha. It appears from Hunter's Statistical Account of Bengal, Vols. XVIII and XIX, that 95 or 96 per cent. of the population of districts Cuttack, Balasore and Puri are Hindus and the vast majority of them are Vishnu worshippers.

But then it was contended that even if "*Natu Churi*" may be considered as a religious book and may not be considered as immoral or obscene by the Hindus, there are non-Hindus, Christians for example, among Uryas who might read the book and take immoral ideas from it. But the book is a religious one, as some of the witnesses for the prosecution say. It is apparently intended for Hindus and describes incidents which are not considered improper by the Hindus who form the vast majority of the Urya population. Under these circumstances, I do not think the book can be condemned as obscene merely because a small section of the Uryas, who do not believe in the divinity of Radha and Krishna, might take immoral ideas from it. Besides, it will be obvious even to a non-Hindu on a perusal of the book that it purports to deal with the amours of the infant Krishna, who is described as a divine person and as performing some supernatural acts, as shown by the miraculous dropping of the tops and string out of nothing.

From the evidence it appears that the "*Natu Churi*" was formerly in palm leaf manuscript. Madhu Sudan Rao, the retired Inspector of Schools, says he understands that the book was about 100 years in palm leaf. In cross-examination, he stated he heard from Pandit Gobind Nath that the book was in palm leaf. Witness Gobind Nath says that the book is an old work, like those of Upendra Bhanja (who is stated to have written three hundred years ago), and was formerly in palm leaf, and the District Registrar, Abdul Samad, says that it is an old work published very often. This witness says that he has to register every book published in Cuttack before it is notified in the *Calcutta Gazette*, that he does not register a book if it is obscene and he has to see if it is obscene before registering a book. He admits that he might have registered this book 15 or 20 times, but says that he does not read a book before registering it, that his clerk does so, and that he read the book in question for the first time when it was sent to him by the District Magistrate. The witness Narain Prasad Mahanti, Deputy Inspector of Schools, says that he read an edition of the book 10 or 12 years ago. The book is described in the Bengal Library Catalogue of books as a mythological poem. It also appears from the *Calcutta Gazette* that several editions of "*Natu Churi*" printed in other presses are described as mythological poems.

Though the mere fact that no notice was taken of other editions of the book, or that the book is described in the *Calcutta Gazette* as a mythological poem, would not justify its publication if it is really obscene, the fact remains that it was recognised as a mythological poem and was never objected to before the present prosecution.

The question raised in this case does not appear to have been raised in any case before. Having regard, however, to the facts appearing on the record, *viz.*—

(*i*) that the Urya Haribans is a very sacred work of the Uryas,

(*ii*) that the story as related in the "*Natu Churi*" is the same as that in the Urya Haribans, and the language used in the former is not more objectionable than that used in the latter,

(*iii*) that "*Natu Churi*" is an old work published very often,

(*iv*) that it is a religious work,

(*v*) that the Hindus believe in the divinity of Radha and Krishna, and do not consider their doings as improper, and that the incident described in the book would not suggest immoral thoughts in those who believe in their divinity,

(vi) that Vaishnavism is the prevailing religion of the Uryas,

(vii) that in the "*Natu Churi*" Krishna is described as a boy of 5 years of age, as a divine person and as performing supernatural acts,

I do not think it can be said that the tendency of the book is to deprave and corrupt those whose minds are open to immoral influences or that the book is one of which it was certain that it would suggest thoughts of a most impure character, and I am unable to hold that it comes within the purview of section 292 of the Indian Penal Code.

The conviction of the petitioner and the sentence passed upon him are accordingly set aside. The fine, if paid, will be refunded.

Rule made absolute, Conviction set aside.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 662 OF 1911.

February 22, 1912.

Present:—Mr. Justice Robertson and Mr. Justice Rattigan.

LAD KHAN—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Approver—Evidence—Corroboration—Penal Code (Act XLV of 1860), *s.* 397—*Deadly weapon*—Lathi.

An approver's evidence cannot be accepted unless it is corroborated in material particulars by other and independent evidence.

A *lathi* cannot be rightly described as a deadly weapon within the meaning and for the purposes of section 307 of the Penal Code.

Appeal from the order of the Sessions Judge, Delhi Division, dated the 17th October 1911, convicting the Appellant.

Mr. *Telman*, Government Advocate, for the Respondent.

JUDGMENT.—This judgment will dispose of this and the connected Appeals Nos. 663, 664, 665, 666 and 667, Criminal of 1911. Seven persons, namely, (1) Lad Khan, (2) Ghori, (3) Kalu Khan of Papra, (4) Mamla, (5) Kale Khan of Girari, (6) Naurang and (7) Murad were charged before the Sessions Judge of the Delhi Divis on with having committed an offence punishable under section 397, Indian Penal Code, on the night of the 29th May 1911 at a place within the Gurgaon *Tahsil* of the Delhi District. Of these persons, Murad has been acquitted and the others have been convicted by the learned Sessions Judge, and in each case the opinions of the assessors have been in accordance with the findings of the Sessions Judge.

Lad Khan and Kale Khan of Papra have, in view of the fact that they have each been once previously convicted of an offence under Chapter XVII of the Indian Penal Code, been sentenced to transportation for 10 years. Ghori, Mamla, Kale Khan of Girari and Naurang have received each a sentence of seven years' transportation. They have all appealed from these sentences through the Jail Authorities, and we have very carefully considered the evidence on the record and have had the advantage of hearing the learned Government Advocate in support of the convictions.

That a very bold dacoity took place at the *Riasat* Hajipur on the night of the 29th May 1911 and that in the course of the dacoity, the complainants, Maluka (P. W. No. 2) and Ganga *Chamar* (P. W No. 3), were more or less seriously beaten with *lathis* and robbed of two bullocks and a *chadar* are facts about which there can be no possibility of doubt. The only question in the case is whether the guilt of the various appellants has been brought home to them. Against them, there is, in the first place, the evidence of Budha, the approver (P. W. No. 1). If his evidence is to be believed, the guilt of each of the appellants has been fully established. But, following the rule of practice which is observed in all Courts in this country, we are not disposed to accept his evidence unless we find it corroborated in material particulars by other and independent evidence, and it is with this criterion before us that we have arrived at our conclusion in this case.

The Police have throughout the proceedings acted fairly towards the accused persons and it is obvious from a perusal of the evidence that no attempt has been made to take unfair advantage of the men who were incriminated. The identification of the latter by the prosecution witnesses was conducted properly and the very fact that a number of witnesses were unable to identify Murad shows that the Police did not, in their zeal, forget that the accused persons were entitled to just and honest treatment. In a case of this kind, Subordinate Police Officers might have been tempted to secure convictions by all means in

their power, especially as the crime of dacoity has been particularly rife in the Delhi District and we are, therefore, all the more happy to find that any such temptation has been set aside by the Police Officers who have been concerned in the investigation of the present case. It is quite unnecessary for us to detail the evidence against each appellant and we need say no more than that in every instance we find ample corroboration of the statements made by the approver. The Sessions Judge has summarized the evidence in his judgment and we have carefully checked the summary, with the result that we find it in every case absolutely correct. We see no reason, therefore, to question the correctness of the finding that the six appellants were guilty of the offence of dacoity.

But we are doubtful whether a *lathi* can be rightly described as "a deadly weapon" within the meaning and for the purposes of section 397, Indian Penal Code. Unfortunately, a *lathi* often does cause fatal injuries especially in this Province, and we cannot too strongly deprecate its use for offensive purposes. But, in itself, it is a stick which is used in every day life by the ordinary agriculturists and we think that the conviction of the appellants might well have been under section 395, Indian Penal Code, especially as the sentences awarded by the Sessions Judge could have been equally awarded under the latter section read with section 59. Mulaka was severely beaten, but "no grievious hurt" was apparently caused nor was there seemingly any attempt to cause such hurt. We accordingly alter the convictions to convictions of offences punishable under section 395, Indian Penal Code.

As regards the sentences, we see no reason to interfere except in the case of Lad Khan and Kale Khan of Papra. Each of these two has, in view of a prior conviction, been sentenced to 10 years' transportation, but those former offences must have been of a trifling character.

Lad Khan, aged 30, was, on the 25th July 1910, convicted of an offence under section 411, Indian Penal Code, and sentenced to 30 stripes and Kale Khan of Papra, aged 22, was on the 14th April 1909 convicted of an offence under section 379, Indian Penal Code, and sentenced to a fine of Rs. 10. Judging from the sentences imposed, the offences committed by the two appellants were not of a very heinous character and we think that a substantial sentence of 7 years' transportation will suffice in each case to meet the ends of justice so far as the present offence is concerned. We accordingly so far accept their respective appeals as to reduce the sentence upon them to seven years' transportation. In all other respects, the appeals are rejected.

Sentence reduced.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No 740 OF 1911.

February 19, 1912.

Present:—Mr. Justice Tudball.

BHAROSA PATAK AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 133—Nuisance—Magistrate's power to take action—Jurisdiction—Common nuisance—Advantage or convenience to the person causing nuisance—Penal Code (Act XLV of 1860), s. 268.

Section 133 of the Criminal Procedure Code enables a Magistrate to take action if he considers on information and inquiry that an unlawful obstruction or nuisance should be removed from any way, river, or channel which is or may be lawfully used by the publice or from any public place.

A common nuisance cannot be excused on the ground that it causes some convenience or advantage to the person guilty of it.

Application for revision against an order of the Sessions Judge of Gorakhpur.

Mr. *Surendra Nath Sen*, for the Applicants.

Dr. *Tej Bahadur Sapru*, for the Opposite Party.

JUDGMENT.—This application in revision arises out of proceedings taken by a Magistrate under section 133 of the Criminal Procedure Code. The facts, as far as they can be gathered from the record and the not very luminous judgment of the lower Court, appear to be as follows: The complainants in the matter are residents and cultivators of Amam and Basarat, two villages, and the opposite party are residents of *Mauzi* Barkagaon. Apparently the lands of the latter village lie at a lower level than those of the two former and when excessive rain falls the water from the higher lands flows down upon the lower lands of Barkagaon. Presumably, both sets of lands lie in an ill-defined hollow. In 1885 there was civil litigation between the parties in regard to a dam which the Barkagaon people built across their fields to prevent

AMBIKA PROSAD SINGH *v.* GUR SAHAI SINGH.

the excess water from the lands above flowing on to their lands. The Civil Court held that the dam was an ancient one and maintained it. The *patwari's* evidence also shows that there is a *tal* or *jheel* in Amam the end of which is also dammed to keep back its waters and that this dam is broken in several places.

The complaint made to the Magistrate was to the effect that the opposite party, the Barkagaon men, had extended their old dam both eastwards and westwards, thereby adding a further obstruction to the flow of excess water along its natural channel over the lands of Barkagaon, with the result that the lands above the dam were flooded and a large area of crops damaged. As usual, they exaggerated their case by pleading that houses in their villages had been flooded out and had fallen.

The Magistrate, who inspected the locality and recorded the evidence, has found that there has been a considerable extension of the dam, resulting in the holding up of a large volume of water, and that this has resulted in considerable injury to the crops growing over a considerable area above the dam.

He has, therefore, passed an order for the removal of the extensions. He has ostensibly taken action under Chapter X of the Criminal Procedure Code which relates to public nuisances.

The pleas raised and pressed in this Court are (1) that the Magistrate had no jursidiction in the matter as it was merely a case of disputed civil rights;

(2) that the applicants were justified in their action as it was taken to protect their own lands and crops.

In regard to jurisdiction, the matter is by no means clear. Section 133 enables the Magistrate to take action under it if he considers on information and inquiry (if any) that an unlawful obstruction or nuisance should be removed from any way, river or channel, which is or may be lawfully used by the public, or from any public place.

There can be no doubt that the applicants have placed (by extending their dam) an unlawful obstruction in the channel along which the complainant party has in the past drained off the surplus waters which flow upon their lands. This extension has been found by the Magistrate to have been recently made. It affects the lands of at least two villages.

A person is guilty of a public nuisance who does any act which causes common injury to the public or the people in general who dwell or occupy property in the vicinity (*vide* section 268, Indian Penal Code). The resultant injury in the present case affects a large area of cultivated land and a considerable body of persons. It is difficult, if not impossible, to lay down any fixed boundary between what constitutes a public nuisance and what a private nuisance, but in the present case, seeing that the cultivators of two villages are affected, there can be little doubt that the present case is one of a public nuisance.

There cannot be any doubt that even from before 1885, that portion of the public affected by the act has been draining off the excess waters which come upon its lands over the lands of the applicants and that the applicants have placed an unlawful obstruction to prevent the flow of water along its natural channel, a channel which the public body affected has a right to use for the removal of excess water over and above that held up by the smaller pre-existing dam. The case, no doubt, is close to the border line between private and public nuisances but, in the circumstances, I do not see sufficient cause for interference on revision on this point. The second plea has no force. A common nuisance cannot be excused on the ground that it causes some convenience or advantage to the applicants (section 268, Indian Penal Code).

The case is one in which I do not think interference is necessary or advisable and I, therefore, dismiss the application.

Application dismissed.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 995 OF 19 1.

January 18, 1912.

Present:—Mr. Justice Holmwood and Mr Justice Sharfuddin.

AMBIKA PROSAD SINGH—FIRST PARTY—PETITIONER

versus

GUR SAHAI SINGH AND ANOTHER—SECOND PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 147.—Direction to Police to assist party to remove obstruction, whether legal.

EMPEROR *v.* SOHAN SINGH.

A Magistrate has power to invoke the asssistance of the Police in carrying out an injunction made by him under section 147 of the Criminal Procedure Code; that is, the Police may be ordered to see that an obstruction is removed.

Dowlat Koer v. *Siva Pershad Pandit*, 10 Ind. Cas. 615; 12 Cr. L. J. 319; 15 C. L. J. 267, relied upon.

Rule against the order of the Deputy Magistrate of Gaya, dated August 8th, 1911, directing the petitioner to make three openings in the *ail* in dispute within five days.

Babus *Harendra Narain Mitter*, *Atulya Charan Bose* and *Lakhi Narain Singh*, for the Petitioner.

Babus *Manmotha Nath Mukherji* and *Siva Nandan Sahay*, for the Opposite Party.

JUDGMENT.—This Rule was apparently issued on some apparent conflict between the rulings in the case of *Pasupati Nath Bose* v. *Nanda Lal Bose* (1) and *Lalit Chandra Neogi* v. *Tarini Persad Gupta* (2) with the later decision in the case of *Dalmir Puri* v. *Khodadad Khan* (3). All these cases, we may say, are in direct conflict with the early Madras ruling *In re Alfred Lindsay* (4). But that, of course, does not affect our decision in this Court. We are bound to follow the rulings of the Calcutta Court. Now, it so happens that this apparent conflict has been dealt with by us in a judgment [*Dowlat Koer* v. *Siva Pershad Pandit* (5)], which does not appear in any of the various reports, but we are told it is reported in 10 Indian Cases 615, which was passed in Criminal Revision No. 187 of 1911. We, therefore, hold that the ground upon which the order was set aside in *Dalmir Puri's* case (3) was quite distinguishable from the previous cases which held that the Magistrate had power to invoke the assistance of the Police in carrying out the injunction he made under section 147. The injunction in this case is a good one. It appears on the face of the order that the second party having satisfied the Magistrate that he had a right to have an opening in the *ail* in question for the purpose of passing water, he having exercised the right for several years and that also during the last rains when the right was last exercisable, it was clearly the Magistrate's duty to direct the first party to make three openings in the said *ail* within a reasonable time from the passing of the order. The time given was 5 days.

Then comes the question, if he failed to carry out the Court's order, what was to be done? The Court held, following our judgment in *Dowlat Koer* v. *Siva Pershad Pandit* (5) and the cases we have cited from 5 Calcutta Weekly Notes, that the Police might be ordered to see that the obstruction was removed. Of course, there is the alternative that the parties, who failed to carry out the injunction, should be prosecuted under section 188. But we think that that would be a cumbrous course and it would be much more prejudicial to the second party in a section 145 case than the usual method of obtaining Police assistance.

The Rule is, therefore, discharged.

Rule discharged.

(1) 5 C. W. N. 67.
(2) 5 C. W. N. 335.
(3) 36 C. 923; 14 C. W. N. 178; 4 Ind. Cas. 415; 10 Cr. L. J. 579.
(4) 4 M. 121.
(5) 10 Ind. Cas. 615: 12 Cr. L.J. 319; 15 C. L.J. 267.

(s. c. 18 P. R. 1911 Cr.)

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 1101 OF 1911.

October 4, 1911.

Present:—Mr. Justice Kensington.

EMPEROR—PETITIONER

versus

SOHAN SINGH—CONVICT—RESPONDENT.

Punjab Laws Act (IV of 1872), ss. 47, 50-B—No rules framed by Government—Possession of buoy for crossing river not a punishable offence.

No rule having been framed by the Local Government under section 47 or section 50-B of the Punjab Laws Act, constituting the manufacture of rafts or buoys or their use in crossing rivers an offence in the Lahore district, the possession of a buoy in this part of the province for use in crossing a river is not a punishable offence.

Case reported by the Sessions Judge, Lahore Divison, with his No. 944 of 16th August 1911.

FACTS.—A buoy ($6\frac{1}{2}$ feet long and $2\frac{1}{2}$ feet wide at the broad end) with 6 dried water-melons, with the inside emptied out, was found out from the possession of the accused who had no license.

The accused, on conviction by Sardar Sohan Singh, exercising the powers of a Magistrate of the first class in the Lahore District, was sentenced by order, dated 21st July 1911, under section 47, Act IV of 1872, to undergo one month's rigorous imprisonment.

GURAMEAH *v.* EMPEROR.

GROUNDS.—Accused was sentenced to one month's rigorous imprisonment for having in his possession dried water-melons, with the insides emptied out, for use as buoys to cross the Ravi. He was sentenced under section 47 of the Punjab Laws Act. I forward the case for revision, as no sentence is provided by law for a breach of section 47. No rules have been framed under section 50 B nor were there any pre-existing rules.

The sentence appears clearly illegal. I recommend that it be quashed

Mr. *Obeduiloh*, for the Crown.

ORDER.—For reasons given by the learned Sessions Judge, the conviction is set aside. Sohan Singh must be acquitted as having committed no offence known to law. He is discharged from his bail.

This is not the first case of the kind which has come before me from the Lahore District. The Magistrate should take measures to see that men are not prosecuted for supposed offences under section 47 of the Punjab Laws Act, there being no rules under either section 47 or section 50B constituting it an offence, in this part of the Punjab, to manufacture rafts or buoys, or to use them for crossing rivers.

Revision accepted.

(s. c. 16 C. W. N. 336.)

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1082 OF 1911.

December 6, 1911.

Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.

GURAMEAH AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Warrant—Destruction by accused—Presumption of legality—Criminal Procedure Code (Act V of 1898), ss. 98, 100, 552—Penal Code (Act XLV of 1860), ss. 147, 332.

Where, upon an application under section 552 of the Criminal Procedure Code, a warrant under section 100 of the Code was issued to compel restoration of an abducted female, but was drawn up on a form which was printed for use under section 98 of the Code, and the accused persons snatched away the warrant and destroyed it:

Held, that it must be presumed that the warrant contained the substance of what is set out in section 100 and that the portions which had to be altered were altered.

Rule against the order of the Additional Sessions Judge of Chittagong, dated July 24th, 1911, affirming that of the Deputy Magistrate of Chittagong, dated July 14th, 1911, convicting the accused under sections 147 and 332 of the Indian Penal Code and sentencing them each to undergo rigorous imprisonment for nine months and to pay a fine of Rs. 30.

FACTS.—The complainant filed an application under section 552 of the Criminal Procedure Code for the restoration of his wife who was alleged to have been detained by her uncle, one of the accused, for the purpose of being married to some other person.

The application was made to the Joint Magistrate, who, not being a Presidency or a District Magistrate, was not empowered to act under section 552. He, therefore, issued a warrant under section 100 of the Code for immediate appearance of the woman, but as there was no printed form under that section, a form under section 98 for house search was issued with the necessary alterations having been made in the form.

The Police Officer, who was entrusted with the execution of the warrant, went to the house of the woman's uncle where the complainant's wife was said to have been detained. But he was resisted and assaulted while attempting to execute the warrant, which was snatched away from him and destroyed by the accused.

The accused were then tried for the offences under sections 147 and 332 of the Indian Penal Code, convicted and sentenced as stated above.

The accused obtained this Rule.

Mr. *A. Chowdhury* and Babu *Khitish Chandra Sen*, for the Petitioners.

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—This was a Rule calling upon the District Magistrate of Chittagong to show cause why the conviction and sentence passed on the petitioners should not be set aside on the ground that on the facts proved it ought to be held that the alleged search-warrant was illegal and without jurisdiction, and resistance, if any, to the execution thereof does not amount to any offence.

We are unable to find on the facts that the alleged search-warrant was either illegal or without jurisdiction. The order

of the Magistrate passing it was made with jurisdiction and it was an order for a warrant under section 100 for Manuda Khatun for immediate appearance. Now, that warrant was snatched away and destroyed by the accused persons, and it must, therefore, be presumed that it contained the substance of what is set out in section 100, although admittedly it was drawn up on a a form which is printed for use under section 98. Now, under section 100 the only kind of warrant that can be issued is a search-warrant, and the person to whom such warrant is directed may search for the person so confined and such search shall be made in accordance therewith and the person, if found, shall be immediately taken before the Magistrate. Now, let us see how this warrant under section 100 can be conveyed on a form under section 98. It is perfectly clear that the form under section 98, afte scratching out clauses (*c*) and (*d*), would be perfectly sufficient for the execution of a process under section 100. It is in evidence that there is no form printed under section 100 and that the form under section 98 is always used for these warrants under section 100. We must, therefore, take it that the portions which had to be altered were altered. But a warrant under section 98 used for the purpose of section 100 would run perfectly correctly, in the words of section 93, to enter with such assistance as may be required in such place, that is, the house where the woman was confined, and to search the same in the manner specified in the warrant and to take into custody and carry before the Magistrate the person named therein. Now, the evidence is that the person named therein is this Manuda Khatun. We, therefore, find that the alleged search-warrant was not illegal nor without jurisdiction, and that any resistance thereto was, therefore, an offence.

Several cases have been cited to us, but there was only one of them which in any way touches this case, and this is the ruling in *Busi Haldar* v. *Probhat Chander* (1). There the person applied under section 100, Criminal Procedure Code, for a search-warrant, but the Magistrate issued a warrant under section 96, Criminal Procedure Code, under which the Police supposed themselves to be acting: held, that the issue of the warrant under section 96 was illegal and the order was a nullity. Reading this finding and the judgment in the case, it is clear that the error in that case was an error in substance and not in form. The Magistrate himself with his eyes open issued the warrant under section 96. The warrant purported to be for the purpose of section 96 and the Police who executed it supposed that they were acting under section 96. The case, therefore, is clearly distinguishable from the present case where the error, if there is any, as to which we know nothing, could have been one merely of form. But, having regard to what the learned Judge has said with respect to these cases in the last passage in his judgment, we think that the accused have been too harshly dealt with. The learned Judge says:—"This is one of those cases of not infrequent occurrence which show how keenly Muhammadans resent the issue of any process against a woman who may be an accused or a witness in a 498 Indian Penal Code case, or analogous case; and it is doubtless because of such cases that the Government of this Province has recently issued an order that such complaints should in the first instance be referred to a Local Muhammadan Marriage Registrar or other gentleman of position for inquiry and report. Probably, if this had been done in the present instance the present case would not have arisen."

We think that there is a great deal to be said from this point of view, and, while we agree with the learned Judge that the Police when they get a warrant from the Magistrate are bound to execute it and must be fully protected in the execution thereof, we are willing to take a more lenient view of the conduct of the accused in the present case than the lower Courts have found it necessary to do.

We, therefore, in discharging the Rule, direct that the sentence on the petitioners be reduced to one of three months' rigorous imprisonment, and that the fine of 30 rupees each passed upon them do stand with the alternative sentence of imprisonment. The accused will, therefore, surrender to their bail and serve out the rest of their modified sentence.

Sentence reduced.

(1) 6 C. L. J. 127; 11 C. W. 836; 6 Cr. L. J. 33.

GAJENDRA GHORAI *v.* EMPEROR.

(s. c. 15 C. L. J. 80.)

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 360 OF 1911.

April 27, 1911.

Present:—Mr. Justice Caspersz and Mr. Justice Sharfuddin.

GAJENDRA GHORAI AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), *s.* 147—*Rioting—Cutting crops grown by accused—Right of private defence.*

B. bought the disputed land from the guardian of a minor. The minor subsequently sold the same land to *S.* Thereupon *B.* obtained an *ex parte* decree declaring his right to the land and secured possession in execution of that decree. In the meantime, the petitioners, who held the land as *bhagdars* under *S.*, actually cultivated the land and raised the crop which *B*'s *bhagdar*, the complainant, tried to cut. The petitioners opposed and a riot ensued, and the petitioners were convicted :

Held, that as the petitioners actually cultivated the disputed crop and were no parties either to the suit or to the delivery of possession of the land, they were justified in claiming what they had grown and in resisting the action of the complainant when he went to take possession, and that the petitioners were not guilty of rioting.

Rule against the order of the District Magistrate of Midnapore, dated the 21st March 1911, modifying that of the Sub-Deputy Magistrate of Contai, dated the 27th February 1911.

Babu *Dasarathi Sanyal*, for the Petitioners.

Babu *Baramasibasi Mukerjee* (for Babu *Sajani Kanta Sinha*), for the Opposite Party.

JUDGMENT.—This Rule involves a contest between two persons who are, respectively, the under-tenants of Baidyanath and Sukhamani Dey. Baidyanath bought the disputed land from the guardian of a certain minor. That minor, however, subsequently sold the same land to Sukhamani Dey. Thereupon, Baidyanath obtained an *ex parte* decree on the 14th March 1910, declaring his right to the land; and, in pursuance of that decree, he secured possession.

Now, the riot in respect of which the petitioners have been convicted, and which conviction has been upheld by the District Magistrate on appeal, was due to an assertion of right by the petitioners who held as *bhagdars* under Sukhamani. It has been found that the crop for which the quarrel took place, was grown by Sukhamani, that is, by the petitioners

EMPEROR *v.* DILSUKH.

who would be entitled to possession of the same in their capacity as *bhagdars*. The decree in favour of Baidyanath was one passed in a suit to which the petitioners were not parties; and, even if they had been parties we are not prepared to accept the contention that possession of the land would necessarily connote delivery of possession of the crop grown thereupon. On this point, Mr. Justice Jackson, in *Afatoolla Sardar* v. *Dwarka Nath Moitry* (1), the case to which the District Magistrate has referred, expressed his judgment with some uncertainty. He was then dealing with the sale of an under-tenure for arrears of rent under section 66 of Bengal Act VIII of 1869.

On general principles, however, there can be no doubt that the petitioners who actuallly cultivated the disputed crop, being no parties either to the suit or to the delivery of possession of the land, were justified in claiming what they had grown and in resisting the action of the complainant when he went to take possession. We are not prepared to say that the right of private defence was exceeded in the circumstances of this case.

The Rule is, therefore, made absolute and the conviction and sentences are set aside.

The petitioners will be discharged from the obligation of their bail-bonds.

Rule made absolute.

(1) 4 C. 814.

(s. c. 19. P. R. 1911 Cr.)

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 1319 OF 1911.

November 11, 1911.

Present:—Mr. Justice Rattigan.

EMPEROR—PETITIONER

versus

DILSUKH—ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), *s.* 488—*Maintenance—Order restricted to money payment—Grain allowance not justifiable.*

An order, under section 488 of the Criminal Procedure Code, for maintenance must be for a sum of money payable as a monthly allowance, at a rate not exceeding Rs. 50 a month. The section does not warrant an order that the allowance be paid wholly or partially in grain or the like.

Case reported by the District Magistrate, Hissar, with his No. 2159, dated 23rd September, 1911.

EMPEROR *v.* LEKRIA.

FACTS.—*Musammat* Kesar, wife of Dilsukh, applied under section 488, Criminal Procedure Code, for maintenance to be granted to her. The case was decided by Lala Murari Lal, Magistrate, 1st class, Hissar, who passed the following order on 30th August 1911:—

"*Mulzim muddaya ko ek man fi mah anaj ab aur fasle rabi ke bad derh man fi mah diya kare, aur adam adaegi men char rupaya mah war baraye guzara mustaghisa ka muqarrar kiya jata hai.*" (Translation—Accused to give to complainant one maund of grain *per mensem* and from the next harvest $1\frac{1}{2}$ maunds of grain. In default, four rupees *per mensem* are fixed as maintenance to be paid per month by accused).

GROUND.—The Criminal Procedure Code seems to sanction only a monthly allowance in cash to the extent of Rs. 50 *per mensem* and the order as regards payment of grain seems to be illegal (see Instructions to Judicial Officers issued by the Chief Court, paragraphs 13-15, pages 217-8, edition of 1900).

ORDER.—No one present. An order under section 488, Criminal Procedure Code, for maintenance must be for a sum of money payable as a monthly allowance, at a rate not exceeding Rs. 50 a month, and the section does not warrant an order that the allowance be paid wholly or partly in grain or the like. I accordingly alter the order of the Magistrate and direct that Dilsukh pay *Musammat* Kesar the sum of Rs. 4 a month as maintenance from the date of the Magistrate's order (*viz.*, the 30th August 1911).

Revision accepted.

(s. c. 8 N. L. R. 20.)

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 89-B OF 1911.

December 1, 1911.

Present:—Mr. Batten, A. J. C.

EMPEROR—PROSECUTOR

versus

LEKRIA—ACCUSED.

Criminal Procedure Code (Act V of 1898), *ss.* 123,397 *—Accused under detention in default of giving security —Subsequent sentence of imprisonment for substantive offence—Commencement of sentence.*

A person committed to prison under section 123 (1), Criminal Procedure Code, is not undergoing a '*sentence* of *imprisonment*' within the meaning of section 397.

Consequently, when a person undergoing imprisonment in default of furnishing security is sentenced to imprisonment for some substantive offence, the sentence for the substantive offence should commence from the date on which it was passed, and not from the expiration of the detention in default of furnishing security.

Queen-Empress v. *Diwan Chand*, 14 P. R. 1895 Cr.; *Imperator* v. *Durga Bahirav Tiwari*, Criminal Ruling No. 33 of 1904; *Joghi Kunigan* v. *Emperor*, 31 M. 515; 4 M. L. T. 223; 8 Cr. L. J. 402, followed.

Emperor v. *Tula Khan*, 30 A. 334; A. W. N. (1908) 133; 5 A L. J. 318; 7 Cr. L. J. 247; 4 M. L. T. 41, dissented from.

Criminal revision from the order of the Extra Assistant Commissioner and Magistrate, 1st Class, Akola, on 6th September 1911.

JUDGMENT.—On the 2nd September 1911, in proceedings taken under section 109, Criminal Procedure Code, Lekria was ordered, under section 118, Criminal Procedure Code, to execute a bond, with two sureties each for Rs. 200, for his good behaviour for the period of one year. As he failed to give security, he was, on the same date, under section 123, Criminal Procedure Code, committed to prison for one year or until within the year he should give the security. On the 6th September 1911, the same Magistrate convicted Lekria of an offence under section 13 (*e*) of the Arms Act as applied to Berar, and sentenced him to rigorous imprisonment for four months. The Magistrate directed that this sentence was to take effect from the date of the expiry of the imprisonment for failure to give security or from the date that he should furnish security. The District Magistrate has referred the sentence under the Arms Act for the orders of this Court, as he is of opinion that the direction, that the sentence should not take effect until the expiry of the imprisonment for failure to give security, is illegal. The direction given by the Magistrate was, no doubt, given in what he considered to be compliance with the provisions of section 397, Criminal Procedure Code, which runs as follows:—"When a person already undergoing a sentence of imprisonment, penal servitude or transportation is sentenced to imprisonment, penal servitude or transportation, such imprisonment, penal servitude or transportation shall commence at the expiration of the imprisonment, penal servitude or transportation to which he has been previously sentenced." The proviso to this section is not material in the present case. In the case of

Queen-Empress v. *Diwan Chand* (1), where the facts were similar to those of the present case, it was held that when a person undergoing imprisonment in default of giving security is sentenced to imprisonment for some substantive offence, the sentence for the substantive offence should commence from the date on which it was passed. It was pointed out that section 123, Criminal Procedure Code, does not say that a person failing to give security shall be "sentenced" to imprisonment, but that he shall be committed to, or detained in prison, until the period expires, or the security is given. In the words of Frizelle, J., "Had it been the intention of the Legislature that when a person undergoing imprisonment in default of giving security, is sentenced to imprisonment for some substantive offence, that sentence should commence on expiration of the period for which security is required, we think it would have made a distinct provision to that effect. If accused had given security, instead of undergoing imprisonment in default, the sentence in question would have taken effect at once and not on expiration of the period of security, and the fact that he is unable to give security should not make any difference." The same view has been taken in Bombay, vide *Imperator* v. *Durga Bhairav Tiwari* (2), and in Madras, vide *Jeghi Kannigan* v. *Emperor* (3). A contrary view has been taken in *Emperor* v. *Tula Khan* (4), but the weight of authority appears to be in favour of the view that when a person is committed to prison under section 123 (1), Criminal Procedure Code, he is not undergoing a sentence of imprisonment within the meaning of section 397, and that also is my own opinion The direction given by the Magistrate on the 6th September 1911 is amended, and I direct that the sentence under section 13 (*e*) of the Arms Act as applied to Berar shall take effect from the date on which it was passed. It follows that the period of imprisonment under the Arms Act will run concurrently with a portion of the imprisonment in default of giving security, should security not be given before the expiration of the sentence of imprisonment under the Arms Act.

(1) 14 P. R. 1895 Cr.
(2) C. R. No. 33 of 1904.
(3) 31 M. 515; 4 M. L. T. 222; 8 Cr. L. J. 402.
(4) 30 A. 334; A. W. N. (1908), 133; 5 A. L. J. 318; 7 Cr. L. J. 427; 4 M. L. T. 41.

(s. c. 9 A. L. J. 156.)

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No 580 OF 1911.

January 6, 1912.

Present:—Mr. Justice Griffin.

GAURI SHANKAR LAL—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 476—*Legal Practitioners Act (XVIII of 1879)*, s. 23—*Magistrate holding inquiry—Whether a Court.*

For the purposes of section 476 of the Code of Criminal Procedure, a Magistrate holding an inquiry under section 23 of the Legal Practitioners Act is a Court.

Application for revision against an order of the District Magistrate of Ballia.

Mr. *Satya Charan Mukerji*, for the Applicant.

Mr. *Howard*, for the Crown.

JUDGMENT.—In the course of an inquiry under the provisions of section 23 of the Legal Practitioners Act, regarding the conduct of a Revenue Agent, the applicant now before me, Gauri Shankar Lal, gave certain evidence on oath, which the presiding officer, Mr. Jopling, considered to be false. Under the provisions of section 476 of the Code of Criminal Procedure, Mr. Jopling directed the prosecution of the applicant for giving false evidence. Gauri Shankar Lal applies in revision to this Court. It is contended on his behalf that Mr. Jopling in holding the inquiry under section 23 of the Legal Practitioners Act was not a Court within the meaning of section 476 of the Code of Criminal Procedure. Having regard to the definition of Court contained in the Evidence Act and the Penal Code, I do not think this contention can prevail.

A further ground taken is that Mr. Jopling was not competent to hold an inquiry under section 23 of the Legal Practitioners Act. It is not clear under what circumstances Mr. Jopling came to hold the inquiry. If the complaint which gave rise to the inquiry against the Revenue Agent, was first filed in the Court of a subordinate to the Collector, Mr. Jopling as Collector was

entitled to transfer the proceedings to his Court. On the merits, there is nothing to be said. The application is dismissed.

Application dismissed.

CALCUTTA HIGH COURT.
CIVIL RULE No. 5426 OF 1911.
March 4, 1912.

Present:—Mr. Justice D. Chatterjee and Mr. Justice N. Chatterjea.

RAM CHARAN CHANDRA AND OTHERS —PETITIONERS

versus

TIRUPULLA SHEIKH AND OTHERS—OPPOSITE PARTY.

Sanction to prosecute—Refusal of sanction by Munsif —Appeal to the District Judge—Transfer of appeal to Sub-Judge—Jurisdiction of Sub-Judge to hear appeal—Civil Procedure Code (Act V of 1908), s. 115—Bengal, North-Western Provinces and Assam Civil Courts Act (XII of 1887), ss. 21, 22—Criminal Procedure Code (Act V of 1898), s. 195, cls. (6), (7).

As the District Judge is the only Court to which appeals from the orders of a Munsif ordinarily lie within the meaning of clause (7) of section 195 of the Criminal Procedure Code, a Subordinate Judge has no jurisdiction to hear an appeal from an order of a Munsif granting or refusing a sanction for prosecution, although the appeal having been at first filed in the District Court was transferred by the District Judge to the Sub-Judge for disposal under section 22 of the Bengal Civil Courts Act.

Rule against the order of the Sub-Judge of Mymensingh, dated July 22nd, 1911, reversing that of the Munsif of Pingua, dated April 21st, 1911.

Babus *Dwarka Nath Chakravarti* and *Kali Kinkar Chakrawarti*, for the Petitioner

Babu *Akhil Bandhu Guha*, for the Opposite Party.

JUDGMENT.

D. CHATTERJEE, J.—In this case a Munsif dismissed a suit on a bond and the decree was upheld by the Appellate Court. An application for sanction to prosecute the plaintiff for offences under sections 463 and 471 of the Indian Penal Code was refused by the Munsif. From this order an appeal was referred evidently to the District Judge. This appeal was heard by the Subordinate Judge who reversed the order of the Munsif and granted sanction. The plaintiff obtained this Rule for setting aside the order of the Subordinate Judge.

It is contended by the learned Vakil for the petitioner that the Subordinate Judge had no jurisdiction to make the order that he has made and on the merits that the order of the Munsif refusing sanction was a proper one and should not have been set aside, as the Courts which decided the bond-suit went upon the failure of the plaintiff to prove his case. The learned Vakil for the opposite party contends that we cannot go into the second question as we have no jurisdiction to interfere under section 195 of the Criminal Procedure Code and the Rule must be discharged, unless we uphold the first contention in which case we may have jurisdiction under section 115 of the Civil Procedure Code. We shall deal with the first question first. Section 195, clause 6, of the Criminal Procedure Code provides that "any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate." Clause 7 provides that "every Court shall be deemed subordinate only to the Court to which appeals from the former Court ordinarily lie." Chapter III of the Civil Courts Act, which is headed as dealing with ordinary jurisdiction, contains section 21 of which clause 2 says that "save as aforesaid, an appeal from a decree or order of a Munsif shall lie to the District Judge." The saving is in respect of any provision to the contrary in any other Act and is not material in this case, as there is no suggestion that there is any such special enactment applicable to it. Clause (4) of section 21 provides that the High Court may, under certain circumstances, allow appeals lying to the District Judge to be preferred to the Court of a particular Subordinate Judge. That also is not material, as there is no suggestion that there is any such special order applicable to the present case. No appeal lay to the Subordinate Judge and he was, therefore, not the authority which could grant or revoke a sanction refused or granted by the Munsif. It is true that under section 24 (1), clause (*a*), of the Civil Procedure Code, the District Judge can transfer any suit, appeal or proceeding pending before him to any Subordinate Court competent to try it, but the Subordinate Judge was not competent to try this appeal as he was not the authority to which the appeal lay. The order of the Subordinate Judge was, therefore, incompetent.

As regards the second question, there is some conflict of authority. The Allahabad High Court has held that under section 195,

clause (6), there can be only one proceeding by way of appeal from an order giving or refusing a sanction and as soon as the Appellate Court makes an order either way, there is no further appeal. See *Emperor v. Serhmal* (1); *Kanhai Lal* v. *Chhadammi Lal* (2). The Madras High Court has decided that an appeal lies to the High Court not only in cases where the first Court refuses sanction and sanction is granted by the Court to which that Court is immediately subordinate, but also in cases where the first Court grants sanction and the sanction is revoked by the Court to which that Court is immediately subordinate. See *Mutu Swami Mudali* v. *Veeni Chetti* (3). The learned Judges differ from the Calcutta ruling in *Hamijuddi Mondal* v. *Damodar Ghose* (4) and agree with two subsequent Calcutta rulings, *Habibur Rahman* v. *Munshi Khodabux* (5); *Girija Sankar Roy* v *Binode Sheik* (6). The same point was raised in the case of *Ram Prosad Malla* v. *Raghubar Mollan* (7), but the learned Judges, whilst expressing an inclination in favour of the Madras view, supported as it was by some of the Calcutta cases, preferred to interfere under section 622 of the old Civil Procedure Code. It is not necessary, however, to pursue this question further as our view on the first question is sufficient to dispose of this Rule.

The Rule is accordingly made absolute. We make no order as to costs.

N. CHATTERJEA, J.—I agree with my learned colleague in making the Rule absolute.

Under section 21, sub-section (2), of the Bengal, North-Western Provinces and Assam Civil Courts Act, an appeal from a decree or order of a Munsif ordinarily lies to the District Judge and not to the Subordinate Judge. There is no suggestion in this case that there is any special order as provided for in sub section (4) of that section under which appeals could have been preferred to the particular Subordinate Judge who passed the order on appeal in the present case. Under section 22(1), a District Judge, no doubt, may transfer to any Subordinate Judge under his administrative control any appeal pending before him from the decrees or orders of Munsifs. When an appeal transferred under section 22 (1) is withdrawn by the District Judge, he may either dispose of it himself or transfer it to a Court under his administrative control competent to dispose of it. The question of competency to dispose of an appeal does not arise when an appeal is transferred in the first instance to a Subordinate Judge under section 21 (1), and it seems, therefore, that a Subordinate Judge is competent to dispose of any appeal pending before the District Judge and transferred by him to the former.

But, under section 195, sub-section 6, of the Criminal Procedure Code, the power of revoking or granting any sanction given or refused, is given to the authority to which the authority giving or refusing it is subordinate and sub-section (7) provides that *for the purposes of this section* every Court shall be deemed to be subordinate *only* to the Court to which appeals from the former Court ordinarily lie. There is no doubt that the District Judge is the only Court to which appeals from an order of a Munsif ordinarily lie. For the purpose of section 195, Criminal Procedure Code, therefore, a Munsif is not subordinate to a Subordinate Judge. A Subordinate Judge can dispose of any appeal transferred to him by the District Judge under section 22 (1) of the Civil Courts Act, but the power of revoking or granting sanction is given only to the Court to which an appeal lies. The power, therefore, cannot be exercised by a Subordinate Judge to whom an appeal does not lie, but who can only dispose of an appeal transferred to him by the District Judge.

In this view of the matter, the other questions raised in this Rule need not be considered.

Rule made absolute.

(1) A. W. N. (1908) 102; 5 A. L. J. 247; 3 M. L. T. 377; 7 Cr. L. J. 359; 30 A. 343.

(2) 31 A. 48; 6 A. L. J. 1; A. W. N. (1908) 290; 5 M. L. T. 55; 9 Cr. L. J. 63; 1 Ind Cas. 5.

(3) 20 M. 382; 17 M. L. J. 266; 2 M. L. T. 239; 6 Cr. L. J. 102.

(4) 10 C. W. N. 1026; 4 Cr. L. J. 168.

(5) 11 C. W. N. 195; 5 C. L. J. 219; 6 Cr. L. J. 29

(6) 5 C. L. J. 222; 5 Cr. L. J. 188.

(7) 13 C. W. N. 1038; 4 Ind. Cas. 6; 37 C. 13; 10 Cr. L. J. 454.

END OF VOLUME XIII.

GENERAL INDEX.

VOLUME XIII—1912.

—— :-o-: ——

Abandonment—Contract to sell land **879**

——— ——— —— Heritable non-transferable interest—Intent to abandon **613**

——— ——— —— Usufructuary mortgage by tenant **941**

Abatement order—No application to set aside abatement—Appeal—Revision **963**

Absolute privilege, rule of, inapplicable in India **217**

Accounts, decree for—Opportunity to defendant to prove what amount due **374**

——— ——— Mode of proving item in a suit for accounts—Burden of proof **955**

——— ——— Partnership—Account stated or settled—Long acquiescence—Limitation—Account to be taken from commencement unless account settled subsequently—Ordinary items not to be challenged in absence of fraud **23**

——— ——— Principal entitled to final accounts at the determination of agency **642**

——— ——— Right of mortgagor to take accounts for surplus profits **963**

——— ——— Suit for rendition of account against agent's heirs—Rendition of accounts, meaning of—Refusal, what constitutes **930**

——— ——— **books** how to be proved **678**

Accused's past misconduct, when may be considered **279**

Accused of poor wits—Practice **216**

Acknowledgment. *See* LIMITATION ACT, s. 19.

——— ——— ——— ——— *Several judgment-debtors—Acknowledgment by one whether saves limitation against others—Application for execution for a certain sum—Acknowledgment of same—Subsequent application for additional amount not included in first application—Whether limitation saved in respect of additional amount—Limitation Act (XV of 1877), s. 19.*

If a joint claim is made against *A.*, *B.* and *C.*, each one of them is a party against whom the claim is made, and if any one has made an acknowledgment within the meaning of section 19 of the Limitation Act he will start the running of a fresh period of limitation against himself alone.

Therefore, an acknowledgment made by one of several judgment-debtors cannot operate to save limitation as against any of the judgment-debtors other than the person making the acknowledgment.

The decree-holder applied for realisation of Rs. 231 as the amount of the decree, and one of the judgment-debtors acknowledged that sum. Subsequently, the decree-holder applied in execution for realisation of Rs. 845 including an additional amount of interest which by mistake was not mentioned in the first instance:

Held, that the acknowledgment was only in respect of the smaller amount and could not give a fresh starting point for limitation as regards the additional amount. CHANDRA KUMAR *v.* RAM DIN, 15 C. L. J. 251; 16 C. W. N. 496 **702**

Acknowledgment—concld.

——— ——— **of debt**—Insolvency petition—Setting out debt the subject-matter of execution proceedings—Saving of limitation **603**

Acquiescence—Alienation in favour of daughter—Inference—Evidence **344**

——— ——— ——Contract to sell land **879**

——— ——— ——— Incomplete mortgage—Demand—Payment of interest **559**

——— ——— ——— by landlord. *See* LANDLORD AND TENANT **32**

——— ——— ——— Waiver—Pre-emptor assisting in sale negotiations and demarcation of land **561**

Acquittal—Interference by High Court—Erroneous interpretation of law **389**

——— ——— No adverse inference against accused after acquittal **279**

Act 11 of 1890, s. 19 **780**

Acts—GENERAL.

Act 1859—XI. *See* REVENUE SALE LAW.
—— 1859—XIV. *See* LIMITATION ACT.
—— 1860—XLV. *See* PENAL CODE.
—— 1865—X. *See* SUCCESSION ACT.
—— 1867—XXV. *See* PRINTING PRESSES AND NEWSPAPERS ACT.
—— 1869—IV. *See* DIVORCE ACT.
—— 1870—VII. *See* COURT FEES ACT.
—— 1871—I. *See* CATTLE TRESPASS ACT.
—— 1871—XXIII. *See* PENSIONS ACT.
—— 1872—I. *See* EVIDENCE ACT.
—— 1872—IX. *See* CONTRACT ACT.
—— 1873—X. *See* OATHS ACT.
—— 1877—I. *See* SPECIFIC RELIEF ACT.
—— 1877—III. *See* REGISTRATION ACT.
—— 1877—XV. *See* LIMITATION ACT.
—— 1878—I *See* OPIUM ACT.
—— 1878—IV *See* FERRIES ACT.
—— 1878—VII. *See* FOREST ACT
—— 1879—XVIII. *See* LEGAL PRACTITIONERS ACT.

Acts—GENERAL - concld.

Act 1881—V. *See* PROBATE AND ADMINISTRATION ACT.
—— 1881—XXVI. *See* NEGOTIABLE INSTRUMENTS ACT.
—— 1882—II. *See* TRUSTS ACT.
—— 1882—IV. *See* TRANSFER OF PROPERTY ACT.
—— 1882—XIV. *See* CIVIL PROCEDURE CODE.
—— 1887—VII. *See* SUITS VALUATION ACT.
—— 1887—IX. *See* PROVINCIAL SMALL CAUSE COURTS ACT.
—— 1889—VII. *See* SUCCESSION CERTIFICATE ACT.
—— 1890—II. *See* Act.
—— 1890—VIII. *See* GUARDIANS AND WARDS ACT.
—— 1890—IX. *See* RAILWAYS ACT.
—— 1894—I. *See* LAND ACQUISITION ACT.
—— 1896—XII. *See* EXCISE ACT.
—— 1897—VIII. *See* REFORMATORY SCHOOLS ACT.
—— 1897—X. *See* GENERAL CLAUSES ACT.
—— 1898—V. *See* CRIMINAL PROCEDURE CODE.
—— 1899—.... *See* CANTONMENT CODE.
—— 1899—II. *See* STAMP ACT.
—— 1904—XIV. *See* VALIDATING ACT.
—— 1907—III. *See* PROVINCIAL INSOLVENCY ACT.
—— 1908—V. *See* CIVIL PROCEDURE CODE.
—— 1908—VI. *See* EXPLOSIVE SUBSTANCES ACT.
—— 1908—IX. *See* LIMITATION ACT.
—— 1908—XVI. *See* REGISTRATION ACT.

Acts—LOCAL.

Act 1865—VIII. *See* MADRAS RENT RECOVERY ACT.
—— 1868—VII. *See* BENGAL ACT.
—— 1872—IV. *See* PUNJAB LAWS ACT.
—— 1873—III. *See* MADRAS CIVIL COURTS ACT.
—— 1876—II. *See* LOWER BURMA LAND AND REVENUE ACT.
—— 1876—VII. *See* BENGAL LAND REGISTRATION ACT.
—— 1876—VIII. *See* BENGAL ESTATES PARTITION ACT.
—— 1876—XVIII. *See* OUDH LAWS ACT.
—— 1879—I. *See* CHOTA NAGPUR LANDLORD AND TENANT PROCEDURE ACT.
—— 1879—XVII. *See* DEKKHAN AGRICULTURISTS RELIEF ACT.
—— 1880—IX. *See* BENGAL CESS ACT.
—— 1881—XVIII. *See* CENTRAL PROVINCES LAND REVENUE ACT.
—— 1883—IX. *See* CENTRAL PROVINCES TENANCY ACT.
—— 1884—XVIII. *See* PUNJAB COURTS ACT.
—— 1885—VIII. *See* BENGAL TENANCY ACT.
—— 1886—XXII. *See* OUDH RENT ACT.
—— 1887—XII. *See* BENGAL, N. W. P. AND ASSAM CIVIL COURTS ACT.
—— 1887—XVI. *See* PUNJAB TENANCY ACT.
—— 1887—XVII. *See* PUNJAB LAND REVENUE ACT.
—— 1891—XX. *See* PUNJAB MUNICIPAL ACT.
—— 1895—I. *See* BENGAL PUBLIC DEMANDS RECOVERY ACT.
—— 1895—III. *See* MADRAS HEREDITARY VILLAGE OFFICE ACT.
—— 1898—I. *See* PUNJAB GENERAL CLAUSES ACT.
—— 1898—IV. *See* BOMBAY CITY IMPROVEMENT ACT.
—— 1898—XI. *See* CENTRAL PROVINCES TENANCY ACT.
—— 1900—I. *See* PUNJAB LIMITATION ACT.
—— 1900—XIII. *See* PUNJAB LAND ALIENATION ACT.
—— 1901—II. *See* AGRA TENANCY ACT.
—— 1901—III. *See* U. P. LAND REVENUE ACT.
—— 1904—III. *See* MADRAS CITY MUNICIPALITY ACT.

Acts—LOCAL—concld.

—— 1905—II. *See* PUNJAB PRE-EMPTION ACT.
—— 1908—I. *See* MADRAS ESTATES LAND ACT.
—— 1908—VI. *See* CHOTA NAGPUR TENANCY ACT.

Regulations.

——.. —— 1806—XVII. *See* REGULATION.
——.. —— 1886—I. *See* REGULATION.
—— ——.. 1793—VI. *See* BENGAL REGULATION.

Statutes.

11—12 Vic. C. 21. *See* INSOLVENT DEBTORS ACT.

Adjournment—Criminal case—Witnesses **928**

Adjustment of decree. *See* CIVIL PROCEDURE CODE, 1908, s. 47.

Administration-bond—*Assignment — Second assignment while first is in force, whether valid—Appeal—Order assigning bond—Probate and Administration Act (V of 1881), ss. 78, 79, 86—Civil Procedure Code (Act V of 1908), s. 105.*

There is no provision in the law which authorizes a District Judge to assign an administration-bond under section 78 of the Probate and Administration Act again while the first assignment is still in force.

There is no appeal from an order assigning an administration-bond. KALIMUDDIN *v.* MAHURNI, 15 C. L. J. 382; 16 C. W. N. 662 **690**

Admissibility—*Statement in document as to boundary—Admissibility against stranger.*

A statement by the grantor in the schedule to a lease regarding the ownership of certain property situate on the boundary of the land demised can be used in evidence against persons who were not parties to the transaction evidenced by the lease. IMRIT CHAMAR *v.* SRIDHAR PANDAY, 15 C. L. J. 7 **120**

Adverse possession—Mortgagee in possession—Mutation as owner **852**

—— —— —— Partition—Possession subsequent to partition **790**

—— —— —— Possession of co-sharer **953**

—— —— —— —— Possession of mortgagee after satisfaction of mortgage **963**

—— —— —— —— Possession of property by a female of a joint Hindu family not entitled to the property **644**

—— —— —— —— *Ineffective possession—Assertion of title to the knowledge of the owner.*

Where the possession of defendant is of an ineffective nature, supposing its character could be improved by an assertion of title, it is necessary for the party so in possession to prove that the owner had knowledge of such assertion.

An "openly avowed claim" means a claim which may be said to have come to the knowledge of the true owner. NALLA VEERANNA *v.* MALLA CHELAMAYYA, (1912) 1 M. W. M. 68 **467**

Agent, authority of—Construction of authority **705**

Agent—concld.

——— ——— *Compromise — Power-of-attorney — Construction of deed—Words giving general powers* —Ejusdem generis—*Power to compromise not similar to power to refer to arbitration—Agent not signing on behalf of principal—One plaintiff signing for the other though not appointed agent.*

Three brothers, *A.*, *B.* and *C.* were plaintiffs in a suit. *A.* and *B.* had given a special power-of-attorney for the case to *C.*, authorizing the latter to engage a legal practitioner or to prosecute the case himself, to present applications to Court and to refer to arbitration. The power-of-attorney then recited the following words: "*garze ke kull sakhta pardakhta mukhtar mazhar ko manzur wa makbul hoga*" "In short, everything done by the *mukhtar* will be binding on me."

A compromise in writing was put in; it was signed by *A.* and *C*, but *B.* neither signed the compromise nor appeared in Court to assent to it. *C.* signed the compromise only for himself and not on behalf of *B.* *A.* signed to the following effect:—"for myself and as *mukhtar* for the other plaintiff through *C. mukhtar.*"

C. was told, on the presentation of compromise, to produce *B.* on a given date. *C.* appeared on that date and said that *B.* had not come though told to do so, and that *C.* was then acting only for himself:

Held, (1) that the compromise did not bind *B*;

(2) that the words purporting to express acceptance of all acts done by the *mukhtar* must be interpreted in the light of the powers previously specifically set forth. The power to compromise, like the power to withdraw the suit or confess judgment, was not *ejusdem generis* with the powers specifically set forth in the power-of-attorney. Power to refer to arbitration could not be likened to the power to compromise; *Wazir Begam* v. *Piari Begam*, 50 P. R. 1898, followed.

(3) that *C.* never acted in the matter of the compromise on behalf of *B*, and *A.*'s signature on behalf of the other plaintiff could not bind *B.* as *A.* held no power-of-attorney from *B.* BISHNA *v.* RATTANI, 20 P. W. R. 1912; 28 P. L. R. 1912 **92**

Agnate, meaning of **665**

Agra Tenancy Act (II of 1901), s. 4 (2)—*'Land,' meaning of—Whether includes grove land—Tenancy—Suit in Revenue Court for ejectment on ground of sub-tenancy—Subsequent suit in Civil Court for ejectment on ground of trespass*—Res judicata.

A grove-holder is a tenant within the meaning of the Agra Tenancy Act.

A. brought a suit in the Revenue Court against *B.* for ejectment on the ground that *B.* was his sub-tenant in respect of certain grove land.

The Revenue Court held that *B.* was not *A.*'s sub-tenant. Subsequently, *A.* instituted a suit against *B.* in the Civil Court on the ground that he was a trespasser in respect of that land:

Held, that the suit in the Civil Court was barred by *res judicata.* CHHOTEY LAL *v.* HAR NARAIN **634**

——— ——— ——— **s. 9**—*Entry of name as fixed-rate tenant—Presumption as to nature of tenancy and not as to title to the tenancy—Conclusive proof.*

The entry as to fixed-rate tenancy mentioned in section 9 of the Agra Tenancy Act is conclusive proof as to the nature of the tenancy only and not as to the title to the tenancy. JAINATH PATHAK *v.* KALKA UPADHYA, 9 A. L. J. 238 **643 F. B.**

Agra Tenancy Act—concld.

——— ——— ——— **s. 10**—*Co-sharer who has transferred his share, whether becomes ex-proprietary tenant of entire co-parcenary body—Suit for profits against* lambardar—*Neglect of* lambardar *in collection of rent—Liability of* lambardar—*Private partition does not affect undivided co-parcenary body—United Provinces Land Revenue Act (III of* 1901*), s.* 164.

C. a co-sharer in a certain undivided *mahal* transferred his share to *K.* and became an ex-proprietary tenant in respect of the *sir* which was in his possession. *K.* got the rent fixed on the ex-proprietary tenancy and attempted to recover it from *C.* and subsequently tried to eject him both in the Revenue and Civil Courts but failed. He then sued *T.*, the *lambardar*, for profits on the ground that he had neglected to collect the rent from *C*:

Held, (*Karamat Husain, J*, *dissenting*) that under the circumstances *T.* could not be said to have neglected the collection of the rent from *C.* and was not liable to *K.* for his neglect.

Per Karamat Husain, J.—Where a co-sharer in an undivided *mahal* transfers his share to a third person he becomes an ex-proprietary tenant in respect of his *sir* of the entire co-parcenary body and not only of his transferee.

Co-sharers in a *mahal* have no power to put an end to the undivided character of the *mahal* by a private arrangement. KISHORI LAL *v.* TODAR SINGH, 9 A. L. J. 244 **535**

——— ——— ——— **ss. 166, 201**—*Lessee recorded as such in revenue papers—Right to sue for profits—Presumption.*

A lessee of a proprietary right, who continues to be recorded as such in the revenue papers even after the expiry of his lease, is entitled to maintain a suit for profits under Chapter XI of the Agra Tenancy Act. Under section 201 of the Act, the Court is bound to presume that he had such right. AHMAD SAID KHAN *v.* MASI-ULLAH KHAN, 9 A. L. J. 152 **975**

——— ——— ——— **s. 193 (g)**—*Suit for arrears of rent—Set-off claimed by defendant in respect of a sum wrongfully collected by plaintiff—Proof of payment—Receipt lost—Proof by other evidence.*

In a suit by a lessor against his lessee for arrears of rent, the lessee is not entitled to claim a set-off in respect of a sum which had been wrongfully collected by the lessor as rent.

If a receipt granted in lieu of certain payments is lost, the party alleging the payments is not bound to prove the loss of the receipt, but may prove payments by other evidence. MUHAMMAD HUSAIN *v.* AMIR HAIDAR **150**

——— ——— ——— **s. 201** **975**

Amendment. *See* PLAINT, DECREE.

——— ——— **of plaint**—Discretion—Indemnity mortgage—Sub-mortgage **203**

——— ——— ——— Suit to recover account books from one's servant—Adding further relief to recover money **268**

——— ——— ——— Suit to recover property from trustees—Right to remove trustee who has seceded from faith—Absence of prayer for removal **599**

Antecedent debt **547**

Appeal—Abatement order—No application to set aside abatement **963**

——— against one out of two decrees—*Res judicata* **985**

——— Court-fee—Payments disallowed by first Court—Prayer for declaration as to who is entitled to money—Prayer for reduction of amount of decree **305**

——— Decree—Determination of principle for ascertaining mesne profits **186**

——— Detention in lieu of imprisonment—Power of Appellate Court to alter sentence of imprisonment to one of whipping—Effect of alteration **284**

——— Legal representative, determination of question as to decree—Death of party before new Civil Procedure Code—Order after new Civil Procedure Code—Application of new Code **70**

——— Misjoinder of causes of action—Suit before new Civil Procedure Code—Second appeal after new Code—Interference on the ground of misjoinder—Power of Appellate Court **788**

——— Objection that suit bad for want of necessary plaintiff **123**

——— by one plaintiff out of many—Decree in favour of all—Mutation entry, effect of **957**

——— Order assigning administration-bond **690**

——— Order by Sessions Judge that he has no jurisdiction to try the case **921**

——— Order setting aside transfer of insolvent's house—Deputy Commissioner of Darjeeling **605**

——— Preliminary and interlocutory orders **800**

——— Time spent in obtaining copies **850**

——— , whether a continuation of suit or a fresh proceeding **851**

——— *Dismissal—Non-filing of notice to respondent—Civil Procedure Code (Act V of 1908), O. XLI, r. 18—Putting in* talabana *with memorandum of appeal.*

An appeal was filed in the District Judge's Court, and at the same time *talabana* was deposited, but the notice which the appellant was required to file by the Circular Order of the High Court in order that processes might be issued, was not filed. On the day fixed for hearing, the appeal was dismissed:

Held, that the order of dismissal was wrong, as it could not be made under rule 18 of Order XLI as the *talabana* had been deposited. GUL MAHOMED *v.* ABDUL JUBBAR, 16 C. W. N. 498 **694**

——— *Interlocutory order—Order intermediate between preliminary and final decrees, appeal from, whether competent—Civil Procedure Code (Act V of 1908), s. 47—Appellate Court—Jurisdiction, if can be given by consent of parties.*

An agreement between two litigating parties as to the mode of determining the question in controversy between them, different from the mode prescribed by the Legislature, may be binding upon them. But their mutual consent cannot create a right of appeal where none is allowed by statute for a right of appeal is a creature of statute.

Appeal—contd.

A preliminary decree was made in a partition suit on the basis of an award of arbitrators. It directed that certain properties should be divided in execution proceedings. On two previous occasions appeals were preferred against orders made in the proceedings on the basis that they fell within the scope of section 47 of the Code and no objection was taken to the competency of the appeals. Another appeal has been preferred against an order made in the execution proceedings, and it is objected that no appeal lies:

Held, that interlocutory orders, intermediate between the preliminary and the final decrees, are not appealable and that it is open to the respondents to take exception to the competency of the appeal, notwithstanding the direction given in the preliminary decree and notwithstanding their omission to take exception to the validity of the appeals filed against the previous orders in the so-called execution proceedings. PRAYAG NARAIN SINGH *v.* SUKDEO NARAIN SINGH **170**

——— *Minor's property in possession of third person—Remedy of guardian—Suit—Practice—Guardians and Wards Act (VIII of 1890), ss. 47, 48.*

There is no provision in the Guardians and Wards Act authorizing a Court to compel a person in possession of a minor's property to hand over the property to the person appointed guardian of the minor's property.

No appeal lies against an order of the District Judge declining to compel a person in possession of a minor's property to hand it over to the guardian and referring the guardian to a separate suit. NATHU RAM *v.* KARMON, 40 P. L. R. 1912 **326**

——— *Objection-Memo.—Adding parties—Parties not necessary to appeal—Civil Procedure Code (Act V of 1908), O. XLI, r. 20.*

Though a Court has power to add parties in appeal independently of the provisions of Civil Procedure Code, Order XLI, rule 20, yet when a person is not a necessary party to an appeal, a respondent should not be permitted to add him as a party and to raise cross-objections against him. WILLIAMMAI ACHI *v.* NATARAJA PILLAY, 11 M. L. T. 157; (1912) 1 M. W. N. 198 **906**

——— *Power of Appellate Court to refuse to entertain plea of limitation—Belated pleas of limitation, how to be dealt with.*

Where a plea of limitation is not taken in the first Court or in the grounds of appeal but is raised in argument before the Appellate Court, the latter Court would be justified in refusing to entertain it if it involves further inquiry into facts for a proper decision.

Obiter dicta.—A plea of limitation taken in an original Court, before issues are fixed, must be entertained and decided. If it is taken at a later stage and if it can be decided on the issues existing on the record as it stands, the Court is bound to take note of it and decide it. This rule holds good irrespective of how the matter has come to the notice of the Court.

But if, after the issues have been fixed and the case has proceeded to some length, a defendant raises the question of limitation and the Court sees that in

Appeal—contd.

order to decide the question, fresh issues of fact must be gone into and additional evidence taken, then the Court has the option of refusing to entertain the plea.

When a case has passed out of the original Court and is before a Court of appeal, the rule probably remains much the same. An Appellate Court has generally an option of refusing to listen to a plea of limitation even though it can be decided without any further inquiry. SHAH MUHAMAD *v.* PIARA MAL, 84 P. R. 1911 **792**

——— **Second.** *See* CIVIL PROCEDURE CODE, 1908, s 100.

——— ——— Appeal held time-barred--Misapprehension of fact as to sufficient cause—Right of appellant to raise question in second appeal **943**

——— ——— Costs **201**

——— ——— Finding of necessity not a pure question of fact **945**

——— ——— Order setting aside sale **147**

——— ——— Order under section 87 of Chota Nagpur Tenancy Act **193**

——— ——— Question of fact—Whether particular stipulation a penalty **624**

——— ——— Question of law—Permanent tenancy—Inference from facts **606**

——— ——— Small Cause suit—Suit to compel refund of assets improperly distributed under s. 295, Civil Procedure Code **907**

——— ——— Suit as originally framed to be looked to **493**

——— ——— Value determined by original value of suit **174**

——— ——— *Omission to consider evidence--Misreading or misconstruing evidence—Omission to make specific mention of document—Civil Procedure Code (Act V of 1908), s. 100—Conflict of decisions.*

There is considerable conflict of judicial opinion on the point whether a second appeal will lie where the lower Appellate Court omits to consider evidence, or misreads, or misconstrues evidence.

But the omission of the Court to make specific mention of a particular document and the statement in it, does not amount to a substantial error or defect in procedure within the meaning of section 100 of the Code of Civil Procedure. DIBAKAR NAG *v.* MRITTUNJOY BHATTACHARYA **495**

——— ——— *Point of law—Misconstruction of piece of documentary evidence—Civil Procedure Code (Act V of 1908), s. 100.*

The misconstruction of a piece of documentary evidence is not a mistake of law sufficient to concede a second appeal. GANPAT *v.* BALMAKUND **206**

——— ——— *Question of fact or law—Liability of estate to pay Nankar-holders Question to be decided upon construction of documents—Misinterpretation of documentary evidence--Interference on second appeal.*

Where a lower Appellate Court has misread and misinterpreted the documentary evidence on the record, has misunderstood the real point for decision in the case and its finding on a question of fact is based on no evidence at all, the Court of second appeal can interfere with that finding.

The question as to the obligation of an estate to pay *Nankar*-holders which is to be decided upon a construction of the documents before the Court, is a mixed question of law and fact. INDAR DAWAN SINGH *v* DEPUTY COMMISSIONER **629**

——— ——— *Question of law - Construction of document—Evidence—Document of title—Civil Procedure Code (Act V of 1908), s. 100.*

The misconstruction of a document by a Court below cannot justify interference in second appeal, if the document is merely a piece of evidence and not a document of title. MADAN MOHAN *v.* MANMATHA NATH BOSE **425**

Approver. *See* PARDON.

Approver's testimony—Corroboration **279**

——— ——— *Evidence - Corroboration.*

An approver's evidence cannot be accepted unless it is corroborated in material particulars by other and independent evidence. LAD KHAN *v.* EMPEROR, 19 P. W. R. 1912 CR. **998**

Arbitration—*Award—Insertion of name as arbitrator without knowledge of one party—Submission to proceedings by that party—Whether party can object subsequently—Arbitrator not deciding certain matter—Matter ought to have been brought to arbitrator's notice—Blanks and omissions in award—Rules for calculation given without giving result—Arbitrator—Judicial acts to be jointly done—Ministerial act—Reception of written statement—One arbitrator receiving written statement, whether irregular—Arbitrator refusing to take evidence—Evidence ought to be distinctly tendered—Award not signed at same time and place, whether void—Umpire—Appointment of umpire when difference of opinion among arbitrators—No provision as to umpire—Whether award bad—Death of party, effect of.*

The defendants became aware that the name of one *K.* had been fraudulently entered in an instrument of submission to arbitration without their knowledge, but they made no protest and accepted the position that he was a validly appointed arbitrator:

Held, that they were not entitled to repudiate the position they deliberately took up before the arbitrators.

Sheo Nath v. *Ramnath*, 10 M I. A. 413 at p. 426; 5 W. R. (P. C.) 21; 1 Ind Jur. (N S.) 161, relied upon.

The award of an arbitrator which determines all questions brought before his notice cannot be objected to, notwithstanding there are other matters within the scope of the submission to which his attention has not been drawn. In order to invalidate an award because a particular question was not decided, it must be established that the point was specifically stated and brought to the notice of the arbitrator.

Rees Waters, (1847) 16 M. and W. 263; 4 D. & L. 567, relied upon.

Where an arbitrator states rules for calculating the amount of money to be paid, without giving the result of such calculation, the award is sufficiently certain, on the principle that that is sufficiently certain which can be made certain.

Arbitration—contd.

Beale v. *Beale*, (1635) Cro. Car. 383, and *Strong* v. *Strong*, (1872) 9 Cushing 560, relied upon.

An award, therefore, which purports to divide property between two persons by prescribing a rule of division, may well be final though the property in question be not actually divided.

Judicial acts, in order that they may be valid, must be jointly performed by all the arbitrators.

The mere reception of a written statement by one of the arbitrators is not a judicial act.

Harvey v. *Shelton*, 7 Beav. 455 at p. 462; 13 L. J. Ch. 466, distinguished and explained.

The reception by one arbitrator of the written statement of the defendants in the absence of his colleague and the plaintiffs is not a grave irregularity on his part which of itself would invalidate the entire proceedings.

In order to make out a case entitling a party to impeach an award on the ground that the arbitrators improperly refused to take the evidence of an important witness, the witness must be distinctly tendered to the arbitrators.

An award is not void even if it is not signed by the arbitrators at the same time and place.

A submission to arbitration is not bad, because it omits to provide for the appointment of an umpire in the event of a difference of opinion between the arbitrators.

If the intention of the parties to an arbitration is to bind themselves and their representatives-in-interest by the decision of the arbitrators, the reference does not stand revoked merely by the death of one of the parties.

If before the hearing has concluded one of the parties dies, his representatives should be brought on the record and made parties to the submission. But where the hearing has terminated before such death and nothing remains for the arbitrators to do but to deliver their award, the award delivered after the death is binding upon the parties and their representatives. MANINDRA NATH *v.* MOHANUNDA ROY, 15 C. L. J. 360 **161**

——— *Award given after a very long time—Notice to revoke submission—Validity of award—Effect of delay.*

The plaintiff and defendants entered into an agreement submitting their disputes to arbitration on 29th of September 1905. Shortly after the reference, the arbitrators met and did something in that connection. Nothing, however, was done after that for a long time. On 16th of August 1906, plaintiff served a notice to revoke the arbitration. After the notice the arbitrators met again on the 20th of August and continued to sit for several days. No one took the least notice of the notice of revocation. The award was given on 29th of August 1906:

Held, that under the circumstances the award was not invalid and could not be set aside. JANKI DAS *v.* TIKA RAM **32**

——— *Arbitrator, if bound by rules of practice adopted by Courts—Arbitrator not to go beyond precise questions submitted—Right of party in whose favour award is given to impeach its validity—Award, if can be filed in part—Civil Procedure Code (Act XIV of 1882), s. 525.*

An arbitrator is not bound by mere rules of practice which the Courts have adopted for general convenience and he has greater latitude than Courts of law to do complete justice between the parties according to equity and good conscience. But he cannot go beyond the precise questions submitted nor can he determine any claims or demands, though existing between the parties, save only those which they have agreed that he shall decide.

Arbitration—concld.

Therefore, where the question submitted to an arbitrator was, whether the plaintiff had a right of way over a specified strip of land: *Held*, that the arbitrator had no authority to lay out a new path on a piece of land over which neither party alleged a right of way.

The party in whose favour an erroneous action of the arbitrator operates, cannot be heard to impeach the validity of the award.

It is not competent to a Court in a proceeding under section 525 of the Code of 1882, to direct that an award be filed in part. An application to file an award which is open to attack in part should be refused. NARSINGH NARAIN SINGH *v.* AJODHYA PROSAD SINGH, 16 C. W. N. 256; 15 C. L. J. 110 **118**

——— *Judge if chosen as arbitrator—Decision final—Judicial pressure, effect of.*

If the parties have treated a Judge as their arbitrator and have submitted to his decision, even though he had no jurisdiction to deal with the matter in controversy, his decision is binding upon them as if it were the award of an arbitrator.

Ledgard v. *Bull*, 13 I. A. 134; 9 A. 191, followed.

This doctrine, however, cannot be applied to the circumstances of a case where the Judge was not chosen by the parties voluntarily and where one party acted under judicial pressure of the highest degree, to which he was not in a position to offer effective resistance. SUBHADRA KOER *v.* DHAJADHARI GOSSAIN, 15 C. L. J. 142; 16 C. W. N. 444 **898**

Arbitrators, powers and duties of—Misconduct of arbitrators **520**

Arrest of father to induce son to confess **721**

Assault—Removal by threat of force—Forcibile removal **237**

Assignment—Mortgage—Suit by assignee—Mistake as to date of mortgagee in assignment deed—Right of plaintiff to prove that suit mortgage was assigned **313**

Attachment—Sale of goods—Suit against buyer—Strangers in possession—Decree only against buyer **469**

——— *Execution—Devisee's interest—Probate taken by Administrator-General—Administrator-General not made party in execution.*

In execution of a personal decree against *A.* his deceased father's estate was attached and out of it the property which fell to the lot of *A.* was sought to be sold. The estate, when attached, was in the hands of the Administrator-General who had taken out Probate of the Will which *A.*'s father had left. The Administrator-General was not a party to the execution proceedings:

Held, that *A.*'s share could be sold.

The attachment of a judgment-debtor's property is not illegal merely because other property which did not belong to him was also included in the attach-

Attachment—concld.

ment. It does not matter whether the estate attached is in the hands of the Administrator-General or whether the Administrator-General has been made a party to the execution proceedings.

A bequest, unless the testator intended otherwise, as in the case of a contingent bequest, becomes a vested interest in the devisee or legatee from the date of the testator's death, although he may not be entitled to receive what has been bequeathed to him except in due course of administration. ADUSUPATTI VENKATA RAO *v* SWAMI PILLAI, 11 M. L. T. 27; (1912) 1 M. W. N. 56; 22 M. L. J. 228 **795**

——— ——Malikana *allowance payable from Government Treasury—Whether can be attached—Pensions Act (XXIII of 1871), s. 11.*

A *malikana* allowance payable from a Government Treasury is an allowance of the nature of a pension and is not liable to be attached in execution of a simple money-decree. LALMAN *v.* KALKA PRASAD, 8 A. L. J. 1326 **194**

——— ——— **wrongful**—*Damages — Malice —Not necessary for damages.*

When an act *prima facie* wrongful, *e. g*, attachment of a person's property for revenue due from a stranger, is committed, and actual damages are thereby sustained, no malice need be proved to recover damages. RAMASAWMI AIYENGAR *v.* MUTHUSAWMI AIYER, (1912) 1 M. W. N. 42 **799**

Attestation of deed—Consent **613**

——— ———*Illiterate executant—Scribe writing executant's signature—Not an attesing witness.*

A document was executed by an illiterate executant. The scribe wrote his name as having scribed the deed and also as the actual writer of the executant's signature. He did not sign as attesting witness:

Held, that the scribe could not be regarded as an attesting witness of the document. SAROOP CHAND *v.* TULARAM, 8 N. L. R. 17 **902**

Award. *See* ARBITRATION.

———, *grounds for setting aside of—Arbitrators, powers and duties of—Misconduct of arbitrator—Civil Procedure Code (Act V of 1908), Sch. II, paras. 14, 15 and 20—Limitation Act (IX of 1908), Sch. I, Art. 158.*

Subject to any limitations contained in the instrument of his appointment and to any statutory directions as to the manner in which he is to discharge his duties, an arbitrator may conduct his proceedings in any manner he thinks fit, so long as he acts in accordance with the principles of justice, equity and good conscience. He is not fettered by rules of practice which Courts of law adopt for general convenience, nor bound by the adjective law laid down in the Code of Civil Procedure and the rules made under it or the rules relating to evidence to be found in the Indian Evidence Act. He may also in forming his judgment act upon merely moral considerations of which a Court of law could not take cognizance.

Where an award is good on the face of it, the parties cannot object to the arbitrator's decision either upon law or fact and the Courts will not ordinarily review his discretion provided he acts within his authority and behaves fairly to each party. Nor will

Award—concld.

they interefere with his judgment on any mere ground of mistake.

An arbitrator called as a witness in an action on an award might be examined as to every matter of fact with reference to the making of the award and whether in his estimate of the compensation he took into consideration any matters not included in the reference and, therefore, not within his jurisdiction, but he cannot be questioned as to the elements which he took into his consideration in determining the *quantum* of compensation or so as to scrutinise the exercise of his discretionary power to award compensation.

The principles accepted in the English law for regulating the conduct of arbitrators are not inapplicable to arbitration proceedings held in this country. Nor are the powers of the Courts in India to review the proceedings of arbitrators any more extensive than they are in England.

Article 158 of the first Schedule to the Limitation Act cannot apply to a written statement which a defendant is required to file in answer to an application for the purpose of having the award made a rule of Court. BADRUDDIN HASAN *v.* AMIR BEGAM, 14 O. C. 308 **520**

Bank-note—Property passes by delivery to *bona fide* purchaser for value—Erroneous disposal of currency-note—Power of superior Court to order re-payment of equivalent **213**

Bengal Act (VII of 1868), s. 8 **403**

Bengal Cess Act (IX of 1880), s. 95 **120**

Bengal Estates Partition Act (VIII B. C. of 1876), ss. 23, 25, 29, 45, 46, 119—*Declaratory suit that defendant not tenant, if maintainable during partition.*

The plaintiff and the defendant No. 2, in this case, are the joint owners of an estate which is in course of partition under the Estates Partition Act. The defendant No. 1 claimed that he was a tenant. The plaintiff repudiated that position but his objection was overruled by the Revenue authorities. He now sued for a declaration that defendant No. 1 is not a tenant in respect of any land in the estate and it was contended that the suit was not maintainable:

Held, that section 25 of the Estates Partition Act was no bar to the suit. LAKHI CHOWDHURI *v.* AKLOO JHA, 16 C. W. N. 639 **123**

——— ——— ——— **ss. 25, 29, 45, 46** **123**

——— ——— ——— **s. 89**—*Land of dwelling house of one proprietor allotted to another—Mistake in fixing rent—Trespasser—Suit in ejectment—Remedy—Assessment of rent—Decree for rent—Limitation, no question of, as no rent had been yet assessed.*

In a partition proceeding, the land on which the dwelling-house of one proprietor stood, was allotted to another proprietor and the statutory duty cast upon the Revenue authorities to fix the rent was not performed by reason of the mutual mistake of the Court and the parties:

Held, that the proprietor to whom the land was allotted could not treat the proprietor of the dwelling-house as a trespasser, nor would a suit for ejectment lie against the latter;

Bengal Estates Partition Act—concld.

Held, also, that upon the rent being assessed—a direction to assess the rent in this case having been given—the plaintiff was entitled to a decree for rent, and that no question of limitation could arise as rent had not yet been assessed. RAZIUDDIN HUSSAIN v. TAHARAT HUSSAIN **498**

——— ——— ——— **s. 119** **123**

Bengal Land Registration Act (VII of 1876), s. 70 **353**

Bengal, North-Western Provinces and Assam Civil Courts Act (XII of 1887), ss. 8, 21 - *District Judge—Power to assign cases to Additional Judge—Jurisdiction.*

A District Judge has power to assign any case to an Additional Judge, who, in entertaining an appeal in pursuance of such assignment, does not act beyond his jurisdiction. MUTSADI LAL v. MULE MAL, 9 A. L. J. 95 **384**

——— ——— ———**ss. 21, 22** **1007**

Bengal. Public Demands Recovery Act (I of 1895), ss. 7 (1) (c), 10, 12 (1), 32 (1) **351**

Bengal Regulation XV of 1793, s. 10 **963**

Bengal Tenancy Act (VIII Of 1885), s. 22 (2) **336**

——— ——— ——— **s. 22 (3)** **598**

——— ——— ——— **s. 22, sub. s. (3)**—Ijardar *purchasing occupancy-holding—Occupancy-right, whether ceases—Tenancy, whether ceases.*

When an *ijardar* purchases an occupancy-holding, the occupancy-right comes to an end, but the holding itself does not cease to exist.

Therefore, the purchaser of a holding from an *ijardar* becomes a *raiyat*. MEHDI LAL v. GRANT **636**

——— ——— ——— **s. 49** **598**

——— ——— ——— **s. 60** - *Landlord's name registered in respect of certain share—Collection of rent by him for larger share—Suit for larger share, whether maintainable.*

Where the name of a landlord is registered in respect of a certain share but it is found that he has collected rent separately in respect of a larger share, he is entitled to sue in respect of a larger share. SHARASHI MOHAN ROY v. RAMESH CHARAN ROY **451**

——— ——— ——— **s. 66, cl. (2)** - *Non-occupancy* raiyat—*Ejectment—Arrear for more than one year - Landlord's right to eject—Waiver—Judgment—"Decretal money," meaning of—Amendment of decree directing ejectment in default of payment of arrear of entire decretal money.*

Section 66 of the Bengal Tenancy Act refers to an arrear for one year only. If the landlord omits to sue for ejectment in default of payment of the arrear for one year, he must be deemed so far to have waived his right to turn out the tenant.

Sita Nath Midda v. *Basudeb Midda*, 2 C. L. J. 540, relied upon.

Jogeshuri Chowdhurain v. *Mahomed Ebrahim*, 14 C. 33, referred to.

Bengal Tenancy Act—contd.

A landlord brought a suit for arrears of rent for four years and got a decree. The judgment directed that a decree for ejectment should be made in terms of section 66 in default of payment of the decretal money within 15 days. The decree directed that the defendant would be ejected in default of payment of the entire decretal money within 15 days. The plaintiff executed his decree, as the defendant did not put in the entire decretal amount but a sufficient amount to cover one year's arrears, and took possession. Subsequently the defendant asked for the amendment of the decree which was done:

Held, that the expression "decretal money" in the judgment meant the decretal money as limited and confined to the amount as specified in accordance with sub-section (2) of section 66, that it could not mean the entire decretal amount, and that the amendment was rightly granted.

Held, also, that it was open to the Court to amend the decree even after it had been executed. JAGAT CHANDRA MAJUMDAR v. MUNSEF ALI SARKAR **671**

——— ——— ——— **s. 85** **912**

——— ——— ——— **s. 88** **449**

——— ——— ——— **s. 106**—*Suit between rival proprietors—Question of possession—Suit between two rival tenants—Question of title, if may arise—Court not to go behind statement in judgment.*

The question of possession alone should be considered in a proceeding under section 106 of the Bengal Tenancy Act between two rival proprietors; but the question of title may legitimately arise and be decided in such a proceeding between two rival tenants or between a landlord and a tenant.

Mohunt Padmalav Ramanuja Das v. *Lukshmi Rani*, 12 C. W. N. 8 at p. 15, relied upon.

A Court will not go behind any statement in the judgment of another Court. ENSAR ALI v. YAKUR ALI **311**

——— ——— ——— **s. 120, sub-s. (2)**—*"Any other evidence"*—Zerait *land—Admission by tenant in previous deposition—Assertions of witnesses that land is cultivated by landlord—Mere execution of* kabulyat.

The policy of the Legislature is that a *zemindar* should not be at liberty to add to his stock of private lands, that is, to absorb the *raiyati* lands of the estate and convert them into his private lands. Only those lands can be treated as private lands which were originally set up by the *zemindar* as such.

Under section 120, sub-section (2) of the Bengal Tenancy Act, an admission by a tenant defendant in his previous deposition is admissible as "any other evidence."

Nilmony Chuckerbutti v. *Baikanta Nath Bera*, 17 C. 466, referred to.

Assertions of witnesses to the effect that the land was cultivated by the landlord as his *zerait* land for a number of years, are also admissible in evidence.

The mere execution of a *kabulyat* is no evidence that the land was *zerait*, although the fact may be taken into consideration along with other evidence. AKHJU SINGH v. JAGANNATH PRASAD SINGH **1**

——— ——— ——— **s. 161** **144**

Bengal Tenancy Act—contd.

——————— **ss. 164, 167**—*Rent suit against real though not recorded tenant—Effect of decree—Whether decree, rent decree or money decree—Provisions of sale to be strictly followed—Purchase of tenure by mortgagee in execution—Subsequent purchase by landlord in execution of rent-decree—Non-annulment of incumbrance of mortgage, effect of—Priority of title.*

A suit for rent was brought against the real tenant who was not recognised as tenant, but was sued merely as he was in possession, and a decree was made:

Held, that the decree was not a money decree for compensation for use and occupation, but a good decree for rent.

Ranee Lalun Monee v. *Sona Monee Dabee*, 22 W. R. 334 and *Surnomoyee* v. *Dinonath Gir*, 9 C. 908; 13 C. L. R. 69, relied upon.

The provisions of the Bengal Tenancy Act regarding sales are very stringent and the results are generally destructive of various derivative rights belonging to third parties not before the Court. Those provisions are a part of public policy intended for the benefit of all parties concerned. If the landlord wants the special results provided for by the Act, he must proceed strictly in accordance with its provisions.

If the bidding for a tenure put up to auction under section 164 of the Bengal Tenancy Act does not reach the level of the decretal amount, the sale cannot be held under that section. If the sale takes place on the first day of sale without the issue of a second proclamation, the sale is not one under the Bengal Tenancy Act and only the right, title and interest of the judgment-debtor will pass to the purchaser.

The mortgagee of a tenure purchased the mortgaged property in execution of his own mortgage decree. The same property was subsequently purchased by the landlord in execution of a rent decree but the mortgage incumbrance was not annulled:

Held, that the landlord could not oust the mortgagee without annulling the incumbrance under section 167 of the Bengal Tenancy Act, and that the mortgagee purchaser was entitled to fall back upon his mortgage lien to defend himself from the attack of the landlord. BANBIHARI KAPUR *v.* KHETRA PAL SINGH ROY, 38 C. 923; 16 C. W. N. 259 **785**

——————— **s. 176** **785**

——————— **s. 170, cl. (3)**—*Purchaser of holding before rent-decree—Right to deposit to prevent sale.*

Where a tenure is transferred before a rent decree is made against the transferor tenant, the transferee is not entitled to make a deposit under section 170 clause (3) of the Bengal Tenancy Act.

But where on previous occasions, similar deposits made by the transferee were withdrawn by the landlord decree-holder, the transferee should be permitted to make the deposit. BRINDARANI CHOUDHRANI *v.* ANNODA MOHAN RAY, 16 C. W. N. 94 **328**

——————— **s. 170 (3)**—*Right to deposit to avoid sale under rent-decree—Transferee of non-transferable occupancy-holding.*

The transferee of a non-transferable occupancy-holding does not acquire any interest in the holding by his purchase, and has no right to make a deposit under section 170 (3) of the Bengal Tenancy Act to defeat the landlord's right to bring the holding to sale in execution of a rent-decree. NALINI BEHARI ROY *v.* FULMANI DASI, 16 C. W. N. 421; 15 C. L. J. 388 **487**

——————— **s. 174**—*Party, litigant if permitted to assume inconsistent positions—Appellant before L. A. Court not permitted to object that no appeal lies in case—Civil Procedure Code (Act V of 1908), s. 47, O. XXI, rr. 11 (3), 89, 91, 92—Execution of rent-decree—Decree-holder auction-purchaser—Application to set aside sale—Order or decree are appealable—Court's power to extend time for making deposit under section 174, Bengal Tenancy Act—Act of Court not to prejudice any one—Five per cent. on purchase-money to be paid even when decree-holder is auction-purchaser—Copy of decree, or* Vakalatnamah, *not necessary in execution proceedings—Poundage fee, refund of, on sale being set aside.*

The decree-holders purchased at auction property of the judgment-debtors and the purchase-money was set off against the judgment-debt. The judgment-debtors applied to have the sale set aside under section 174 of the Bengal Tenancy Act. The application was dismissed and the judgment-debtors appealed to the District Judge who set aside the sale. From that order a second appeal was preferred to which the judgment-debtors objected that no appeal lay:

Held, first, that it is not open to a party litigant to assume inconsistent positions: the respondents, having succeeded in the lower Appellate Court on the assumption that the order of the original Court was of a particular description and appealable, cannot now be permitted to turn round and assume an entirely different and inconsistent position and say that that order is not appealable.

Held, secondly, that the order of the original Court is one under section 47 of the Code of Civil Procedure, 1908, and in the nature of a decree against which a first appeal and a second appeal lie.

It is not open to the Court to extend the time within which the judgment debtor is required to make a deposit under section 174 of the Bengal Tenancy Act.

But the position may be different if the party has been prevented from making the deposit by reason of the action of the Court, for an act of the Court can perjudice no one.

A judgment-debtor who applies to have a sale set aside under section 174 of the Bengal Tenancy Act is bound to deposit 5 per cent. of the purchase-money even where the decree-holder is the auction-purchaser and the purchase money is set off against the judgment-debt.

A copy of the decree is not necessary for the purpose of the execution proceedings.

The authority of a Pleader engaged in the suit does not terminate with the decree, and it is competent to him to appear on behalf of his client in the course of execution proceedings without a fresh authority which is unnecessary.

The poundage fee paid by the decree-holders auction-purchasers in respect of an execution sale is refunded on the sale being set aside.

Therefore, the decree-holders auction-purchasers are not entitled to charge the amounts spent by

Bengal Tenancy Act—concld.

them in obtaining a copy of the decree, in the Court-fee of a fresh *Vakalatnamah* in the execution proceeding, and in payment of the poundage-fee, as part of the costs mentioned in section 174 of the Bengal Tenancy Act. RAGHUBAR DAYAL SUKUL *v.* JADU NANDAN MISSIR, 15 C. L. J. 89 **365**

——— ———— **s. 182**—*Homesteads — Purchase by raiyat of homestead of another tenant—Cultivation of purchased homestead land—Character of such land.*

A *raiyat* purchased two parcels of land from the respective *raiyats* to whose homesteads they originally belonged Since then he cultivated them and paid rent to the landlord, who subsequently sued to eject him:

Held, that the parcels, whatever they had been once, were now agricultural lands held by the *raiyats* and that the Bengal Tenancy Act applied to them. JOTINDRA MOHAN *v.* KEDAR NATH **289**

——— ———— **Sch. III, Art. 6 (3) 140**

Bombay City Improvement Act (Bom. Act IV of 1898), s. 48—*Validating Act (XIV of 1904)—Tribunal of Appeal—Jurisdiction—Power to determine and apportion compensation—Power to decide question of title.*

The Tribunal of Appeal, constituted under the provisions of the Bombay City Improvement Act, has power to deal with and decide questions relating to the apportionment of the money directed by it to be paid in respect of compensation. It has also the power to decide the questions of title raised by the claimants *inter se*, if that is necessary for the exercise of the power to determine the amount of compensation and apportion it. PANDURANG BHIVAJI *v.* GANGA RAM GANU, 14 BOM. L. R. 22; 36 B. 203 **855**

Buddhist Law—*Guardian — Minor — Grand-uncle acting as guardian in the life-time of grandfather—De facto guardian—Contract made in good faith for minor's benefit binding on minor.*

Failing the father and mother and their appointees, no person however nearly related, is of right entitled to the custody of a minor Buddhist or to the guardianship of his property.

The grand-uncle of a minor undertook the duties of guardian of minor's property without opposition on the part of the minor's grandfather. In the capacity of guardian the grand-uncle made a contract on behalf of the minor in good faith for the minor's benefit:

Held, that the grand-uncle acted as a *de facto* guardian of the minor and as the contract was made in good faith for the minor's benefit, it was binding on the minor. MG PO THWE *v.* MA BAW, 4 BUR. L. T. 272 **373**

Buoy, possession of, for crossing river, when a punishable offence **1001**

Burden of proof. *See* CUSTOM—SUCCESSION.

——— ———— *Biswadar's* liability to pay *Kudi Kamini* Cess **865**

——— ———— Contract by minor—Validity **956**

——— ———— Custom recognising partition and alienation of *vrit* **225**

Burden of proof—concld.

——— ———— Debt contracted by Manager of joint family—Presumption that debt incurred for benefit of joint family **34**

——— ———— Mortgage by Hindu father **401**

——— ———— Title suit after defeat of claim **455**

——— ———— *Claim for a declaration that defendant's name has been entered in Revenue papers by mistake.*

The *onus* of proving separate exclusive possession of certain land and that defendant's name has been wrongly entered in the Revenue papers as joint owner thereof lies on the plaintiff. BHOLA *v.* BRIJ LAL, 27 P. W. R. 1912; 32 P. L. R. 1912 **960**

Cantonment Code, 1899, s. 94—*Notice not specifying the nature and extent of repairs, whether legal.*

Section 94 of the Cantonment Code contemplates that the owner should know the precise nature and extent of the repairs which, in the opinion of the Cantonment authority, he should execute in the interests of the safety of the occupier or of the public. Therefore, a notice under the section which does not state at all what kind of repairs the Cantonment authority requires the owner to make to the houses specified in the notice, is illegal. EMPEROR *v.* QADIR BAKHSH, 3 P. R. 1912 CR; 9 P. W. R 1912 CR. **209**

Cattle-pounds—Maintenance of cattle-pounds whether compatible with Cattle Trespass Act **965**

Cattle Trespass Act (I of 1871) 965

Caveat-emptor, *applicability of—Attaching creditors, responsibility of—Decree-holder, liability of, for improper attachment—Warranty of title of judgment-debtor.*

Per *Lindsay, A. J. C.*—The rule of *caveat-emptor* has no application in India in the case of ordinary sales of goods by private contract.

In India an attachment is made at the risk of the attaching creditor and he is responsible for any results which can be traced to an unlawful attachment carried out upon application made by him. In the case of sale in execution in India although there is no warranty given by the Court or by the officer entrusted with the duty of carrying out the sale, yet there is a warranty by the decree-holder that the property does belong to the judgment-debtor. The property is sold as the property of the judgment-debtor on a representation to that effect made to the Court by the decree-holder who is taking out execution.

A stranger whose property is sold behind his back without any authority does not need to have the sale set aside.

Where the decree-holder pointed to a carriage as the property of the judgment-debtor which was thereupon attached and at the sale was purchased by the plaintiff's predecessor-in-title, but subsequently on a suit brought by a third person claiming the carriage it was decreed to him and the purchaser lost it:

Held, that the plaintiff was entitled to recover the purchase-money from the decree-holder. BRIJ MOHAN LAL *v.* MUNNI BIBI, 14 O. C. 343 **803**

Central Provinces Land Revenue Act (XVIII of 1881), s. 83—*Suit for amendment of Settlement Record—Party—Whether Government necessary party.*

The plaintiff brought a suit for a declaration that he was the maintenance grant-holder of a certain *Mouzah* and for the amendment of the Settlement papers in which he had been described as a *ticcadar*. In the Courts below he obtained the declaration but he omitted to give notice of the suit to Government:

Held, that the words of section 83 of the Central Provinces Land Revenue Act are imperative, and it was the duty of the plaintiff to give notice of his suit to Government. UJAL SINGH *v.* DEBYA SINGH SARDAR **184**

Central Provinces Tenancy Act (XI of 1898), ss. 41, 43 (2) **982**

——— ——— ——— **ss. 46, 47, 48, 70, 71, 72, 95**—*Transfer of tenant-right—Transfer prohibited by s. 46 or s. 70—Jurisdiction of Civil or Revenue Court—Suit to avoid transfer.*

Where a transfer of tenant-right would be valid between the parties thereto in the absence of the prohibition contained in section 46 or section 70 of the Central Provinces Tenancy Act, 1898, it cannot be avoided except in the manner and to the extent provided by that enactment.

No suit would lie in a Civil Court to avoid such a transfer. GANESHDAS *v.* SHANKAR, 8 N. L. R. 22 **909**

——— ——— ——— **ss. 47, 48, 70, 71, 72, 95** **909**

Central Provinces Zemindars—*Exercise of Police and Excise functions by sufferance or delegation—Resumption of those functions by Government—Act under Sovereign powers—Maintenance of private cattle-pounds, whether compatible with Cattle Trespass Act—Maintenance of cattel-pounds under control of Government officials—Act of Executive Government—Jurisdiction of Civil Court to interfere.*

Where in the Central Provinces certain *zemindars* in exercising Police and Excise functions were not acting as of right, but were so acting either by sufferance or by delegation:

Held, that the resumption of those functions by the Government was a thing done by the Government in exercise of its Sovereign powers, and that a suit to question the resumption was not maintainable in a Civil Court.

Held, also, that the maintenance of private cattle-pounds was incompatible with the provisions of the Cattle Trespass Act and that the establishment and maintenance of cattle-pounds in the present case, under the superintendence and control of Government officials, empowered to obtain the assistance of the Police when required, might be considered essential for the maintenance of law and order, and the peace and good government of the country, and, therefore, an act of the Executive Government with which a Civil Court was not competent to interfere. BIR BIKRAM DEO *v.* SECRETARY OF STATE, 16 C. W. N. 362 **965 P. C.**

Charge—Charges to be separate for every act of perjury or forgery **398**

Charge—concld.

——— **of dacoity**—No details of offence—More than three dacoities, charge for—Evidence of three other dacoities **781**

——— **to Jury.** *See* JURY TRIAL.

——— ——— ———. *See* MISDIRECTION **218**

Cheating. *See* PENAL CODE, s. 420.

Cheque—Receipt—Instrument purporting to receive money from bank and specifying name of messenger **330**

Chota Nagpur Landlord and Tenant Procedure Act (I B. C. of 1879), s. 124—*Chota Nagpur Tenancy (Amendment) Act (V B. C. of 1903), s. 35—Resumable under-tenure—Sale at auction—Sale before Tenancy Amendment Act—Effect of sale.*

Under section 124 of the Chota Nagpur Landlord and Tenant Procedure Act, 1879, as it stood originally a resumable under-tenure could not be sold in execution of a rent-decree, but the right and title of the judgment-debtor could be sold. That section was repealed by section 35 of the Chota Nagpur Tenancy (Amendment) Act, 1903. The repealing enactment came into force on November 4th, 1903, and its section 1, sub-section (3), declared it applicable to all cases pending on the date of its commencement so far as might be.

A resumable under-tenure was sold at an auction-sale in execution of a rent-decree, on August 18th, 1903:

Held, that the repealing enactment could not affect the sale concluded before its commencement, that section 124 as originally passed applied, and that the purchaser purchased only the right and title of the defaulting under-tenure-holder. DWARKA NATH *v.* PRALHAD RAM **201**

Chota Nagpur Tenancy Act (VI of 1908), ss. 87, 224—*Civil Procedure Code (Act V of 1908), s. 100—Second Appeal—Order under s. 87 of Chota Nagpur Tenancy Act.*

There is no second appeal from a decree of the Judicial Commissioner of Chota Nagpur made on appeal from an order under section 87 of the Chota Nagpur Tenancy Act. RAGHUBIR SAHI *v.* PROTAB UDOY NATH SAHI DEO, 16 C. W. N. 294; 15 C. L. J. 145; 39 C. 241 **193**

——— ——— ——— **s. 224** **193**

Chota Nagpur Tenancy Amendment Act (V B. C. of 1903), s. 35 **201**

Civil Procedure Code (Act XIV of 1882), s. 13 **351**

——— ——— ——— **s. 13**—Res judicata—*Alienation by grandfather—Vendee suing minor grandson for possession—Guardian* ad litem *confessing judgment—Subsequent suit for possession by minor not barred—Inquiry into consideration and necessity—Negligence of guardian.*

Negligence on the part of a guardian *ad litem*, even apart from fraud or collusion, is sufficient to prevent the *quondam* minor from being bound by the decree passed in the suit.

Daulat Singh v. *Raghubir Singh*, A. W. N. (1894) 141, dissented from.

Ahmad Ali v. *Amir Shah*, 35 P. R. 1898, followed.

Civil Procedure Code—(1882)—contd.

A.'s grandfather alienated certain ancestral property. The vendee obtained possession of the property by a suit in which *A.*, then a minor, was a defendant and was represented by his mother as his guardian. In that suit, the mother confessed judgment Subsequently, *A.* brought the present suit for possession of the property on the ground that the alienation was not for consideration and necessity. The lower Courts held the suit barred as *res judicata*:

Held, that the former suit did not bar the present suit and that, in the interests of justice, *A.* was entitled to claim an inquiry into the present suit. If on inquiry it should be found that the alienation was for consideration and necessity, then the suit would fail on the merits. If, however, it was not for necessity and consideration, the mother was negligent in not defending the suit and the decree in the previous suit was not binding on *A.* MOHAMMAD *v.* SUKHA SINGH, 36 P. W. R. 1912; 15 P. L. R. 1912 **20**

——— ——— ——— **s. 30** **599**

——— ——— ——— **s. 43**—*Former suit for injunction dismissed on ground that plaintiff was not in possession—Second suit for possession, whether barred.*

Plaintiff sued defendant seeking a permanent injunction restraining defendant from interfering with his possession. This suit was dismissed on the ground that the plaintiff was not in possession. The plaintiff then brought a second suit for possession:

Held, that the second suit for possession was not barred by section 43 of the Civil Procedure Code, 1882. BANDEY ALI *v.* GOKUL MISIR, 9 A. L. J. 111 **154**

——— ——— ——— **s. 43**—*Hindu Law—Partition* karar—*Agreement to give one brother Rs. 5,000 for daughter's marriage—Pro-notes executed in pursuance of such agreement—Consideration—Family settlement—Pro-note binding on minor members—Suit for partition in 1904—Suit on pro-note in 1905—Former suit no bar Causes of action altogether different.*

A, *B.*, *C.* and *D.* were 4 brothers in an undivided Hindu family In consequence of disputes that arose between them, they entered into a partition *karar* in 1901, whereby *B*, *C.* and D. agreed to pay *A.* Rs 5,000 towards the expenses of the marriages of his daughters. Subsequently, in pursuance of the said *karar B* on behalf of himself and as guardian of the minor son of *C.* who died in the meanwhile executed a pro-note in 1902 in favour of *A.* for Rs 3,333-5-4; and *D.* executed another pro-note in *A.*'s favour for the balance of Rs. 5,000. In 1904 *A.* sued his brothers for partition of the family properties and obtained a decree. Now, in 1905 *A.*'s widow sued *B.* and the minor son of *C.* for Rs. 3,333-5-4 on the pro-note executed by them. The defendants contended (1) that the suit pro-note had no consideration; (2) that at any rate it does not bind the minor son of *C.*, as it was not for his benefit; (3) that the claim is barred under section 43 of Act XIV of 1882, as it ought to have been included in the previous suit of 1904:

Held, (1) that the agreement to pay Rs. 5,000 was not an independent promise, but was one of the terms of the contract of partition, and *A.*'s agreement to the other terms of the contract was sufficient consideration;

(2) that it would bind the minor son of *C.* as being one of the terms of a *bona fide* compromise constituting a settlement between the members of the family;

(3) that the suit was not barred by section 43 of the old Civil Procedure Code, as the pro-note constituted a separate cause of action, different from the obligation existing under the *karar* ANANTANARAYANA IYER *v.* SAVITTRI AMMAL, (1912) 1 M. W. N. 59, 11 M. L. T. 63; 22 M. L. J. 231 **458**

——— ——— ——— **s. 57** **377**

——— ——— ——— **s. 102**—*Case and application to restore it dismissed in default in early part of the day—Sufficient cause.*

When a case is called on and the parties do not appear the Court should wait a reasonable time before dismissing it. A suit or a petition should not be dismissed owing to the absence of the parties in the early part of the day.

Where a suit or a petition has been dismissed owing to the temporary absence of the plaintiff or his pleader and such absence is satisfactorily explained the suit of petition should be restored. JESA RAM *v.* THAKAR DAS, 197 P. W. R. 1911 **468**

——— ——— ——— **s. 112** **128**

——— ——— ——— **s. 158**, dismissal under, whether operates as *res judicata* **172**

——— ——— ——— **s. 230**—*Decree providing for payment of money from some of the defendants and for sale of mortgaged property in case of other defendants—Nature of decree—Whether such decree is a mortgage decree or a decree for payment of money.*

In 1897 a decree was passed against four persons. The decree directed the defendants Nos. 1, 2 and 3 to pay the amount decreed in certain instalments and then went on to provide that if the money decreed could not be recovered from defendants Nos 1, 2 and 3 then it should be recovered from the property mortgaged by the 4th as a surety.

In 1910, the decree-holder made an application to execute the decree against defendants Nos. 1, 2 and 3:

Held, (per *Karamat Husain, J.*) that the decree being a money-decree was barred by section 230 of the Code of Civil Procedure, 1882.

Held, per *Chamier, J.*) that the decree was not barred by the provisions of section 230 of the Code of Civil Procedure, 1882, because a decree cannot be split up when different reliefs are given against different defendants. PARBHU NARAIN SINGH *v.* LALJI SINGH, 9 A. L. J. 79 **187**

——— ——— ——— **s. 232**—*Oral assignment of decree—Whether application in accordance with law—Step-in-aid of execution—Limitation.*

The effect of section 232, Civil Procedure Code, 1882, is that no application for execution based on an oral assignment of the decree, can be entertained at all by Courts. Such an application is not one in accordance with law, nor is it a step-in-aid of execution. The assignee of a decree under an oral assignment has no *locus standi* at all to apply for execution.

Civil Procedure Code—(1882)—contd.

Where an application by a verbal assignee for execution of the decree has been dismissed it will not have the effect of enlarging the time even if written assignment is subsequently obtained after the expiry of limitation. RAMANATHAN CHETTIAR *v.* SOKKANATHA GOUNDEN, (1911) 2 M. W. N. 559 ; 10 M. L. T. 532 **78**

——— ——— ——— **s. 244 204, 543**

——— ——— ——— **ss. 244, 258**—*Execution of decree—Adjustment of decree out of Court—Certificate of adjustment—Recognition of payment.*

The provisions of section 258 of the old Code are express that no payment or adjustment shall be recognised unless it has been certified; and, therefore, an alleged uncertified adjustment is no answer under section 244 to an application for execution of a decree.

The objection of the judgment-debtor cannot be treated as an application under section 258.

If a decree-holder agreed with his judgment-debtor that he would not execute his decree and that the matter should be settled between them, then if he broke that agreement, he would be liable for an action for damages, just as any other person would who breaks an agreement. BAJRANG BEHARI LAL *v.* LACHMI NARAIN, 15 C. L. J. 83 **944**

——— ——— ——— **ss. 257A, 244**—*Civil Procedure Code (Act V of 1908), s 47, O. XX, r. 11—Execution of decree—Arrangement between parties substantially adding to decree—Sanction of Court—Execution after coming into force of Civil Procedure Code, 1908—Enforceability.*

Order XX, rule 11, and section 47 of the new Civil Procedure Code, 1908, has altered the law contained in section 257 A of the old Code, and renders legal arrangements between parties after decree, which provide for a distinct benefit to one of them, and treats proceedings under section 244 of the old Code as a suit.

In the course of execution proceedings, the parties came to an arrangement, while the old Code was in force, whereby, in consideration of defendant being given time, plaintiff was to get higher interest and was given liberty to proceed against defendant's person. This arrangement having been sanctioned by Court the plaintiff applied to enforce it after the Code of 1908 came into force :

Held, that plaintiff was entitled to enforce it. SUBBARAYA IYER *v.* RAMASWAMI PILLAI, 11 M. L. T. 18 ; (1912) 1. M. W. N. 9, 458 ; 22 M L. J. 166 **204**

——— ——— ——— **s. 258 944**

——— ——— ——— **s. 268 91**

——— ——— ——— **s. 273**—*Execution of decree—Application to execute decree already under attachment, whether an application in accordance with law—Limitation—Decree by first Court reversed on appeal—Restitution, whether enforceable in execution—Civil Procedure Code Act V of 1908), s. 144.*

An application for execution of a decree which was dismissed on the ground that the decree itself was already under attachment, is an application in accordance with law so as to save limitation.

The right of restitution arising out of the reversal of a decree of an Appellate Court is, under section 144, Civil Procedure Code, 1908, enforceable in execution and no separate suit lies for the purpose. MULLASERI GOPALA MENON *v.* KRISHEKI KOVILAKNATH MANAVIKRAMAN, 10 M. L. T. 508 ; 22 M. L. J. 146 **179**

——— ——— ——— **s. 274 91**

——— ——— ——— **s. 283**—*Title suit after defeat of claim—Burden of proof.*

In a suit under section 283 of the Civil Procedure Code, 1882, the burden of proof is upon the unsuccessful intervenor in the claim case. NARAK LAL *v.* THAGOO LAL **455**

——— ——— ——— **s. 291 337**

——— ——— ——— **s. 295**—*"Assets realised by sale or otherwise," meaning of—Private payment by judgment-debtor to one decree-holder—Appeal—Civil Procedure Code (Act V of 1908), s. 102—Provincial Small Cause Courts Act (IX of 1887), Sch. II, cl. (26)—Appeal, second—Suit to compel refund of assets improperly distributed under section 295.*

To constitute a realisation within the meaning of section 295 of the Code of 1882, the sum must be realised either by sale in execution under process of the Court or in one or other of the modes expressly prescribed by the Court.

Therefore, a payment made privately by a judgment-debtor to one of his decree-holders is not an asset within the meaning of section 295.

Where a suit is commenced on the ground that the plaintiff is entitled to relief under section 295, the mere circumstance that he is ultimately to be not entitled to succeed on the merits, does not alter the nature of the suit. Such a suit is excluded from the jurisdiction of a Provincial Small Cause Court and a second appeal lies. GOURI DUTT *v.* AMAR CHAND, 15 C. L. J. 49 **907**

——— ——— ——— **s. 310A**—*Mortgage-decree—Tenure—Subsequent rent-decreee—Tenure sold in execution—Mortgage decree-holder paying money under s. 310 A—Suit for money against mortgagor—Bengal Tenancy Act (VIII of 1885), s. 161—Incumbrance—Contract Act (IX of 1872), ss. 69, 70.*

The plaintiff obtained a mortgage-decree against the defendant on January 29th, 1901. The superior landlord of the mortgaged tenure obtained a decree against the registered tenant on December 7th, 1901. The landlord in execution of his rent-decree sold the tenure and the plaintiff thereupon deposited money under section 310A of the Code of 1882 and the sale was set aside. The plaintiff then sued the defendant for the money he had deposited :

Held, that, if the plaintiff had not obtained the mortgage-decree, he would have been entitled to have the sale set aside.

Paresh Nath v. *Nabo Gopal*, 29 C. 1, relied upon.

The fact that he had obtained a decree does not in any way alter his position.

A mortgage created by a tenant is a lien on his tenure and is consequently an incumbrance within the meaning of section 161 of the Bengal Tenancy Act. If the mortgagee obtains a decree, his lien on the tenure does not cease, and his interest even after the decree continues to be an incumbrance.

A payment made under section 310A of the Code

Civil Procedure Code—(1882)—concld.

of 1882 is a valid payment for the purpose of section 70 of the Indian Contract Act.

Therefore, the payment in the present case by the plaintiff was made lawfully and the case is completely covered by section 70 of the Contract Act. JOG NARAIN SINGH v. BADRI DAS **144**

——— ——— ——— **s. 311** **542**

——— ——— ——— **s. 318** **951**

——— ——— ——— **s. 375A**—*Compromise in execution—Subsequent application for execution on basis of compromise—Estoppel—Question of law.*

In execution of a decree a compromise was effected by the parties as to the mode of satisfying the decree and accepted by the Court, which dismissed the execution application then pending and directed that if the parties did not adhere to the compromise a fresh application for execution would have to be filed. Thereafter several payments were made in accordance with the compromise but the whole amount due not having been paid it was sought to realise the balance in execution when the defendant contended that the terms of the compromise could not be enforced in execution:

Held, that the defendant was estopped from contending that the terms of the arrangement could not be enforced in execution.

Held, further, that the question whether estoppel arises on certain facts is a question of law, and that whatever its other effects may be, section 375A of the Civil Procedure Code, does not in any way affect the rule of estoppel SRIRANGA BUPALA BALAI RAO GARU v. NAYANIM BAHADUR VARU **81**

——— ——— ——— **s. 440**—*Next friend other than certificated guardian—Leave of Court—Notice to guardian—Defective service of notice—Unimportant irregularity.*

Where a Court appointed a person other than the certificated guardian of a minor, who acted adversely to the minor's interest, as the minor's next friend in a suit in which the guardian was also a party, but service of the formal notice under section 440 of the Civil Procedure Code of 1882 upon the guardian was defective:

Held, that it was merely an unimportant irregularity and that the minor was properly represented. KARIM KHAN v. SALAMUDDI **594**

——— ——— ——— **s. 457** **414**

——— ——— ——— **s. 525** **118**

——— ——— ——— **s. 575**—Whole appeal referred **353**

——— ——— ——— **s. 578** **788**

——— ——— ——— **ss. 588, 589** **605**

——— ——— ——— **s. 647** **859**

Civil Procedure Code (Act V of 1908), s. 2 (2)—*Decree, definition of—"Rights of parties", meaning of—Preliminary and interlocutory orders—Appeal—Revision.*

The words "rights of the parties," in the definition of decree in section 2 (2) of the Civil Procedure Code, 1908, must be taken to mean rights of the parties *inter se* in regard to the subject-matter of the suit.

Civil Procedure Code—(1908)—contd.

The following preliminary and interlocutory orders are not decrees and consequently not appealable:

(1) An order on an objection as to part of the suit being based upon the terms of the Pensions Act.

(2) An order on a question as to how the portion of the claim dealing with profits is to be determined.

(3) An order on a demand by the defendant that security should be taken from the plaintiff before the case proceeds further.

(4) An order on an allegation by the defendant that the total Court-fee stamp required by the Court from the plaintiff is largely deficient.

Where an appeal will lie from the decree that may be passed in a suit, the High Court will not interfere on revision with merely preliminary and interlocutory orders. UMAR ALI v. NASIB-UN-NISSA, 82 P. R. 1911 **800**

——— ——— ——— **s. 2 (10), O. XXI, rr. 53, 16**—*Judgment debtor, whether includes his assignee—Decree-holder, rights of assignee of—Assignee of the holder of attached decree, rights of, to execute decree.*

The definition of "judgment-debtor" does not include the assignee of the judgment-debtor.

Under Order XXI, rule 53, an assignee of a decree-holder does not stand in exactly the same position as the decree-holder himself for purposes of execution. The only two persons who can take out execution under the rule are the decree-holder of the attached decree or the attaching creditor, and not the assignee of the holder of the attached decree. THIRUVENGADAM PILLAI v. DORIDLA SUBBIAH, 11 M. L. T. 144; (1912) 1 M. W. N. 176 **659**

——— ——— ——— **s. 2, O. XXII, r. 5**—*Legal representative, determination of question as to decree—Appeal—Death of party before new Civil Procedure Code—Order after new Civil Procedure Code—Application of new Code.*

An order under rule 5 of Order XXII of the Code of 1908 determining the question as to who is the legal representative of a deceased party, is not a decree and is not appealable under the new Code, though it was appealable under the old Code.

Where the party died in 1908 but the order was passed in 1909 under Order XXII, rule 5: *Held*, that the order must be treated as one under the new Code and it is not appealable. SITAL PROSAD v. BAJRANGI SAHAI **70**

——— ——— ——— **s. 11**—Res judicata—*Partition proceedings—First suit that certain land was not* shamilat deh—*Dismissal of suit—Land allotted to defendants—Subsequent suit that defendant had no right to share in* shamilat.

In partition proceedings a dispute arose between plaintiffs and certain other persons including the defendants as to whether a certain area of land was the proprietary land of plaintiffs or was part of the *shamilat deh*. Plaintiffs were directed to establish their rights in a Civil Court. Consequently, plaintiffs brought a declaratory suit in which it was held that the land was *shamilat deh*.

The land in suit was in subsequent partition proceedings allotted to defendant. Plaintiffs thereupon brought this suit for possession of the land on the ground that the defendants were not *khewatdars* in

Civil Procedure Code—(1908)—contd.

the village, that they had no right to share the *shamilat deh*, and that the award of the land to defendants was erroneous:

Held, that the suit was not barred by reason of the previous suit. The only issue in the previous suit was whether or not the land was *shamilat deh* and plaintiffs were not bound to urge in the previous suit that defendants had no right to share in the *shamilat* as they were not *khewatdars*. JAN KHAN *v.* AHMAD, 24 P. W. R. 1912 **445**

——————— **s. 11**—*Civil Procedure Code (Act XIV of 1882), s.* 318—Res judicata—*Point not decided in second appeal—Separate suit.*

An auction-purchaser applied under section 318 of the Civil Procedure Code, 1882, for possession of the property. It was objected that the application was barred by limitation. The first Court overruled the objection. An appeal was preferred to the District Judge, who held that the application was barred by limitation. The auction-purchaser preferred a second appeal which was dismissed by the High Court on the ground that the application was barred by time. The High Court, however, did not go into the question whether the order of the first Court was an order under section 244 of the old Civil Procedure Code and so appealable to the District Judge:

Held, that the decision did not operate as *res judicata* so as to bar a subsequent suit brought by the auction-purchaser for possession of the property. BALDEO SINGH *v.* HIRA LAL, 9 A. L. J. 67 **951**

——————— **s. 11**—Res judicata—*Suit on a loan—Plea of discharge by plaintiff in a previous suit against him by defendant—Bar—Non-production of pleadings in previous suit to prove* res-judicata.

This is a suit for money and articles alleged to have been advanced to defendant as a loan by plaintiff. In a previous suit by defendant against plaintiff for *waram* due to the former, the present plaintiff pleaded that he deducted the *waram* from out of the present loan. As plaintiff's witnesses did not appear, that suit was decided against him. Without causing the pleadings or judgment in that suit to be produced, the lower Court dismissed the present claim of plaintiff as barred by the operation of the rule of *res judicata*:

Held, in remanding the suit for fresh disposal, (1) that if the present plaintiff's plea in the previous suit was one of discharge, the claim was not *res judicata*;

(2) that the lower Court should not have decided the question of *res judicata* without an examination of the pleadings and the judgment in the previous suit. AKILANDAM PILLAI *v.* CHINNASAWMI MOOPAN, (1912) 1 M. W. N. 172; 11 M. L. T. 201 **649**

——————— **s. 15** **244**

——————— **s. 20** **943**

——————— **s. 24 (3)**—*Transfer of case—Power of District Judge to transfer to Additional District Judge.*

A District Judge has the power, under section 24 (3) of the Civil Procedure Code, 1908, to transfer a case pending before him to the Court of the Additional District Judge. O'BRIEN *v.* ABDUL RAHMAN, 28 P. W. R. 1912; 14 P. L. R. 1912 **6**

Civil Procedure Code—(1908)—contd.

——————— **s. 47** **170, 204, 618**

——————— **s. 47, O. XXI, r. 2, cls. (2) and (3)**—*Adjustment of decree out of Court—Not certified to Court—Fraud of decree-holder, whether Court can enter into investigation of—Limitation Act (XV of 1877), s.* 18—"*Kept from* knowledge *of right*"—Exercise *of right—Difference between—Substantial compliance with cl.* (2), *r.* 2, *O. XXI.*

If the adjustment of a decree out of Court has not been certified as required by rule 2 of Order XXI of the Code of 1908, the Court executing the decree cannot take notice of it. In such a case it is not open to the Court to investigate, under section 47 of the Code, allegations of fraud made by the judgment-debtor against the decree-holder.

Gadadhar Panda v. *Shyam Churn Naik*, 12 C. W. N. 485, explained.

Ramayyar v. *Ramayyar*, 21 M. 356, dissented from.

Periatambi v. *Vallaya*, 21 M. 409; *Ganapathy* v. *Changa*, 29 M. 312, referred to.

Kamini Debi v. *Aghore Nath*, 4 Ind. Cas. 502; 11 C. L. J. 91; 14 C. W. N. 357, *Nistarini Dassi* v. *Kazim Ali*, 12 C. L. J. 65; 7 Ind. Cas. 258; *Mon Mohan Karmakar* v. *Dwarkanath Karmakar*, 7 Ind. Cas. 55; 12 C. L. J. 312 and *Hiramony Biswas* v. *Musa Khan*, 7 Ind. Cas. 625, followed.

Even if it is established that the conduct of a decree-holder is fraudulent the judgment-debtor is not entitledd to obtain an extension of the time within which to make an application to the Court under clause 2 of rule 2 of Order XXI, because the judgment-debtor is not, by means of fraud, kept from the *knowledge* of his right to make the application, within the meaning of section 18 of the Limitation Act, but from the *exercise* of his right to make the application.

In such a case it is open to the judgment-debtor to institute a suit for damages for the fraud.

Poromanand Khasnabish v. *Khepoo Paramanik*, 10 C. 354, followed.

While an appeal from a decree was pending, the decree-holder applied for execution. The judgment-debtor appellant obtained an *ad interim* stay of execution. After that the judgment-debtor made an application to the Court of Appeal stating that the case had been adjusted and that he wanted to withdraw the appeal. Accordingly, the appeal was dismissed and the decree-holder respondent waived his right to costs. An application for execution which was pending in the Court below was also dismissed. Subsequently, the decree-holder again applied for execution of the decree:

Held, that, under the circumstances, the judgment-debtor by his application to the Court of Appeal had in substance complied with the requirements of clause 2, rule 2, Order XXI, of the Code. BIROO GORAIN *v.* JAINURAT KOER **63**

——————— **s. 47**—*Execution proceedings—Money-decree—Death of judgment-debtor—Ancestral property—Objection by judgment-debtor's heir on the ground of want of necessity—Objection to be decided in execution proceedings and not by separate suit.*

The heir of a deceased judgment-debtor is entitled to object in execution proceedings that the ancestral

Civil Procedure Code—(1908)—contd.

property in his hands is not liable for a money-decree against the deceased on the ground that the debt was not incurred for necessity.

The dispute on such an objection is one for decision in execution proceedings and is not a matter for a separate suit. TOTA SINGH *v.* PARTAB SINGH **670**

——— ——— ——— ——— **s. 47, O. XXI, r. 2**

—Payment or adjustment out of Court, not certified—Effect of—Limitation for certifying to Court—Limitation Act (XV of 1877), Sch. II, Art. 173A—Judgment-debtor's remedy—Suit.

The Court cannot recognise a payment or adjustment, which has not been certified for any purpose whatsoever, as, for example, to prolong the period of limitation for applying for execution.

The judgment-debtor is at liberty to inform the Court and so to protect himself from any fraud of the decree-holder. But he cannot be permitted to evade the provisions of Article 173A of the Limitation Act, and to obtain a decision in a matter which does not strictly come within the scope of section 47, because it is a matter which has been specifically provided for in Order XXI, rule 2. The judgment-debtor may have his remedy by suit on a plaint properly framed. KUTUBULLA SARKAR *v.* DURGA CHARAN, 16 C. L. J. 396 **424**

——— ——— ——— ——— **s. 47**—*Questions relating to execution—Construction of decree and validity of sale are such questions.*

The question whether a sale held in execution of a decree is valid or invalid on the ground that it is not, warranted by the decree is one relating to the execution of the decree and must be contested under section 47, Civil Procedure Code, 1908.

The question of the construction of a decree is one relating to execution. Therefore, the question whether the actual execution of a decree is in excess of the decree itself relates to execution. GUNNIAH VENCATACHALAPATHY AIYAR *v.* PERUMAL IYER, 10 M. L. T. 527; (1912) 1 M. W. N. 44 **133**

——— ——— ——— ——— **s. 48**—*Fraud—Extension of period of limitation—First application for arrest—Second application for attachment—Whether second application is in continuation of the first—Execution of decree.*

Where an application is made for execution of a decree by arrest of the judgment-debtor, and then a second application is made for execution by attachment of his property, the second application is not in continuation of the first.

Where a judgment-debtor evaded arrest and when finally arrested, spent two years in pretending to prosecute proceedings in an insolvency Court whereas he never intended to press them and thus successfully prevented the decree-holder from executing his decree within the period of 12 years:

Held, that the judgment-debtor was guilty of fraud within the meaning of section 48 of the Civil Procedure Code, 1908. MEWA LAL *v.* AHMAD ALI, 9 A. L. J. 17 **929**

——— ——— ——— ——— **s. 48**—*Fraud, interpretation of—Judgment-debtor's objection to validity of sale, if fraud proved—"Date of decree"—Order by Appellate Court—Decree-holder's power to add to period of limitation.*

Civil Procedure Code—(1908)—contd.

Section 48, sub-section (2), clause (*a*), Civil Procedure Code, requires not only that there should be fraud on the part of the judgment-debtor, but also that the fraud should be of such a character as to prevent the decree-holder from executing the decree.

Seshachalam Chetti v. *Rajam Chetty*, 8 M. L. J. 203, relied upon.

The term "fraud" in section 48 should be interpreted in a wider sense than that in which it is generally used in English law.

Pattakara v. *Kangasami Chetti*, 6 M. 365, followed.

The conduct of a judgment-debtor cannot be deemed fraudulent simply because his objection to the validity of the sale of his property in execution, ultimately proves unsuccessful, and that objections cannot stand in the way of further execution of the decree.

In the course of execution proceedings in connection with a certain decree, an Appellate Court directed that the judgment-debtor should pay a certain amount every month in satisfaction of the decree:

Held, that it was not the intention of the Appellate Court to supersede the original decree and that the order merely determined the mode of payment for the satisfaction of the decree, and that if clause (*b*) of sub-section (1) of section 48 of the Code be not applicable to the case, the decree-holder cannot execute the decree after 12 years from the date of the original decree though the application for execution is made within 12 years of the Appellate Court's order aforesaid.

A decree-holder cannot, by binding himself not to execute a decree for a certain period, add to the time which the law allows him to execute it. RAGHUNATH PROSAD *v.* KASHI PROSAD **88**

——— ——— ——— ——— **s. 60, cl. (n)**—*Right to future maintenance—Crops on land granted to a widow for maintenance—Liability for attachment.*

Where land is granted to a widow to be enjoyed by her during her life in lieu of maintenance, what is acquired under the grant is not a right to maintenance, but to retain property or rather the usufruct of that property. The produce of that land, as it accrues, becomes her property and is not exempt from attachment under the provisions of clause (*n*) of section 60, Civil Procedure Code, 1908.

The produce cannot be treated as standing on the same footing as a right to maintenance. The crops are the widow's property and available to answer her debts.

What is interdicted by clause (*n*) is the attachment of a mere right to future maintenance, and not of a debtor's property or any interest in property though such property or interest might have been granted to the debtor for maintenance. GOVINDA PILLAY *v.* MEENATCHI ACHI, 10 M. L. T. 493; (1911) 2 M. W. N. 563; 22 M. L. J. 204 **152**

——— ——— ——— ——— **s. 75** **440**

——— ——— ——— ——— **s. 80** **260, 370**

——— ——— ——— ——— **s. 80**—Suit against public officer for act done in bad faith—Notice to Government, whether necessary **721**

——— ——— ——— ——— **s. 88** **40**

Civil Procedure Code- (1908)—contd.

——— ——— ——— **s. 92**—*Power of Government to authorise Sub-Judge to try suit pending before District Judge.*

A notification directed by a Local Government to a particular Sub-Judge empowering him to try a particular suit pending in the Court of a District Judge, is not a notification contemplated by section 92 of the Civil Procedure Code, 1908. ABDUL KARIM *v.* ABDUL SOBHAN, 16 C. W. N. 44; 39 C. 146 **243**

——— ——— ——— ——— **s. 92**—*Scheme suit—Parties—Suit by two worshippers of temple—Petition by other worshippers to be made parties—Jurisdiction.*

A suit brought by two worshippers of a temple under section 92, Civil Procedure Code, for removal of trustees and framing a scheme is a representative suit. The fact that the sanction of the Advocate-General has been obtained does not change the character of the suit and it is open to the Court to add other worshippers as parties, if it be shown that the plaintiffs are not prosecuting the suit to the advantage of the persons they profess to represent. VARADAYYA CHETTY *v.* MUNUSAMI CHETTY, 10 M. L. T. 514 **232**

——— ——— ——— ——— **s. 92 (2)**, interpretation of—Retrospective effect **264**

——— ——— ——— ——— **s. 98 (2)**—Point of law only to be referred **353**

——— ——— ——— ——— **s. 99** **788**

——— ——— ——— ——— **s. 100** **193, 206, 425, 495, 606**

——— ——— ——— **s. 100**—*Second Appeal—Failure to realise true question in controversy—Defect in procedure.*

Where a lower Appellate Court failed to appreciate the true question in controversy between the parties but considered the case from an erroneous point of view, in consequence of which the appeal to that Court was not properly tried, it was held that the appeal should be re-heard. NARAK LAL *v.* THAGOO LAL **455**

——— ——— ——— **s. 102** **907**

——— ——— ——— ——— **s. 102**—*Second appeal—Suit as originally framed to be looked.*

For the purpose of deciding whether or not a second appeal lies, the form of the suit as originally brought must be looked at.

If in an ejectment suit against a trespasser the Court awards damages only, a second appeal will not be barred simply because the decree was for money. JAGAN NATH *v.* DEBI SAHAY **493**

——— ——— ——— **s. 104 (2), O. XLIII r. 1 (i), O. XXI, rr. 90, 92**—*Order setting aside sale—Second appeal.*

No second appeal lies from an Appellate order setting aside a sale under Order XXI, rule 90. But the High Court may entertain an appeal as a revision, if the case calls for further consideration. KUAR RADHAKA RAMAN PRASHAD *v.* GULZARI KUAR **147**

——— ——— ——— **s. 105** **690**

——— ——— ——— **s. 115** **283, 1007**

Civil Procedure Code—(1908)—contd.

——— ——— ——— **s. 115**—*Material irregularity—Refusal of jurisdiction—Leaving material issue undecided.*

In a suit on a promissory-note executed by defendant No. 2, the questions were, whether he had authority to bind defendant No. 1, and whether his action had been ratified by defendant No. 1. The lower Appellate Court held that defendant No. 2 had no authority to borrow money on behalf of defendant No. 1, and that the issue of ratification was immaterial, and it did not come to any finding upon it. That Court also held that in point of law it would have been ratification if the defendant No. 1 had told the defendant No. 2 to pay the plaintiff from his pocket, but as the defendant No. 1 directed defendant No. 2 to pay the plaintiff out of his rent collections that was not ratification. The Court did not come to any finding on the facts alleged to have occurred:

Held, by *Stephen J.*, (whose opinion prevailed), that the lower Appellate Court did not decline jurisdiction, nor did it act with material irregularity, and that the High Court could not interfere in revision.

Held by *Chatterjee, J.*, that the Court below left the most important issue undecided and so acted with material irregularity and virtually refused to exercise a jurisdiction vested in it by law. BAIJ NATH *v.* JANG BAHADUR **657**

——— ——— ——— **s. 141** **859**

——— ——— ——— **s. 144** **179**

——— ——— ——— **s. 151, O. XX, r. 3**—*Interlocutory judgment—Right of successor to re-consider—Civil Procedure Code (Act V of 1908), s. 92 (2), interpretation of—Retrospective effect—Civil Procedure Code (Act XIV of 1882), s. 539—Scheme suit instituted before passing of new Code—Bar under section 92 (2)—General Clauses Act (X of 1897), s. 6, scope of—Interpretation of Statutes—Procedure Acts.*

A Judge has power to re-consider an interlocutory judgment delivered by his predecessor on any issue before the final disposal of the case, if the interlocutory judgment is based on an erroneous assumption or hypothesis.

Where a provision in an enactment is in its nature declaratory, the presumption against construing it retrospectively is inapplicable.

Where the Legislature allows an interval of time between the passing of an enactment and its commencement so that steps might be taken for avoiding any hardships arising from the change of law, the inference is that the enactment was intended to have retrospective effect.

The operation of section 6 of the General Clauses Act is limited to cases in which the change in the law is the result of a mere *repeal* of the old enactment and does not extend where it is due to an addition to it.

The Code of Civil Procedure, 1908, contains no saving of pending *suits* from its operation. The general intention of retrospectivity is indicated by the special savings of pending arbitration proceedings and the present right of appeal.

The provisions of sub-section (2) of section 92 of the Code of Civil Procedure are of a declaratory nature inserted with a view to settle the point whether the provisions of the corresponding section 539

Civil Procedure Code—(1908)—contd.

of the former Code were mandatory or not; consequently, they operate retrospectively.

A suit for removal of certain trustees and for the proper administration of a trust instituted without the sanction of the Advocate-General would be barred under section 92 (2) of the new Code even if the suit was instituted in 1904.

In 1904, the point whether the provisions of section 539 of the old Civil Procedure Code were mandatory or merely directory was a most doubtful one for the Province of Sind and a plaintiff cannot be said to have had in 1904 an indubitable right to bring a scheme suit without the sanction of the Advocate-General or other officer authorized under section 539.

The subsequent ruling of the Judicial Commissioner's Court Sind in 1907, *Radhibai* v. *Kundanmal*, 1 S. L. R. 155, cannot properly be said to operate retrospectively so as to vest in plaintiff a right at the date of the institution of suit which he did not possess in the state of the laws then existing as interpreted by the Bombay High Court or the Sind Sadar Court. HEMANDAS *v.* CHELLARAM, 5 S. L. R. 184 **264**

——————— **O. 1, r. 9** **123**

——————— **O. 1, r. 9**—*Applicability of the rule—Hindu Law—Mortgage—Suit against joint Hindu family for sale of mortgaged property—One of the members not made defendant within limitation—Objection as to non-joinder taken at earliest opportunity, effect of—Dismissal of suit—Limitation.*

G. sued *C.* and others, members of a joint Hindu family, on foot of a mortgage for sale of the mortgaged property. *G.*, however, did not implead an infant of the defendants' joint family as party to the suit within limitation. An objection as to non-joinder was taken at the earliest opportunity:

Held, that under the circumstances the entire suit should be dismissed as time-barred. GENDAN LAL *v.* BABU RAM, 9 A. L. J. 86 **197**

——————— **O. 1, r. 10**—*Suit instituted by a person having no interest in the property—Right person added as plaintiff subsequently by order of Court—Discretion.*

A. and *K.* were brother and sister living in the same house. Defendants built a construction encroaching upon a portion of the house in which *A.* and *K.* lived. *A.* brought a suit for injunction and demolition of the construction. Later on, it turned out that *K.* was the owner of the house and that *A.* had no interest in it. The Court made *K.* also a plaintiff in the suit and proceeded to decide the case:

Held, that the suit could proceed between the parties, and that having regard to the circumstances of the case and to the fact that *A.* was living in the same house with his sister *K.*, the joining of *K.* as a plaintiff by the Court was not an unreasonable or illegal exercise of the powers conferred on the Court by Order I, rule 10, of the Civil Procedure Code. ABDULLAH BEG *v.* ABDUL HASAN **350**

——————— **O. 5, r. 17**—*Service of summons—Substituted service—Ordinary residence—Leaving temporarily—Due and reasonable diligence to find defendant.*

If a person leaves his place of residence only temporarily, it cannot be said that the house which he occupied is not where he ordinarily resided.

A peon went to serve the defendant with a summons, but could not find the defendant at his place of residence. Upon inquiry he was told by the defendant's wife that her husband had gone to B., a place in the Madras Presidency. He thereupon affixed a copy of the summons to the outer door of the defendant's house. The defendant returned to his house about three months after this:

Held, that the peon had used all due and reasonable diligence within the meaning of rule 17 of Order V of the Code, and that service of the summons had been properly effected. SITARAM *v.* KALANDI PATRA **127**

——————— **O. 5, r. 28**—*Service of notice—Sepoy—Notice received without objection without the intervention of Commanding Officer.*

Where a notice of appeal was sent to a *sepoy* respondent without the intervention of his Commanding Officer and the *sepoy* received it without demur, he cannot subsequently urge in an application to set aside the *ex parte* decree, that he was not duly served, the notice not having been sent through his Commanding Officer. SANTU *v.* ARJAN DAS **318**

——————— **O. 6, r. 7** **128**

——————— **O. 6, r. 17**—*Suit to recover account-books from one's servants—Amendment of plaint—Adding further relief to recover moneys.*

Where a suit as originally framed is to recover the account-books of the plaintiff from his servants who were in charge of his business, an application for amendment, before any evidence was recorded, merely claiming by way of further relief the moneys due from them also on the facts stated in the original plaint is proper and should be allowed. The fact that the further relief asked for might have been barred in the interval does not by itself render the amendment improper.

Account-books are personal property and a suit to recover them from servants would lie. SEVUGAN CHETTY *v.* KRISHNA AIYANGAR, 10 M. L. T. 557 **268**

——————— **O. 9, rr. 8, 9** **859**

——————— **O. 20, r. 11** **204**

——————— **O. 20, r. 12**—*Determination of principle for ascertaining mesne profits—Decree—Appeal.*

An order by which a Court determines the principle whereupon mesne profits are to be assessed and directs their ascertainment by a Commissioner, is an interlocutory order in a pending suit and not appealable as a decree. DALGLIESH *v.* NANDAN MISSER **186**

——————— **O. 20, r. 23** **264**

——————— **O. 21, r. 2** **424**

——————— **O. 21, r. 2, sub-rr. (1), (3)**—*Fraudulent arrangement between decree-holder and judgment-debtor—Adjustment of decree in part—Arrangement not certified, effect of—Decree-holder's fraud—Estoppel against precise term of enactment.*

An arrangement between the decree-holder and

Civil Procedure Code—(1908)—contd.

the judgment-debtor of a compromise instalment decree to the effect that the latter should make defaults in the payment of instalments, in collusion with the decree-holder in order to give the latter an opportunity of executing his decree so that certain property instead of being sold out of Court according to the stipulation in the compromise, should be sold in execution, is an adjustment of the decree in part to the satisfaction of the decree-holder, within the meaning of Order XXI, rule 2, of the Code of Civil Procedure. Such an arrangement ought to have been certified to the Court, and if not certified it would not be recognised by the execution Court.

Order XXI, rule 2, sub-section (3), applies even where the decree-holder is guilty of fraud.

There can be no estoppel against the precise terms of a provision of the Code. SHAM LAL v. HAZARI MAL, 15 C. L. J. 451 **326**

——————— **O. 21, r. 2 (2), (3)** **63**

——————— **O. 21, r. 2 (3)**—*Uncertified payment—Court cannot allow it to be proved in execution.*

In execution of a decree, the Court should not allow the judgment-debtor to prove those payments which had not been certified under Order XXI, rule 2, of the Code of Civil Procedure, 1908, within the prescribed period. JANKI PARSAD v. THAKUR DAS **21**

——————— **O. 21, r. 11 (3)** **365**

——————— **O. 21, r. 16** **324** **659**

——————— **O, 21, r. 35**—*Suit and decree for joint possession.*

An action for joint possession is maintainable and a decree for such possession must be given unless the Court deems it unreasonable in the interests of all the parties concerned to pass such a decree. JAGAR NATH v. RAMPHAL, 8 A. L. J. 1312; 31 A. 150 **79**

——————— **O. 21, rr. 46, 54**—*Civil Procedure Code (Act XIV of 1882), ss. 268, 274—Attachment of debt—Debt secured by a hypothecation bond—Moveable property—Immoveable property—General Clauses Act (X of 1897)—Transfer of Property Act (IV of 1882), s. 58.*

A debt secured by a hypothecation bond is moveable property within the meaning of rule 46 of Order XXI, Civil Procedure Code, 1908.

The provisions of rule 54 of Order XXI, Civil Procedure Code, are not meant to apply to property of the nature of a debt secured by a hypothecation bond. The provisions seem to contemplate that the immoveable property should be in the nature of tangible property.

Security must follow the debt and if the debt is once attached, the benefit of the security would accrue to the attaching creditor, if his remedy against the property still exists. NATARAJA IYER v. SOUTH INDIA BANK, 10 M. L. T. 503; (1911) 2 M. W. N. 590; 22 M. L. J. 105 **91**

——————— **O. 21, r. 53** **659**

Civil Procedure Code—(1908)—contd.

——————— **O. 21, r, 54** **91**

——————— **O. 21, r. 58**—*Simple money-decree—Attachment—Objection by transferee of property.*

Where property is attached in execution of a money-decree, a transferee of the property is entitled to prefer an objection to the attachment under Order XXI, rule 58. NIHAL CHAND v. ABDULLAH **563**

——————— **O. 21, rr. 66, 90**—*Notice to judgment-debtor to settle details in sale proclamation—Effect of non-objection by judgment-debtor—Judicial sale not to be assailed on technical grounds—Sales to be conducted by fair methods—Civil Procedure Code (Act XIV of 1882), s. 291—Hour of sale to be inserted in sale proclamation—Non-insertion, material irregularity.*

If in a sale proclamation the value of the properties to be sold, is understated, and this is calculated to mislead bidders, and to prevent them from offering adequate prices or from bidding at all, and an altogether inadequate price is offered, the sale is liable to be set aside.

An inquiry under Order XXI, rule 66, is intended to be of the most summary character. But the judgment-debtor has notice of the proceeding and has an opportunity to take exception to the statements proposed to be entered in the sale proclamation. If his objection as to under-valuation is not heeded by the decree-holder, the latter proceeds with execution with full knowledge that if he purchases the properties for a small amount, the validity of the sale is sure to be challenged by the judgment-debtor. But if the judgment-debtor, with notice of the proceedings, does not object to the entries in the sale proclamation at that stage, a subsequent objection by him on the ground of inaccuracy or insufficiency of description, is not likely to be entertained by the Court.

Arunachellam v. *Arunachallam*, 15 I. A. 171; 12 M. 19, referred to.

Although the validity of judicial sales, properly conducted, should be supported and should not be allowed to be assailed on technical grounds, yet, at the same time, the purity of judicial proceedings in connection with execution sales should be assured to a reasonable extent; and a decree-holder should not be allowed to employ the machinery of the Court to secure for himself at a grossly inadequate price the properties of his judgment-debtor by methods which will not bear examination.

Obiter dictum.—When a sale is adjourned under section 291 of the Civil Procedure Code of 1882, it is necessary to mention the hour of sale, and an omission to do so is a material irregularity. PRAN SINGH v. JANARDAN SINGH, 14 C. L. J. 541 **337**

——————— **O. 21, r. 89** **365**

——————— **O. 21, r. 89**—*Auction-sale—Application to set aside sale—Application, verbal or written—Person interested may apply.*

An application under Order XXI, rule 89, to set aside an auction-sale need not be in writing, but the application, whether made orally or in writing, must be in time.

A deposit of money alone is not sufficient.

Tender by a person who is neither a general or

Civil Procedure Code—(1908)—contd.

special attorney, nor a Vakil or Mukhtar for the owner of the property sold, is not sufficient tender within the rule. SARVOI BEGAM *v.* HAIDER SHAH, 9 A. L. J. 12 **404**

——————— **O. 21, r. 89**—*Sale of property by judgment-debtor after auction-sale—Right of judgment-debtor or his transferee to make an application for setting aside auction-sale.*

If a judgment-debtor sells his immoveable property, after it has been sold by auction, then neither he nor his transferee has a right to make an application under Order XXI, rule 89, of the Code of Civil Procedure to set aside the auction-sale. ISHAR DAS *v.* ASAF ALI KHAN, 9 A. L. J. 19 **134**

——————— **O. 21, r. 90** **147**

——————— **O. 21, r. 90**—Non-insertion of hour of sale in sale proclamation—Material irregularity—Conditional sale not to be set aside on technical grounds **337**

——————— **O. 21, rr, 91, 92** **365**

——————— **O. 21, r. 92** **147**

——————— **O. 22, r. 5** **70**

——————— **O. 24, r. 4**—*Suit for recovery of debt—Deposit of amount in Court by defendant—Costs, award of—Discretion of Court.*

In a suit for the recovery of a debt, where the amount has been deposited in Court, the Court has a discretion as to the disposal of costs. RAMASAMI REDDI *v.* LAKSHMIAMBAL AMMAL, (1911) 2 M. W. N. 568 **200**

——————— **O. 24, r. 4 (2)**—*Deposit of amount in Court—Costs, award of—Finding as to which party was most to blame necessary—Demand before suit.*

Where, in a suit for the recovery of a debt, the defendant pays the amount in Court under Order XXIV, rule 4 (2), and plaintiff avers that he made demands before suit but defendant denies them, the Court should, to enable it to determine by whom the costs have to be paid, record a finding as to whether plaintiff demanded the amount before suit. JAYANTI KISTAPPA *v.* JAYANTI CHINNAPIYA, (1912) 1 M. W. N. 38 **188**

——————— **O. 32, r. 4 (3)** **414**

——————— **O. 34, r. 1**—*Suit for redemption of trust properties—Parties—Non-joinder of trustees—Bad and fatal to the suit.*

One of three Uralars alone cannot institute a suit for redeeming a Kanom without making the other two parties to the suit. MALAPPURATH PARAMADHATHIL *v.* CHANNAZHI KRISHNAN, (1911) 2 M. W. N. 537 **234**

——————— **O. 37** **244**

——————— **O. 41, r. 10**—*Security for respondent's costs—Appeal by servant of Government—Interest of Government—Appellants not having means to pay costs—Nature of security—Bond of Secretary of State.*

Where it appeared that the respondent's costs which the appellants were ordered to pay amounted to two lacs and fifty thousand rupees, that the appellants have no such means as to be able to pay costs, that the prosecution of the appeal will entail a very heavy expenditure on the part of the respondent, and that the suit was and the appeal is being carried on by the Government on behalf of the appellants, Government servants, at an enormous expense:

Held, that this is eminently a case where the Court of Appeal should exercise its discretion in favour of directing security for costs.

The security was ordered to be taken in the form of a bond of the Secretary of State, the respondent being satisfied with the same. WESTON *v.* PEARY MOHAN DAS, 16 C. W. N. 119 **335**

——————— **O. 41, r. 18** **694**

——————— **O. 41, r. 20** **906**

——————— **O. 41, r. 22**—*Cross-objections by respondent—Appeal not maintainable, whether cross-objections sustainable.*

A respondent is entitled to file cross-objections even where the appeal filed by appellants is not maintainable at all. SHANKAR LAL *v.* SARUPLAL **19**

——————— **O. 41, r. 22, sub-r. (1)**—*Cross-objection against co-respondent—Test to be applied—Mortgage-suit.*

Order XLI, rule 22, sub-rule (1) of the Civil Procedure Code of 1908 is comprehensive enough to admit of a cross-objection by one respondent against another.

The test to be applied is, where the questions, which arise between the several sets of parties, are so connected that one of them ought not to be allowed to re-open matters, so far as he is concerned, without an opportunity being allowed, in the interests of justice, to another to protect himself by urging his objections, even though they be directed, not against the appellant, but against a co-respondent.

In a mortgage-suit the queston were, whether the plaintiff's mortgage took effect from the date of execution (January 19th, 1908), or from the date of registration (January 23rd) that is, whether it was entitled to priority over the mortgage of defendants Nos. 3 and 4, dated January 22nd, and whether the mortgage set up by defendant No. 5 was genuine. The Court held upon the first question in favour of the plaintiff and on the second question, against defendant No. 5 who appealed making the plaintiff and the other defendants, respondents. Defendants Nos. 3 and 4 preferred a cross-objection to the effect that the plaintiff's mortgage took effect from January 23rd and was not entitled to priority over their security:

Held, that the cross-objection was competent. JADUNANDAN PROSAD SINGH *v.* KOER KALLYAN SINGH, 15 C. L. J. 61; 16 C. W. N. 612 **653**

——————— **O. 41, r. 23** **813, 855**

——————— **O. 41, r. 27**—*Further evidence in appeal.*

The provisions of Order XLI, rule 27, of the Civil Procedure Code are not intended to give a party a second opportunity of proving his case but to supply a defect in the existing evidence on the record. KHAZAN SINGH *v.* PANNA LAL, 9 A. L. J. 59 **131**

Civil Procedure Code—(1908)—concld.

——— ——— ——— ———**O. 41, r. 31** 194

——— ——— ——— ———**O. 41, r. 33** 176

——— ——— ——— ———**O. 41, r. 33** — *Appeal by one plaintiff out of many—Decree in favour of all.*

Rule 33 of Order XLI of the new Civil Procedure Code (Act V of 1908) justifies an Appellate Court to decree in favour of all the plaintiffs, what they are entitled to get collectively, though only one of them has appealed. BHAGTU *v.* BUA DITTA, 26 P. W. R. 1912; 34 P. L. R. 1912 **957**

——— ——— ——— ———**O. 43, r. 1 (j)** 147

——— ——— ——— ———**O. 43, r. 1 (k)**—*Abatement order—No application to set aside abatement—Appeal—Revision—Punjab Courts Act (XVIII of 1884), s. 70 (1) (a).*

No appeal lies under Order XLIII, rule 1 *(k)*, Civil Procedure Code, 1908, where there has been no application to the Court to set aside an abatement.

The failure of a person to apply to the Court to set aside abatement precludes interference with the order of abatement by way of revision under section 70 *(1) (a)* of the Punjab Courts Act. THAKAR DAS *v.* PERMA NAND, 95 P. R. 1911 **963**

——— ——— ——— ———**O. 47** 365

——— ——— ——— ———**O. 47, r. 1**—*Review—Inconsistent judgment in the same case—Error apparent on face of the record.*

Where in the same case the High Court by mistake gave two inconsistent judgments, one before and one after remand, the error was held to be apparent on the face of the record and was corrected on review. OUDH BIHARI PANDE *v.* MAHADEO SAHI **646**

——— ——— ——— ———**O. 47, r. 1 (1)**—Review of *ex parte* decree **318**

——— ——— ——— ———**Sch. I, Appendix E, Form 29**—*Sale in execution—Bid considered highest by* Nazir *conducting sale—Re-opening of bids by order of Court—Higher bid obtained and bidder declared purchaser—Legality of procedure.*

Certain property was put up for sale in execution, and the petitioner offered a bid of Rs. 9,000 which the Nazir, who was conducting the sale, treated as the highest. Immediately afterwards it was represented to the Court that other persons were willing to bid Rs. 15,000. The Court thereupon directed that the sale should proceed, and the result was that the opposite party bid Rs. 15,000 and was declared to be the purchaser:

Held, that there was sufficient warrant for the procedure adopted by the Court, in the third of the conditions of sale which are adopted as a part of the proclamation of sale, Form No. 29, Appendix E of Schedule I of the Civil Procedure Code of 1908, and that in the interests of justice the High Court should not interfere. ASHUTOSH CHATTERJEE *v.* SUDHINDRA CHANDRA MOULIK **597**

——— ——— ——— ———**Sch. II, para. 14** **520**

——— ——— ——— ———**Sch. II, para. 15** **234**

——— ——— ——— ———**Sch. II, paras. 15, 20** **520**

Commision—*Judicial functions of Court not to be delegated—Civil Procedure Code (Act V of 1908), s. 75.*

The judicial functions of a Court cannot be delegated to a Commissioner. The power of a Court to issue a Commission is defined in section 75 of the Code of 1908. RAM NARAIN SINGH *v.* ODINDRA NATH, 15 C. L. J. 17 **440**

Common Nuisance. *See* CRIMINAL PROCEDURE CODE, s. 133.

Company, *joint stock, limited—Proprietors of zemindary forming into limited company—Legality—Public policy.*

The proprietors of a *zemindari* being numerous and their separate interests minute, they formed themselves into a joint stock limited company:

Held, that the means adopted for the management of their property would seem to be beneficial and that the recognition of the company was not contrary to public policy, as its existence does not injure or endanger the rights of anybody. LAL GOPAL DATTA CHOWDHURY *v.* KHOROORIAH MAJOZILLA ZEMINDARY SYNDICATE, LD., 16 C. W. N. 297 **673**

Compensation. *See* CRIMINAL PROCEDURE CODE, s. 250.

——— ——— ———Alienation by widow—Suit by reversioners—Refund of purchase-money to alienee and delivery of property to plaintiff—Alienee's right to interest from date of widow's death—Excess extent discovered on later measurement **450**

Complaint—*Dismissal—No opportunity given to complainant to prove case—Criminal Procedure Code (Act V of 1898), ss. 202, 203.*

After the examination of a complainant on oath, the Magistrate is bound to dismiss the complaint at once, or to elect to hold inquiry under section 202, Criminal Procedure Code, before issuing process. If he elect to do the latter, it is his duty to impress upon the complainant that he should produce his witnesses on a particular day fixed for hearing; and if on that date no witnesses are produced, the Magistrate should dismiss the complaint.

A Magistrate made some inquiry from the Solicitor of the accused and looked into the papers filed by the accused before the Police, and thereupon dismissed the complaint:

Held, that the action of the Magistrate was irregular and that he should have given the complainant an opportunity to prove his case. SANDYAL *v.* KUNJESWAR MISRA, 16 C. W. N. 741 **781**

Compromise by agent **92**

——— ——— ———Construtions **269**

——— ——— ———Vakil's power to compromise—Vakil exceeding power—Compromise prejudicial to client **595**

——— ——— ———**decree.** *See* RAZINAMA DECREE.

——— ——— ———*Compromise obtained under undue influence—Suit to set aside the decree, whether maintainable.*

A suit to set aside a consent decree obtained under undue influence is maintainable. SHAMINATH *v.* RAMJAS, 9 A. L. J. 1; 34 A. 143 **80**

Concurrent sentences, when can be passed **109**

Condonation. *See* ESTOPPEL.

Confession—Incriminating statement—Asking forgiveness **398**

——— ———of guilt before Police—Not to be allowed to go in as evidence **783**

Consent—Attestation of deed **613**

Consideration—*Hundi* drawn by principal for a gambling debt paid by agent **319**

Conspiracy—*Suit for damage, whether maintainable—Standard of proof—Plaintiff to be kept strictly to cause of action set forth in plaint—Pleading—Criminal conspiracy, when gives rise to Civil liability—Arrest of father to induce son to confess crime—Civil Procedure Code (Act V of* 1908), *s.* 80—*Suit against public officer for act done in bad faith—Notice to Government, whether necessary—Limitation Act (IX of* 1908), *Sch. I, Arts.* 23, 36, 120—*Suit for damage for conspiracy—Special damage to be proved by plaintiff—Pecuniary loss to be proved.*

The law does not permit of a man being arrested in order to put pressure on his son to confess, even if the person causing the arrest believes that by so doing he will get evidence that will lead to the conviction of persons engaged in a huge conspiracy.

There is no rule in the Indian Evidence Act that the standard of proof of a conspiracy in a suit for damages in consequence of injury resulting from the conspiracy, must be the same as if the defendants were being tried on a criminal charge.

Gopessur Dutt, In the goods of (unreported), relied upon.

A suit to recover damages resulting from a conspiracy is maintainable in British India.

The plaintiff in a suit on a conspiracy must be kept strictly to the cause of action that he has set out in his plaint.

A criminal conspiracy gives rise to civil liability if special damage has been suffered by the plaintiff.

A public officer sued in respect of an act done in bad faith is not entitled to notice under section 80 of the Civil Procedure Code, 1908.

A suit to recover damages resulting from a conspiracy, falls within Article 36 or Article 120 of the Limitation Act, 1908, and not within Article 23.

In order to sustain such a suit, the plaintiff must prove special damage and the conspiracy must be the proximate cause of the damage or the damage must be such as to have been in the contemplation of the parties.

Pecuniary loss caused directly by the conduct of the defendants must be proved in order to establish a cause of action; but the amount of damage need not be limited to the precise sum so proved. PEARY MOHAN DAS *v.* WESTON, 16 C. W. N. 145 **721**

Construction of compromise-decree. *See* RAZINAMAH DECREE.

——— ———. *See* COMPROMISE DECREE.

——— ——— ———of compromise **269**

——— ——— ———**of decree.** *See* DECREE, CONSTRUCTION OF.

——— ——— ———Dahyak—*Under-proprietary right—Oudh Rent Act (XXII of* 1886), *s.* 3, *cls.* (8) *and* (9)—*United Provinces Land Revenue Act (III of* 1901), *s.* 4, *cl.* (15)—*Civil Court jurisdiction—Declaration of a person as a mere* Thekadar.

Construction—contd.

The defendants' ancestors brought a suit in the Settlement Court for sub-settlement on the assertion that they held the village in *birt*-tenure. The claim for sub-settlement was disallowed and all that they were held entitled to was a decree confirming their existing possession coupled with a condition that the *Talukdar* was always to retain the power of fixing their rent and of renewing the lease. It was also declared that they were entitled to an allowance as *dahyak* of 10 per cent. on the amounts of rent fixed by the *Talukdar*. If they accepted the terms of the lease offered by the *Talukdar* they were to be entitled to deduct the allowance from the rent payable by them. In case they refused to accept the terms they were to be paid 10 per cent. out of the annual rental received by the *Talukdar*. It was admitted that for some years subsequent to the Settlement decree they were out of possession, the superior proprietor having leased the village to other persons during that time:

Held, that, whether or not the right to receive *dahyak* is heritable and transferable, a right of possession such as was conferred by the above decree is neither heritable nor transferable:

Held, further, that having regard to the language of the decree as a whole the right of the defendants did not amount to an under-proprietary right as defined in the Oudh Rent Act and the United Provinces Land Revenue Act (III of 1901):

Held, also, that a Civil Court has no jurisdiction to make a declaration that a person is a "mere *thekadar*" as such declaration amounts to a determination of the class of tenancy which is exclusively within the cognizance of the Revenue Courts. PARMESHAR DAT *v.* MOHAMMAD ABUL HASAN KHAN, 14 O. C. 335 **809**

——— ———**of deed**—Power of attorney—Words giving general powers **92**

——— ——— ———Sale or mortgage—Criteria **667**

——— ——— ———Will or gift **409**

——— ——— ———**of document**—Entry settling accounts and recording amount due under mortgage **650**

——— ——— ———*Sale of share, excluding* sir bila lagan, *construction of—Covenant by vendor to pay rent, if subsequently assessed—Contract to indemnify—Limitation Act (IX of* 1908), *Sch. I, Art.* 83.

Where a person made a sale of his two-annas share "*ba istisnae sir* 30 *bigha kham nambarhai zail bila lagan*" and it was admitted that the purchaser paid the revenue for the whole two-annas share: *Held*, that the reservation of rent excluded the notion that the vendor remained proprietor of the *sir* plots and the stipulation was merely a contract between the parties that the vendor was to remain in possession of the land free of rent.

Where the vendor in a sale-deed in respect of certain lands held free of rent makes a covenant agreeing to pay rent in case any rent is subsequently assessed on it and decreed against the vendee, a claim by the vendee to recover the rent assessed on the land and decreed against him is a claim upon a contract to indemnify and is governed by Article 83 of Schedule I of Act IX of 1908. TAJAMMAL HUSAIN *v.* RAUNAK Ali, 15 O. C. 25 **979**

Construction—concld.

——— ——— ——— **of grant** **155**

——— ——— ——— ——— Maintenance grant **148**

——— ——— ——— **of Kabuliat** **423**

——— ——— ——— **of Karar**—*Allotment for maintenance* Tavazhi—*Partibility*—Wakf *properties—Rent—Arrears of profits—Limitation Act (XV of* 1877), *Sch. II, Arts.* 109, 127.

Where by a *karar* executed between the members of a Muhammadan family in Malabar, following the Muhammadan Law of Inheritance, certain properties which had been constituted *wakf* properties were, after making provision for the expenses of the *wakf*, set apart for the maintenance of various members of the family, each branch of which was described as *tavazhi* and the property was stated to be inalienable: *Held*, in a suit for partition by the children of one of such three donees, that the plaintiffs were entitled to division.

The object of the stipulation against alienation was to prevent an infringement of the rules of Muhammadan Law applicable to *wakfs*. The description in the *karar* of the donees as a *tavazhi* did not by itself attach the custom of indivisibility to the properties allotted to them.

The general rule of law is that holders of limited estate in property are entitled to enforce partition of the same.

Article 127 of the Limitation Act is inapplicable to Muhammadans. Consequently, a plaintiff can only recover profits for three years under Article 109 of the Act. CHERIA IMBICHI BIBEE *v.* SYED ALI, (1912) 1 M. W. N. 45 **791**

——— ——— ——— **of lease** **481**

——— ——— ——— **of statutes.** *See* INTERPRETATION OF STATUTES.

——— ——— ——— **of Wajib-ul-arz.** *See* WAJIB-UL-ARZ; PRE-EMPTION.

——— ——— ——— **of Will.** *See* WILL.

Contract and conveyance, difference between **571**

——— ———, place of performance **943**

——— ——— of service as managing agent to limited Company—Enforcement of contract—Indirectly obtaining relief **868**

——— ——— *Bought-note signed by agent—Authority of agent—Power-of-attorney, construction of—Power of re-sale—Non-appropriation of goods to fulfilment of contract—Measure of damages.*

The defendants authorized their agent by a power-of-attorney to direct, superintend, manage, control and carry on in Calcutta, in the name of defendants, the business of general merchants as carried on by the defendants in Singapore and elsewhere. For that purpose, the widest powers were vested in the agent, followed by the qualification that nothing therein contained should be deemed to authorize the attorney to speculate in gunnies, opium, shares or exchange. The agent under the power-of-attorney signed a bought-note for the purchase of sugar from the plaintiffs on behalf of the defendants:

Held, that the transaction, even if it was a speculation, was outside the terms of the express prohibition on speculation; that the words "as now carried on in Singapore and elsewhere" were merely descriptive of the general character of the business, and were not intended to limit the articles in which business was to be done or to define the terms on which it was to be conducted; and that mere imprudence of the act did not render it unauthorized.

In the contract, it was agreed that delivery of the sugar was to be taken on a certain date, "in default the sellers will have the option of re-selling the same * * * and hold the buyers responsible for all consequences." In a suit by the sellers for the alleged breach of the contract, they claimed as damages the difference between the contract price and the amount realised on the re-sale which took place about a month after the due date. There was no evidence as to any damage on the due date:

Held, that, as the sugar was in bulk and the vendors had not even appropriated the goods for the purposes of the agreement, it could not be said that there were goods to which the powers of re-sale applied so as to make the result of that re-sale the measure of damages, and that the suit should fail. ANGULIA AND CO. *v.* SASSOON AND CO., 16 C. W. N. 593 **705**

——— ——— *Mutuality—Evidence—Minor—Specific performance—Minor's benefit—Subsequent repudiation by guardian—Better offer.*

The mutuality of a contract does not depend on the evidence for it, and if a mutual contract existed, the fact that it would under certain circumstances have been difficult to prove it, does not affect its validity.

A contract which is for a minor's benefit may be specifically enforced against him. Therefore, a valid agreement lawfully entered into on behalf of a minor and for his benefit, cannot be repudiated if the guardian subsequently finds he can make a better bargain elsewhere. LAL GOPAL DATTA CHOWDHURY *v.* KHOROORIAH MAJOZILLA ZEMINDARI SYNDICATE, LD., 16 C. W. N. 297 **673**

——— ——— *Sale of goods—Lien for unpaid purchase-money—Consideration agreed to be paid at a future date.*

The defendant in this case sold certain goods to the plaintiff receiving a part of the consideration at the time of sale and agreeing to receive the balance by instalments; the goods were agreed to be delivered some on demand and the rest on a date before the date of payment of the first instalment. The defendant having failed to deliver the goods, the plaintiff claimed damages:

Held, that the defendant was liable. NARSHING DAS *v.* SHAMAS DIN, 207 P. L. R. 1911 **992**

——— ——— *Provision for benefit of third parties—Right of such third parties to enforce the provision in their favour.*

Where, at a partition between the members of a joint Hindu family, provision is made for the female members of the family the latter are entitled to enforce the same and sue upon it.

Defendants Nos. 3 and 5 entered into a deed of partition whereby their mother was to get certain land which was to be taken by her daughters after her death. The mother having died, plaintiff, one of three daughters, sued for her third-share of the said land:

Held, that plaintiff was entitled to succeed. KOSURI RAJAGOPAL *v.* DATLA RADHAYYA, 11 M. L. T. 14; (1912) 1. M. W. N. 1; 22 M. L. J. 161 **205**

Contract Act (IX of 1872), s. 23 297

——— ———s. 23—Gambling debt of principal paid by agent 319

——— ———s. 39, *applicapility of—Mortgage—Consideration, part-payment of—Suit for foreclosure, maintainability of—Contract and conveyance, difference between.*

In a suit upon a conditional mortgage, a decree for foreclosure may be passed though the mortgagee had failed to pay the whole of the mortgage-money to the mortgagor.

Per Karamat Husain, J.—There is a fundamental distinction between a contract and a conveyance, *i.e.*, a transfer of an interest in land, and for this reason the rights and duties of the parties to a contract are quite different from the rights and duties of the parties to a conveyance.

A mortgage under the Transfer of Property Act is a transfer of an interest in the land mortgaged and not a mere contract. No sooner a valid mortgage-deed is registered, an interest in the property mortgaged vests in the mortgagee in the absence of a contract to the contrary, notwithstanding the fact that the mortgage-money has not been paid by the mortgagee to the mortgagor. The mere non-payment of the mortgage-money cannot have the effect of rendering the mortgage invalid.

A mortgage cannot be cancelled under section 39 of the Indian Contract Act, 1872. RASHIK LAL *v.* RAM NARAIN, 9 A. L. J. 198 573

——— ———s. 45—*Contract—Specific performance—Contract with a number of persons—Right of one to enforce specific performance—Vendor and purchaser.*

Where an agreement is made to sell certain property to several persons, one of the latter only cannot claim specific performance of the agreement. KOIPALLI RAMIAH *v.* SAJJA SUBBIAH, 11 M. L. T. 192; (1912) 1 M. W. N. 415 315

——— ———s. 62—*Novation of contract—Mortgage-deed executed in consideration of previous bonds—Deed not registered—Merger—Waiver—Right to sue on previous bonds—Registration Act (XVI of 1908), s. 49.*

Where a mortgage-deed requiring compulsory registration is executed in considerarion of previous bonds but the deed is not registered, there is no *novation* of contract, as the mortgage-deed being unenforceable in law does not constitute a new contract.

As the Court cannot look at an unregistered mortgage-deed which requires compulsory registration, there can be no merger of the previous bonds in the mortgage-deed.

The promisee is, therefore, entitled to sue on the previous bonds in spite of the unregistered deed of mortgage. ABDUL KAYAM *v.* BAHADUR VITHOBA, 14 BOM. L. R. 26 858

——— ——— ——ss. 69, 70 144

——— ——— ——s. 70—*Contribution suit—Rent-decree against co-sharer tenant—Decree satisfied by judgment-debtor—Suit by him against co-sharers—Liability of co-sharers.*

A co-sharer tenant against whom the landlord gets a decree of rent of the whole holding and who pays in full the decretal amount, is entitled to get contribution from his co-sharers in respect of their shares, under section 70 of the Contract Act. HARI NARAIN CHATTERJEE *v.* ISWAR CHANDRA CHATTERJEE 457

Contract Act—contd.

——— ———s. 74—*Explanation—Interest—Penalty.*

A mortgage deed provided that if in any particular year interest was not paid on the date agreed, the mortgagor would pay double rates. Nothing was paid for 22 years:

Held, (on mortgagee's suit) that the agreement to pay enhanced interest did not amount to a penalty within the meaning of section 74 of the Contract Act.

A stipulation for enhanced interest *may* be a stipulation by way of penalty. The facts of each case must be considered. BANKE BEHARI LAL *v.* AHLAD SINGH 473

——— ———s. 74—*Penalty—Breach of contract—Actual loss not proved—Amount of compensation.*

Where a contract provided for a penalty in the event of its breach, the party complaining of the breach is entitled to compensation even though he is unable to prove actual loss. The amount of compensation is to be such sum as the Court shall, under the circumstances of the case, think reasonable, limited, of course, to the amount specified in the contract. RAMNATH ZUTSHI *v.* THE SECRETARY OF STATE 46

——— ———s. 74—*Penalty—Interest—Addition of interest in advance—Interest at enhanced rate in case of default—Reasonable compensation.*

A bond was executed for Rs. 5,500. The money actually advanced was Rs. 2,410; the balance of Rs. 5,500 being made up of interest calculated upon the sum of Rs. 6,000 for 39 months at the rate of 1½ per cent. per mensem added in advance. The debt was agreed to be paid in monthly instalments of Rs. 50 for the first twelve months and after that of Rs. 100 for another twenty-six months and the balance at the end of the thirty-ninth month. In case of default in the payment of any one instalment on the due date, the whole amount of the bond was recoverable at once on demand. But if the creditor waited longer, the debtor agreed to pay interest at the rate of 5 per cent. per mensem till payment in full. A default occurred in the payment of instalments and the creditor sued for the recovery of the whole amount of the bond as well as interest at the rate of 5 per cent. per month:

Held, that the stipulation for the addition of interest in advance and the stipulation for payment of enhanced interest at the rate of 5 per cent. per mensem were both penal and unenforceable by reason of section 74 of the Contract Act and that it was a reasonable compensation to allow the amount actually advanced with interest at 18 per cent. per annum. VELCHAND CHHAGANLAL *v.* LIEUT. A. FLAGG, 14 BOM. L. R. 18 853

——— ———s. 74—*Interest—Penalty—Enhanced interest—Question of fact.*

Under the terms of a mortgage interest on the mortgage-money was agreed to be paid at the rate of ten annas per cent. per mensem and it was to be paid annually without any objection. If in any year,

Contract Act—concld.

the mortgagor failed to pay the interest, the mortgagee was to have the power either to realize interest or compound interest at the rate of Rs. 1-4 per cent per mensem. Default was made in the payment of interest at the end of the first year:

Held, (1) that the mortgagee was entitled to interest at the rate of ten annas for the first year and thereafter to interest and compound interest at the rate of Rs. 1-4 calculated in the usual way;

(2) that enhanced interest was chargeable from the date of default in the payment of interest at the lower rate;

(3) that the covenant to pay interest at the enhanced rate was not a penalty. It was intended by the parties to be enforced and was not unreasonable.

The question whether an agreement to pay enhanced interest is a penalty or not is a question of fact. MUNNA *v.* MANSA RAM **624**

——— ——— **235**—*Agent and principal—Agent representing untruly the extent of his authority to third person—Breach of contract—Liability of agent to third person—Agent acting beyond the scope of his authority.*

Section 235 of the Contract Act applies to a case where an agent untruly represents the extent of the authority given to him by his principal.

If a man makes a contract as agent, he promises that he is what he represents himself to be and he is liable for the breach of his contract, whether or not he is aware that he is acting beyond the scope of his authority. GANPAT PRASAD *v.* SARJU, 9 A. L. J. 8 **94**

——— ——— **s. 251** **255**

——— ——— **s. 253 (10)** **23**

Contribution suit—Rent-decree against co-sharer tenant—Decree satisfied by judgment-debtor—Suit by him against co-sharers—Liability of co-sharers **457**

Conveyance and contract, difference between **571**

Co-owner—*Joint property—Liability to be ejected—Sale of joint property by one member as his exclusive property—Hostile title.*

One co-owner is not liable to be ejected from joint property at the instance of his co-sharer unless there has been an ouster in the technical sense of the term.

Dijendra Narain v. *Purnendu Narain*, 11 C. L. J. 189, 5 Ind Cas. 171, followed.

Where one co-owner dealt with joint property as if it belonged exclusively to himself and alienated the whole property to a stranger, there was an assertion of hostile title on his part, and inasmuch as the transferee has claimed the entire property in denial of the rights of the co owners of the transferor, the co-owners are entitled to be restored to possession of their share of the property. NAGENDRA KUMAR NATH *v* HARA CHANDRA PODDAR, 14 C. L. J. 646 **376**

Co-plaintiffs—Members of joint family—Death of one plaintiff—Widow brought on record—Appeal against such order dismissed — Widow's right to succeed to her husband's share held time-barred in separate litigation—Practice—Decree in favour of other co-plaintiffs excluding widow **564**

Co-sharers. *See* CO-OWNERS.

——— ———, possession of—Adverse possession **953**

——— ——— *Joint holding—Co-sharer in possession for cultivation—Creating occupancy-tenure in joint holding—Remedy of other co-sharers.*

Before actual partition, no co-sharer can create an occupancy-tenure in any particular field against the wishes of the other co-sharers, although he is holding it separately for the purposes of cultivation. His other co-sharers may treat the lessor as a trespasser and can maintain a civil suit to eject him from the joint holding. DUNI *v.* ALI MUHAMMAD, 8 P. W. R. 1912 **857**

Costs—Partition suit—Party sued unnecessarily **50**

———Pleader's fee—Practice **500**

——— ———Proceedings under s. 195, Criminal Procedure Code **99**

——— ———*Second Appeal.*

The High Court will not interfere in second appeal with the discretion exercised by a lower Appellate Court on a question of costs. DWARKA NATH *v.* PRALHAD RAM **201**

Counsel *retained by party—Examination of Counsel as witness, if proper—Professional ethics.*

It is a rule of professional ethics of almost universal application that having taken up the position of an Advocate he should refrain from testifying on a trial which was being conducted by him. PEARY MOHAN DAS *v.* WESTON, 16 C. W. N. 145 **721**

Court-fee. *See* VALUATION OF SUIT.

——— ———Appeal Payments disallowed by first Court—Prayer for declaration as to who is entitled to money—Prayer for reduction of amount of decree **305**

——— ———Partition suit Plaintiff in possession **185**

——— ———Suit for declaration and injunction in respect of house **403**

Court Fees Act (VII 1870), s. 7 (4) (b) (5) **903**

——— ———**s. 7 (IV) (c), (d)** **408, 864**

——— ———**Sch. II, Art. 17 (6)** **305**

——— ———**Sch. II, Art. 17 (VI)**—*Partition suit—Plaintiff in possession—Claim merely for separation of share—Court-fee payable—Ad valorem Court-fee, when payable.*

In a suit for partition, where the plaintiff alleges that he is in possession and merely claims partition of the property and separate possession of his share, a Court-fee stamp of Rs 10 is sufficient But where the plaintiff is out of possession and claims possession and partition, then he must pay a Court-fee calculated on the value of the share claimed by him. TARA CHAND MUKERJI *v* AFZAL BEG, 8 A. L J. 1329 **185**

Criminal Procedure Code (Act V of 1898)—*Reference after a long time—Enhancement of sentence.*

Although the sentence on an accused is inadequate it ought not to be enhanced after the lapse of nine months. AIYA CHALAMAYA *v.* EMPEROR, (1912) 1 M. W. N. 50 **777**

Criminal Procedure Code—contd.

——— ——— ———s. 4 (h) 273

——— ——— ———ss. 35, 397, 438, 439—*Accused convicted in two separate cases—Second sentence ordered to run from date of order—Direction illegal—Concurrent sentences, when can be passed—Revision—Effect to be given to real intention of Magistrate—Reduction of sentence.*

The question whether sentences should be concurrent or consecutive arises only in cases of separate conviction *at one trial*. In all other cases section 397 is imperative and should not be disregarded.

On 30th March 1910, *A.* was sentenced to four years' rigorous imprisonment. On 19th April 1910, he was convicted in a separate case by the same Magistrate and sentenced to three years' imprisonment which the Magistrate ordered should run from the date of his order. The first sentence was reduced on appeal to two years. On a reference to the Chief Court that the Magistrate's direction as to the commencement of the sentence in the second case was illegal:

Held, (1) that the direction was illegal and ought to be expunged from the order;

(2) that as the intention of the Magistrate was that *A.* should undergo a total period of 4 years' imprisonment, effect should be given to this intention and, consequently, the second sentence should be reduced to a term of two years to commence from the date of expiry of the first sentence. EMPEROR *v.* GANDA SINGH, 20 P. L. R. 1912; 13 P. W. R. 1912 CR. 109

——— ——— ———ss. 98, 100 1002

——— ——— ———ss. 107, 145—*Binding party under s. 107—Whether Magistrate can institute proceedings under s. 145.*

The fact that one party had been bound down to keep the peace under section 107, Criminal Procedure Code, does not take away from a Magistrate his jurisdiction to act under section 145 when the circumstances so require. BAISNAB CHARAN MANJHI *v.* GATI NATH MUNSHI, 16 C. W. N. 384 830

——— ——— ———s. 107—*Security for breach of peace—Vague apprehension—Order—Duties of the Magistrate—Lawful exercise of right—Unlawful opposition.*

Where there is no evidence that the accused are likely to commit a breach of the peace or disturb the public tranquillity or do any act which would probably occasion a breach of the peace, an order under section 107, Criminal Procedure Code, should not be passed merely on a vague apprehension.

A Magistrate should use his power to protect persons seeking to exercise their rights allowed by law and to restrain persons threatening to disturb the exercise of such rights.

Any person who wants unlawfully to oppose another in the exercise of a lawful right, ought to be bound down to keep the peace, and not the person who wants to exercise his ordinary right. GURUSAWMI NADAN *v.* EMPEROR, (1912) 1 M. W. N. 47; 11 M. L. T. 32; 22 M. L. J. 251 831

——— ——— ———s. 107—*Security for keeping peace—Person not likely to commit breach himself but inducing others to do so.*

Criminal Procedure Code—contd.

Security for keeping the peace under section 107, Criminal Procedure Code, should not be taken from a person, who is not likely to commit any breach of the peace himself, but is likely to induce another person to do so. DEWAT SINGH *v.* EMPEROR, 11 P. W. R. 1912 CR. 782

——— ——— ———s. 107—*Security to keep the peace—Religious act, when likely to provoke breach of the peace—Blowing of conch in a place, not set apart for the purpose with intention to wound feelings of neighbours.*

The blowing of a *conch* in a public place for one's personal amusement, or with any other lawful and innocent motive and without any intention of thereby annoying or hurting the religious feelings of any other person, is not a wrongful act.

The blowing of a *conch* in connection with ceremonial acts of worship, in accordance with established usage in a place fixed for the ceremonial or periodical performance of such ceremonies or worship, will not as a rule be a wrongful act, even though there may be persons, within hearing of the sound, who find their religious feelings hurt in consequence. But if certain Hindus commence to perform ceremonies involving the blowing of a *conch* in a place in no way set apart for the purpose and where no such ceremonies had hitherto been performed, with the deliberate intention of triumphing over, insulting and wounding the religious feelings of their Muhammadan neighbours, their act is a wrongful act, which is likely to provoke a breach of the peace and disturb the public tranquillity. EMPEROR *v.* MURLI SINGH, 33 A. 775 922

——— ——— ———s. 109, cls. (a) and (b)—*Concealment with a view to committing some offence—Conspiracy—Correspondence with Criminals outside jurisdiction—Ostensible means of subsistence—Man residing with father capable of supporting him—Action against suspicious strangers.*

The whole of clause (*a*) of section 109 of the Criminal Procedure Code must be read together. Concealment in order to avoid observation is no offence. The object of the concealment must be with a view to committing some offence.

The fact that a person had been previously connected with any criminal conspiracy or might still be connected with anarchist agitation or be in correspondence with any criminal outside the jurisdiction of the Magistrate, would not be relevant in a case under section 109. It would have to form the basis of a substantive proceeding under section 110.

Therefore, a person cannot be called upon to furnish any security under section 109 in respect of an alleged temporary concealment in his father's house unconnected with any intention to commit an offence, nor with any previous concealment which admittedly must have been outside the jurisdiction.

So long as a young man out of employment is staying in his father's house and the father is a man of substance, able, if necessary, to support him, he cannot be said to be without ostensible means of subsistence within section 109, clause (*b*).

The whole object of the last part of clause (*b*) of section 109 is to enable Magistrates to take action against suspicious strangers lurking within their jurisdiction. SATISH CHANDRA SARKAR *v.* EMPEROR, 16 C. W. N. 499; 15 C. L. J. 396 913

Criminal Procedure Code—contd.

——— ——— ——— **ss. 100, 406** - *Judgment of lower Appellate Court verg sketchy—Evidence not examind or weighed carefully—High Court's power to interfere on merits—Revision—Practice—Reputation—Evidence—Admissibility.*

The High Court will not ordinarily interfere on merits with proceedings under section 110 of the Code of Criminal Procedure, provided that the Court hearing the appeal under section 406 shows in its judgment that it has really and not merely nominally considered the evidence on the record.

Where the judgment of a District Magistrate, deciding in appeal a case under section 110 of the Code of Criminal Procedure, is very short and does not show that the evidence was at all examined and carefully weighed, the High Court will interfere on merits in revision.

Sham Lal v. *King-Emperor*, 6 A. L. J. 487; 2 Ind. Cas. 225; 9 Cr. L. J. 528, referred to.

In a proceeding under section 110 of the Criminal Procedure Code a list of crimes in which the accused was suspected by a Police Officer is inadmissible in evidence to establish the reputation of the accused. BABU PERSHAD *v.* EMPEROR **102**

——— ——— ——— **ss. 110, 120, 123** —*Security—Detention of accused in jail subsequent to expiry of period of security—Date of expiry to be mentioned in bond—Making each surety liable for uhole penalty.*

A Magistrate has no power to keep a man in jail beyond the period for which security was ordered.

It is a serious mistake in the bond to make each of the sureties liable for the full penalty of the bond.

When a bond is not executed till after the date on which the period for which security is required commences, it should state plainly the date on which the period expires. EMPEROR *v* NGA PO SIN, 4 BUR. L. T. 270 **398**

——— ——— ——— **ss. 120, 123 398**

——— ——— ——— **ss. 123, 397** — *Accused under detention in default of giving security—Subsequent sentence of imprisonment for substantive offence—Commencement of sentence.*

A person committed to prison under section 123 (1), Criminal Procedure Code, is not undergoing 'a *sentence* of *imprisonment*' within the meaning of section 397.

Consequently, when a person undergoing imprisonment in default of furnishing security is sentenced to imprisonment for some substantive offence, the sentence for the substantive offence should commence from the date on which it was passed and not from the expiration of the detention in default of furnishing security. EMPEROR *v.* LEKRIA, 8 N. L. R. 20 **1005**

——— ——— ——— **s. 133** —*Nuisance—Magistrate's power to take action—Jurisdiction—Common nuisance—Advantage or convenience to the person causing nuisance—Penal Code (Act XLV of 1860), s. 268.*

Section 133 of the Criminal Procedure Code enables a Magistrate to take action if he considers on information and inquiry that an unlawful obstruction or nuisance should be removed from any way, river or channel which is or may be lawfully used by the public or from any public place.

A common nuisance cannot be excused on the ground that it causes some convenience or advantage to the person guilty of it. BHAROSA PATAK *v.* EMPEROR, 9 A. L. J. 355 **999**

——— ——— ——— **s. 144** —*Breach of peace, no likelihood of—Personal apprehension that breach of peace would take place—Jurisdiction to make prohibitory order—Urgency—Scope of s. 144.*

Section 144 of the Criminal Procedure Code is ordinarily to be used in cases of urgency, and should not be allowed to take the place of any other provision of the law which might more appropriately apply.

An order under section 144 should not be made without recording any urgency in the matter and from the Magistrate's personal apprehension that the parties would break the public peace, when there was no report from the Police that there was a likelihood of any such breach. KAMINI MOHAN DAS *v.* HARENDRA KUMAR, 38 C. 876 **782**

——— ——— ——— **s. 145**—Binding party under s. 107—Whether Magistrate can take proceedings under s. 145 **830**

——— ——— ——— **s. 145** —*Dispute as to possession—Possession of Receiver.*

When a Receiver has been appointed by Court for certain properties, his possession should, for the purposes of section 145, Criminal Procedure Code, be regarded as possession on behalf of the party who might ultimately be found by the Magistrate to be in possession immediately before the date of the Receiver's appointment. ISMAIL GHAMI AMMAE *v.* KATIMA ROWTHER, 10 M. L. T. 573; 22 M. L. J. 154. **215**

——— ——— ——— **s. 147** - *Direction to Police to assist party to remove obstruction, whether legal.*

A Magistrate has power to invoke the assistance of the Police in carrying out an injunction made by him under section 147 of the Criminal Procedure Code, that is, the Police may be ordered to see that an obstruction is removed. AMBIKA PROSAD SINGH *v.* GUR SAHAI SINGH **1000**

——— ——— ——— **ss. 154, 172**—*First information, object of—How to be recorded—What is—First information drawn up by Police Officer after commencement of investigation and settled by attorney, if legal—Special diaries, object of.*

The object of a first information being to show what was the manner in which the occurrence was related when the case was first started, it should always be carefully and accurately recorded.

Emperor v. *Kampu Kuki*, 11 C. W. N. 554 at p. 556; 6 Cr. L. J. 86, relied upon.

The law requires that the first information should be the statement of the person himself giving the information, and it becomes valueless if it is drawn up by some person other than the proper informant.

A statement recorded several days after the commencement of the investigation and after there had been some development, is not only no first information, but has very little or no value at all.

Criminal Procedure Code—contd.

A first information drawn up by a Police Officer and finally settled by an attorney, is not a first information within section 164 of the Criminal Procedure Code.

The object of the special diaries under section 172 of the Criminal Procedure Code is to enable the Court to have the means of ascertaining what was the information which was obtained from day to day by the Police Officer who was investigating the case and what were the lines of investigation upon which the Police Officer acted. PEARY MOHAN DAS v. WESTON, 16 C. W. N. 145 **721**

——————— **s. 164,** proceedings under, are judicial proceedings **273**

——————— **s. 167**—*Remand of accused—Accused to be produced before Court—Application for remand, by whom to be made.*

Section 167 of the Criminal Procedure Code requires that before a Magistrate remands an accused person to Police custody, the accused must be produced before him and he shall record his reasons for doing so.

An application for remand to Police custody must be made personally by the Chief Police Officer present to the Chief Magisterial Officer present unless this is impossible owing to the absence of one of the officers concerned or through some other exceptional cause. PEARY MOHAN DAS v. WESTON, 16 C. W. N. 145 **721**

——————— **s. 172,** object of **721**

——————— **ss. 177, 195 and 531**—*Penal Code (Act XLV of 1860), s. 468—Sanction—Commitment by wrong Court—Commitment to wrong Court—Using a document as genuine—Compulsory production in Court.*

As regards the necessity for sanction, an offence under section 463, Indian Penal Code, mentioned in section 195, Criminal Procedure Code, includes all cases of forgery and hence an offence under section 468, Indian Penal Code, requires as a preliminary to its trial the sanction of the Court before which it was committed

Teni Shah v. *Bolahi Shah*, 14 C. W. N. 479; 5 Ind. Cas. 879, *Queen-Empress* v. *Tulja*, 12 B. 36, followed.

The production of a document which a person is summoned by a Court to produce does not amount to using the document as genuine. The expression 'using a document' is apparently used in the sense of its being put forward in some way for one of the purposes mentioned in section 463, Indian Penal Code.

Though the commitment of an accused by a wrong Court may only be an irregularity, a commitment to a wrong Court is an illegality and ought to be quashed. ASSISTANT SESSIONS JUDGE OF NORTH ARCOT v. RAMAMMAL, 10 M. L. T. 563; (1912) 1 M. W. N. 3 **275**

——————— **ss. 190 (c), 191**—*Magistrate acting on his own knowledge of fact—Failure to inform accused of his right to be tried by another Court*

Where a Magistrate acts on his own knowledge of facts under section 190 (c) of the Criminal Procedure Code, he is bound to proceed under section 191 and inform the accused that he is entitled to be tried by another Court. Failure to comply with this imperative rule of law in section 191, is a defect which invalidates the proceedings. MADAR SAHIB v. EMPEROR, 4 BUR. L. T. 259 **388**

——————— **s. 190** **388**

——————— **s. 195** **97, 99, 275, 392**

——————— **s. 195 (6), (7)** **1007**

——————— **ss. 195, 476**—*Sanction, granting, revoking or refusing to grant—Judicial proceeding—Competency of order under section 476 while hearing appeal under section 195 (6)—Sanction to stranger to suit.*

The grant of sanction to prosecute, the revocation of sanction already granted, and the refusal of an application to grant sanction, are all judicial acts.

A District Judge in an appeal under sub section (6) of section 195 of the Criminal Procedure Code affirmed the order of a Munsif and refused to grant sanction to a stranger to a suit, and at the same time made an order under section 476:

Held, that it was perfectly open to the Judge to take proceedings under section 476, inasmuch as the fact of the commission of an offence had been brought to his notice in the course of a judicial proceeding under sub-section (6) of section 195:

Held, also, that the Judge acted properly in refusing to grant sanction to a stranger to the suit. BALA BASBAN KULDIP LAL v. GURWAR MISSER **111**

——————— **s. 195**—*Sanction for prosecution—Forgery—Document put in Court—Absence of judicial inquiry—Preliminary inquiry, whether necessary before giving sanction—Penal Code (Act XLV of 1860), ss. 463, 471, 475, 476.*

Per *Abdur Rahim, J.*, (whose opinion was the judgment of the Court under section 36 of the Letters Patent)—Where a document has been filed in Court by a party, about whose genuineness or otherwise there is no judicial inquiry, the Court should not accord sanction to prosecute the party for having filed a forged document. The Court must make some preliminary inquiry and satisfy itself that there is a *prima facie* case for prosecution.

Per *Spencer, J.*, *Contra.*—Where a document was judicially before the Court and was produced in a proceeding in Court within the meaning of section 195, clause (c) of the Criminal Procedure Code, it was competent to the Court to exercise its powers under section 195.

Section 195 of the Criminal Procedure Code does not require any inquiry as a necessary antecedent to the grant of sanction.

An inquiry, if held under section 195, Criminal Procedure Code, need not be a judicial inquiry. MUTHUVARAPU SESHIAM v. GATRAM RAMIAH, (1911) 2 M. W. N. 526 **211**

——————— **s. 195 (7), cls. (b), (c)**—*Perjury committed in execution proceedings in a rent suit—Sanction to prosecute—"Case," meaning of—Appeal—Jurisdiction—Principal Court of original jurisdiction—District Judge.*

In the course of execution proceedings of a rent decree passed under the Agra Tenancy Act of

Criminal Procedure Code—contd.

1901, *R.* made a statement which was false. An application was made to the Assistant Collector for sanction to prosecute. The Assistant Collector rejected the application. The applicant then appealed to the District Judge who dismissed the appeal on the ground that he had no jurisdiction in the matter:

Held, that the District Judge was right in dismissing the appeal as he had no jurisdiction in the matter.

Per *Chamier, J.*—The word 'case' in clause (*b*), sub-section 7 of section 195 of the Code of Criminal Procedure of 1898, may mean either the original case, out of which arose the case or proceeding in which the offence is said to have been committed; or the actual proceeding in which the offence is said to have been committed. It must be construed with reference to the context in which it appears. There being a remote connection with the original suit and an immediate connection with the execution proceeding, the case in connection with which the offence in question is alleged to have been committed is the execution proceeding.

Clause (*c*) applies to the present case and, therefore, the applicant should have applied to the principal Court of original jurisdiction.

The prinicipal Court of original jurisdiction under the Tenancy Act of 1901, is clearly not the Court of District Judge.

Per *Karamat Husain, J.*—The word "case" in clause (*b*) of sub-section 7 of section 195 of the Criminal Procedure Code means the actual proceedings in which the offence is said to have been committed and not the original case out of which those proceedings arose.

The opening words of clause (*c*) of the section "where no appeal lies" refer to cases in which no appeal lies and not to Courts against the decision of which there is no appeal. AJODHIA PRASAD *v.* RAM LAL, 9 A. L. J. 124 **284**

——————— **ss. 202, 203** **781**

——————— **s. 227**—*Charge—Alteration—Without assigning reason—Penal Code (Act XLV of 1860), ss. 392, 395, 411—Dacoity—Robbery—Pointing out place where stolen articles were concealed—Confession of guilt before Police—Not to be allowed to go in as evidence.*

A Sessions Judge should not alter a charge under section 395, Indian Penal Code, of being concerned in dacoity, to one of robbery, without assigning any reason and before hearing the evidence.

Where the sole evidence against an accused is that he pointed out the place where some of the stolen properties were concealed, it was held that this in itself was not sufficient evidence to support a conviction under section 411, Indian Penal Code, far less was it any evidence that the accused took any part in robbery or dacoity.

Queen-Empress v. *Gobinda*, 17 A. 576, followed.

A Police officer in giving evidence should not be allowed to state that an admission of guilt was made by the accused. PAIMULLAH *v.* EMPEROR, 16 C. W. N. 238 **783**

——————— **ss. 233, 234**—*Joinder of charges—Act II of 1890, s. 19—Ferry contractor's servant—Excessive toll—Former's guilty connivance—Presumption.*

The fact that the servant of a ferry-contractor levied toll without the knowledge of his master, does not give rise to a presumption as to the latter's guilty connivance.

Each individual levy of excess toll constitutes a separate offence, and sections 233 and 234, Criminal Procedure Code, would apply. EMPEROR *v.* ARUMUKHAM PILLAI, (1912) 1 M. W. N. 69 **780**

——————— **ss. 233, 239**—*Joint trial of persons charged with giving false evidence in same judicial proceedings is illegal—"Same transaction."*

The joint trial of two or more persons charged with giving false evidence in the same judicial proceedings is not permissible under section 239 of the Criminal Procedure Code.

The false evidence given by one witness is a transaction complete in itself and not connected with false evidence given by another witness even though in the same case and on the same point.

Such a joint trial is more than an irregularity: it is an illegality which vitiates the whole trial. IMPERATOR *v.* ALU, 5 S. L. R. 129. **215**

——————— **s. 234** **213**

——————— **s. 235 illus. (f)**—*Joinder of charges—"Same transaction"—Causing grievous hurt for the purpose of extorting information—Making false entries to attribute another cause for the death of the injured person—Penal Code (Act XLV of 1860), ss. 114, 193, 218, 330, 331.*

The accused was charged with voluntarily causing grievous hurt to a person with a view of extorting information from him and he was also charged with making a series of false entries so as to attribute another cause for the death of that person who died from the effects of the injuries inflicted by the accused. The accused was tried at one trial for offences under sections 114, 193, 218, 330 and 331 of the Penal Code. He was convicted of offences punishable under section 193, 218 and 331:

Held, that the trial was not bad on the ground of misjoinder of charges.

There was no misjoinder as the case fell under section 235, illustration *(f)*, of the Criminal Procedure Code. The act of making a series of false entries so as to attribute another cause for death was in continuation and pursuance to the transaction of causing voluntarily grievious hurt and the two acts formed part of the same transaction. EMPEROR *v.* BALWANT KONDOO PATOLE, 14 BOM. L. R. 41 **825**

——————— **s. 236**—*Charges—Misjoinder of charges and persons—Theft and receiving stolen property—Penal Code (Act XLV of 1860), ss. 380, 411, 414.*

Four accused were tried together, the first under section 380, the second under sections 380 and 411, the third and the fourth under sections 411 and 414, Indian Penal Code.

All the stolen property for receiving or disposing of which the four accused were charged was traced to possession of the first accused:

Held, that the disposal of the property was one and the same transaction and that there was no misjoinder of the charges or of the persons in the case. NGA PO SHAT *v.* EMPEROR, 4 BUR. L. T. 263 **395**

Criminal Procedure Code—contd.

——— ——— ——— s. 238 210

——— ——— ——— s. 239 215

——— ——— ——— s. 250—*Information of offence to Village Magistrate—"Institution of proceedings"—Compensation.*

Information given to a Village Magistrate cannot be regarded as information given to the Police of an offence within the meaning of section 250, Criminal Procedure Code, even where the Village Magistrate is bound to report the offence to the Police.

Where a person who gave information to the Village Magistrate of theft was directed to pay compensation to the accused, who was acquitted of the charge:

Held, that the award of compensation was wrong as the case was not instituted by complaint or on information within the meaning of section 250, Criminal Procedure Code. *In re*, ARULANATHAM, (1911) 2 M. W. N. 558; 10 M. L. T. 550; 22 M. L. J. 138 221

——— ——— ——— s. 250 *Minor complainant—Guardian not responsible.*

Under section 250 of the Code of Criminal Procedure, a guardian or next friend of a minor complainant cannot be ordered to pay compensation to the accused. ISA *v.* RANON, 1 P. W. R. 1912 CR; 83 P. L. R. 1912 824

——— ——— ——— s. 253 776

——— ——— ——— s. 293 844

——— ——— ——— s. 337 (1), (2), (4) 273

——— ——— ——— s. 339 (2) 273

——— ——— ——— s. 349, clause 2—*Case sent for disposal to higher Magistrate—Power of superior Magistrate to send back case to former—"Pass such order as he thinks fit," meaning of.*

Where a case is sent by a Sub-Magistrate under section 349, Criminal Procedure Code, to a Sub-Divisional Magistrate for disposal, the latter has no power to return the case to the former for disposal, but should dispose of it himself.

The provision in clause 2 of section 349, Criminal Procedure Code, that the Magistrate to whom the proceedings are submitted may pass such order as he thinks fit, means that he may pass such other final order disposing of the case as he thinks fit. POUNNUSAWMY NAIDU *v.* EMPEROR, (1912) 1 M. W. N. 16 110

——— ——— ——— s. 367—*Points for determination, reason for the decision.*

Where the judgment of an Appellate Court does not comply with the provisions of section 367 of the Code of Criminal Procedure and omits to state the points for determination and the reasons for decision, the case should be returned for re-trial. SURYA *v.* LACHMI NARAIN 288

——— ——— ——— s. 369—Judgment of High Court, when complete 776

——— ——— ——— s. 397 109

Criminal Procedure Code—contd.

——— ——— ——— s. 397—Accused under detention in default of giving security—Subsequent sentence of imprisonment for substantive offence—Commencement of sentence 1005

——— ——— ——— s. 406 102

——— ——— ——— ss. 423 (c), 439, 514, 515—*Order forfeiting bond—Revision—High Court—Jurisdiction to revise District Magistrate's order under section 515—Interpretation of Statutes—Curtailment of the jurisdiction of a Superior Court.*

The jurisdction of a Superior Court cannot be taken away except by express words or necessary implication.

Tulsidas v. *Virbussapa*, 4 B. 624, followed.

The general power of revision vested in the High Court is not taken away by the power of revision given to the District Magistrate under section 515 of the Criminal Procedure Code.

The High Court has, under sections 439 and 423 (c) of the Code, power to revise an order passed by a District Magistrate under section 515 or by any Magistrate under section 514 of the Code. EMPEROR *v.* KARAM BAHADIN, 5 S. L. R. 179 223

——— ——— ——— s. 435 921

——— ——— ——— ss. 437, 556—*Section 556 applicable to proceedings under section 437—"Try any case"—"Personally interested"—Magistrate presiding at meeting of Municipal Board sanctioning prosecution—Jurisdiction—Order for further inquiry.*

The expression "try any case" in section 556 of the Criminal Procedure Code is wide enough to include any stage of a judicial proceeding in which the question of the guilt or innocence of an accused is finally adjudicated on. Consequently, the section applies to the proceedings under section 437 of the Code.

Emperor v. *Mohan Lal*, 27 A. 25, distinguished.

A Magistrate who presided at a meeting of the Municipal Board which directed the prosecution of the accused, is disqualified from making an order for further inquiry against the accused under section 437 of the Code. The Magistrate must be deemed to be personally interested within the meaning of section 556 of the Code. IMPERATOR *v.* BHOJRAJ, 5 S. L. R. 137 222

——— ——— ——— s. 438 109

——— ——— ——— s. 439 109, 223

——— ——— ——— ss. 439, 476—*Sanction to prosecute given by Assistant Collector—High Court's power to interfere on criminal side—Duty of Court to inquire—Accused not given opportunity to cross-examine witnesses—Legality—Irregularity.*

An Assistant Collector of the 1st Class acting under section 476, Criminal Procedure Code, directed certain persons to be prosecuted under section 193, Indian Penal Code. On appeal the District Judge confirmed the order of the Assistant Collector. An application for revision was made to the High Court on the Criminal side: *Held*, that the High Court had no jurisdiction to interfere in the matter under section 439 of the Criminal Procedure Code.

Criminal Procedure Code—contd.

In re Bhup Kunwar, 26 A. 249; 1 Cr. L. J. 73; A. W. N. (1904) 15, followed.

When a Magistrate takes action under section 476 of the Code of Criminal Procedure, it is not necessary to the validity of his order that he should hold a preliminary inquiry, and, therefore, if the Magistrate refuses to give the accused an opportunity to cross-examine the witnesses he does not act in the exercise of his jurisdiction illegally or with material irregularity. ABDUL GHAFOOR *v.* RAZA HUSAIN, 9 A. L. J. 231 **829**

——— ——— ——— ——— **Ch. XXXIV** **216**

——— ——— ——— ——— **s. 476**—Accused not given opportunity to cross-examine witnesses **829**

——— ——— ——— ——— **s. 476**—Order under section while hearing appeal under section 195 **111**

——— ——— ——— ——— **s. 476**—*Civil Procedure Code (Act V of 1908), s. 115—Fabrication of evidence and forgery committed by a* Patwari *in* Tahsil *records*—Patwari *appearing as a witness in District Judge's Court—Departmental inquiry made by District Magistrate—District Judge directing prosecution of* Patwari *on basis of Departmental inquiry—Judicial proceedings—No inquiry by District Judge—Material irregularity.*

A *Patwari* appeared as a witness in a Civil case in the Court of a District Judge. After the decision of the case the District Magistrate had a Departmental inquiry made which went to show that the *Patwari* had fabricated false evidence and had also forged a signature in his diary in the *Tahsil* records. Upon this the District Magistrate applied to the District Judge for sanction to prosecute the *Patwari* for the offences of perjury and forgery and along with his application for sanction forwarded the record of the Departmental inquiry.

The District Judge on perusal of this record issued notice to the *Patwari*, and after hearing him directed his prosecution on the basis of the Departmental inquiry:

Held, (1) that the District Judge had no jurisdiction to order prosecution in respect of matters which had occurred in the *Tahsil* and not in his Court;

(2) that, assuming the matters to have been brought to the notice of the District Judge in the course of a judicial inquiry, as the record of the Departmental inquiry was not evidence in the matter of the sanction applied for by the District Magistrate, the District Judge acted with material irregularity in ordering prosecution without having himself made an inquiry. GANESH PERSHAD *v.* EMPEROR **283**

——— ——— ——— ——— **s. 476**—*Legal Practitioners Act (XVIII of 1879), s. 23—Magistrate holding inquiry—Whether a Court.*

For the purposes of section 476 of the Code of Criminal Procedure, a Magistrate holding an inquiry under section 23 of the Legal Practitioners Act is a Court. GAURI SHANKAR *v.* EMPEROR, 9 A. L. J. 156 **1006**

——— ——— ——— ——— **s. 476**—*Order passed before cross-examination of prosecution witnesses—Illegality.*

Criminal Procedure Code—contd.

Where a Magistrate passed an order under section 476, Criminal Procedure Code, before the prosecution witnesses were cross-examined and without giving the defence an opportunity of showing that the prosecution evidence was false:

Held, that the order was illegal and should be set aside. KOLLI APPIAH, *In re*, 11 M. L. T. 91; (1912) 1 M. W. N. 400 **832**

——— ——— ——— ——— **s. 488**—*Maintenance—Child—Father able-bodied person—Sufficient means—Presumption—Burden of proof—Denial of sufficiency of means—Evidence Act (I of 1872), s. 103.*

Any able-bodied man, who is not prevented by any physical infirmity from working, should, in proceedings under section 488 of the Criminal Procedure Code, be presumed to have sufficient means to support his child as well as himself.

The *onus* lies on him to show that he has not sufficient means.

A mere denial by such a man himself of sufficiency of means is not conclusive proof of want of sufficient means. ME THA *v.* NGA SAN E, U. B. R. (1911), I, 90 **914**

——— ——— ——— ——— **s. 488**—*Maintenance—Order restricted to money payment—Grain allowance not jusitfiable.*

An order, under section 488 of the Criminal Procedure Code, for maintenance must be for a sum of money payable as a monthly allowance, at a rate not exceeding Rs. 50 a month. The section does not warrant an order that the allowance be paid wholly or partially in grain or the like. EMPEROR *v.* DILSUKH, 19 P. R. 1911 CR. **1004**

——— ——— ——— ——— **s. 488**—*Maintenance—Wife living separately—Absence of habitual cruelty—Amount, how to be fixed—Offer to maintain, when valid.*

The present Code does not restrict payment of maintenance, where the wife is living separately, to cases in which she has been treated with habitual cruelty.

Ma The v. Tha E, U. B. R 1897-01 I, 101, distinguished.

In fixing the amount of maintenance, no luxury should be allowed and necessaries of life should be considered according to the station in life of the applicant and the means of the respondent.

An offer to maintain, in order to be a valid defence, must be a *bona fide* offer and not made with the object of escaping the obligation to maintain DRAGON *v.* EMELIE MI TAIK DRAGON, 4 BUR L. T. 269 **391**

——— ——— ——— ——— **s. 514, 515** **223**

——— ——— ——— ——— **ss. 517, 520**—*Bank-note—Property passes by delivery to* bona fide *purchaser for value—Erroneous disposal of currency-note—Power of superior Court to order re-payment of equivalent—"Any further order that may be just."*

Property in a bank-note passes, like that in cash, by delivery and a party taking it *bona fide* and for value is entitled to retain it as against a former owner from whom it has been stolen.

Miller v. Race, 1 S. L. C. 463 relied upon.

Where currency-notes or current coins have been erroneously disposed of under section 517 of the

Criminal Procedure Code—concld.

Criminal Procedure Code, a superior Court may order the re-payment of an equivalent under section 520 of the Code.

The intention of the Legislature in adding to section 520 the words "and make any further orders that may be just," was to enable a superior Court to give effect to an order setting aside the order of the Court of first instance, by directing the restitution of the property if the order of the Court of first instance has been carried out. BODOMAL KISHINCHAND v. EMPEROR, 5 S. L. R. 153 **213**

——— ——— ———**s. 520** **213**

——— ——— ———**s. 528**—*Notice, necessity of—Order without notice not illegal—Practice.*

Section 528 of the Criminal Procedure Code does not make it incumbent on a Magistrate to issue notice before making an order. But in many cases it would be improper to take action under the section without issuing notice.

Where the Magistrate himself considers that the case is a fit one to give the accused an opportunity to show cause against an order under section 528, no order should be passed unless the accused has had sufficient time to make an effective representation in the matter. DUR MAHOMED v. ALLAHDINO, 5 S. L. R. 190 **224**

——— ——— ———**s. 530** **394**

——— ——— ———**s. 531** **275**

——— ——— ———**s. 552** **1002**

——— ——— ———**s. 556** applicable to proceedings under section 437 **222**

Criminal trespass. *See* PENAL CODE, ss. 441, 447.

Criminal trial—*Accused of poor wits—Lunacy, inquiry into—Criminal Procedure Code (Act V of 1898), Ch XXXIV.*

Where a Magistrate finds an accused to be of poor wits and wanting in apprehension of the serious consequences of his acts, he should hold an inquiry under Chapter XXXIV, Criminal Procedure Code, into the question whether the accused is a lunatic either at the time of the trial or was a lunatic when he committed the offence of which he is charged. ADALA YERRIVADU, *In re*, 11 M. L. T. 24 **216**

Cross-objection. *See* CIVIL PROCEDURE CODE, O. XLI, R. 22.

——— ——— ———Adding parties—Parties not necessary to appeal **906**

Custom, proof of—Irresponsible expression of opinion—Evidentiary value **711**

——— ———*Kudhi Kamini* cess—*Biswadar's* liability to pay—Burden of proof **865**

——— ——— **Adoption**—*Alienation—Gift—Daughter's son—Muhammadan Rajputs of Hissar District.*

Among Muhammadan Rajputs of the Hissar District, the burden of proving the validity of the adoption of a daughter's son or of a gift in favour of a daughter's son lies on the adoptee or the donee. The adoption of a daughter's son who belongs to another caste is not valid by custom.

A gift of ancestral property to a daughter's son is not valid by custom. ALIM ALI v. NABBU, 12 P. W. R. 1912. **314**

Custom—contd.

——— ——— ———*Effect on property already acquired by succession—Right of succession in natural family as against collaterals—Presumption—Burden of proof*—Bajwa Jats *of Sialkot District.*

An adopted person does not by adoption lose the property to which he has already succeeded.

A person adopted as an heir in the customary manner of the Punjab does not thereby lose his rights to succeed to property in his natural family as against collaterals.

Among *Bajwa Jats* of the Sialkot District when a person is adopted into another family, his right of succession in his natural family, so far as collaterals are concerned, is the same as before. JIWAN v. DIT. **549**

——— ——— ———*Succession—Appointment of heir—Right of appointed heir to succeed to natural father in the presence of collaterals*

The right of an appointed heir and his lineal descendants to succeed to the property of his natural father is preferential to the right of the latter's collaterals. DASAUNDHI v. CHANDA SINGH, 85 P. W. R. 1912 **421**

——— ———**Alienation**—Gift—Daughter's son—Muhammadan Rajputs of Hissar District **314**

——— ——— ———*Gift—Daughter—Khanadamad—Right to property gifted to daughter—Gujars of Gujrat District—Completion of gift—No formal delivery of possession or mutation of names—Construction of deed—Will or gift.*

A., a *Gujar* of *mauza* Bawli Kalan, *tahsil* Kharian in the Gujrat District, executed and registered a deed in favour of his only child, a minor daughter, *B.* By this deed, *A.* declared *B.* his sole heiress in respect of his house and landed property and he also pointed out in the deed that *B.*'s husband *C.* was his *khanadamad* and that *B.* and *C.* were living with him.

A.'s collaterals forthwith instituted a suit against *A.* and *B.*, for whom *A.* acted as guardian *ad litem* for a declaration that the gift would not affect their reversionary rights. The parties in this suit arrived at a compromise by which the gift in respect of all the houses and ⅓rd of the land was to remain valid in favour of B., while in respect of the remaining ⅔rds of the land the gift stood cancelled.

Soon after B. died without issue. No formal delivery of possession was made to *B.*, nor did any mutation of names take place in her favour. But *C.* cultivated all the land of *A.* and lived in the same house. Subsequently, *A.* and *C.* fell out and then *C.* sued *A.* for possession of the houses and one-third of the land gifted to *B*:

Held (1) that there was an immediate and irrevocable gift to *B.* and that the transaction in favour of *B.* was not a testamentary disposition.

(2) That the gift was complete as the donor had done everything that could reasonably be expected in the circumstances to give effect to the gift. In such circumstances formal delivery of possession was not essential to the completion of the gift.

(3) That the gift to *B.* enured after her death for the benefit of *C.* during his life-time.

A gift of this kind amoung the *Gujars* was intended as much for the benefit of the son-in-law as for the benefit of the daughter. RAJA v. JANNAT BIBI, 79 P. W. R. 1912 **409**

Custom—contd.

——**Alienation**—*Gift*—Sheikh Ansari Pathans *of Basti Danishmandan, District Jullundur —Gift of ancestral property by father to daughter—Whether the daughter has only a life-estate—Whether daughter has power to gift—Evidence—Inference —Relevancy—Acquiescence.*

The *Sheikh Ansari Pathans* of Basti Danishmandan, District Jullundur, do not belong to a family to which the Punjab agricultural or other similar restrictive customs must be presumed to apply.

There is no custom applying to the said family of *Sheikh Ansari's* which limits the ancestral lands which came to a daughter by gift from her sonless father to a mere life-estate, and which prevents a daughter from alienating such lands by gift in her lifetime.

Evidence as to the limited rights by custom of a *widow* in her deceased husband's property does not give rise to the inference that a *daughter* also has limited rights in her sonless father's ancestral property gifted to her. Nor has evidence that a Muhammadan father is prevented by some local custom from giving the bulk of his property to one of his sons any bearing on his power to make a gift of the whole of his property to his daughter. MUHAMMAD UMAR KHAN *v.* MUHAMMAD NIAZ-UD DIN KHAN, 6 P. W. R. 1912; (1912) 1 M. W. N. 77; 11 M. L. T. 76; 9 A. L. J. 137; 15 C. L. J. 172; 12 P. L. R. 1912; 22 M. L. J. 240; 14 BOM. L. R. 182; 16 C. W. N. 458; 39 C. 418 **344 (P. C.)**

——*Hindu Law—Presumption —Burden of proof*—Brahmans *of village* Chirah, *Tahsil and District Rawalpindi.*

In the case of *Brahmans*, the initial presumption is that they are not governed by custom but by their personal law.

The question whether such persons have given up their personal law and adopted the custom of the tribes among which they dwell, depends chiefly on the fact whether they are dependent *mainly* upon agriculture.

Brahmans of village Chirah, *Tahsil* and District Rawalpindi, are not proved to be governed by agricultural custom in the matter of alienations. Although many of them no longer exercise any priestly functions and actually cultivate the land with their own hands, it is not established that agriculture is their sole or main occupation. FAKIR CHAND *v.* RAM CHAND, 62 P. W. R. 1912 **709**

——Adoption—Impartible estate **7**

——*Mortgage by way of conditional sale—Mortgagor selling equity of redemption without necessity—Land yielding a little profit—Old debt.*

The validity of a sale of equity of redemption of land mortgaged by way of conditional sale in consideration of an old mortgage debt due from the mortgagor's father not shown to be of profligate habits, cannot be questioned by his sons on the ground of there being no necessity for such sale, where the land is of little use and brings very little profit to the mortgagor and he foresees that it would be impossible for him or his descendants to redeem it in foreclosure proceedings or thereafter. CHET SINGH *v.* ALLAHDITTA, 31 P. W. R. 1912; 47 P. L. R. 1912 **877**

Custom—contd.

——**Alienation**—*Necessity—Duty of alienee to inquire that an antecedent debt is a just debt—Antecedent debt a decretal debt—Alienee an outsider—Rule as to inquiry.*

Where an alienee, who is an outsider, finds that the alienor's debt, regarding which he must make inquiry, is a decretal debt he need not make any further inquiry, and the reversioners will not be allowed to go behind the decree. But this rule will not apply where it is clear that the alienee's suspicions should have been aroused by the surrounding circumstances, or where it is proved that he actually had knowledge of the bad faith of the decretal transaction. UMAR DIN *v.* BUDHE KHAN, 23 P. W. R. 1912; 21 P. L. R. 1912 **58**

——Pathans of *Miani, District Hoshiarpur—Alienation in favour of son-in-law—Right of son's daughter to object to alienation—Son bequeathing right to daughter—Reversioner's right to object not alienable—Alienation by male-holder not void but voidable.*

The right of a reversioner under the Punjab Custom to dispute an alienation of ancestral property by the male-holder cannot be transferred by him to a stranger.

An alienation by a male-holder, otherwise than for necessity, is only *voidable.* It is not void and on the death of the alienor, the property alienated does not vest in the reversioner without any action on his part.

Among *Pathans* of Miani in the Hoshiarpur District a daughter of the son of a male alienor is not entitled to object to the alienation by him of ancestral immoveable property to a son-in-law, even though the said daughter's father has in a Will bequeathed to her the right to raise such objection and to sue for the recovery of such property. ZENAB *v.* SHAH NAWAZ KHAN **526**

——Pre-emption—Price overstated in the deed fraudulently—Decree on payment of market-value—Subsequent suit by vendor's reversioners—Pre-emptor not debarred from asserting real consideration - Real consideration for necessity—Conversion of sale into mortgage—Estoppel—Fraud—*Particeps criminis* **796**

——*Right of collateral in the eleventh degree to contest alienation—Right of succession wider than the right to control alienation.*

In the absence of a special custom in his favour, a collateral of the alienor in the 11th degree has no right to object to the alienation.

The right to succeed, where escheat is the alternative to succession, is far more extensive than the right to control alienation. There is nothing inconsistent in the proposition that a distant collateral, who cannot control alienation, may still have a right superior to the Crown.

The mere fact that the property in respect of which the right of control has been asserted, has descended from the common ancestor of the alienor and the claimant does not in the absence of a special custom in favour of the latter, entitle him to deprive the alienor of the right to select his successor or representative in estate, where the claimant is a very remote relation. The latter succeeds only to so much of the property as has not been disposed of by the alienor. HAZARA SINGH *v.* HARNAM SINGH, 22 P. W. R. 1912; 44 P. L. R. 1912; 24 P. R. 1912 **180**

Custom—contd.

——— **Alienation**—*Sale of waste land—absence of proof of actual necessity and of reckless waste—Objection by sons.*

A *bona fide* sale of waste land of little use by a *Jat* some 20 miles away from his village, where he owns his culturable land, apparently for family expenses, indicating no extravagance, imprudence or reckless waste on the part of the vendor, is binding on his sons and they cannot contest its validity on the ground of there being no proof of actual necessity. KHANU *v.* FATEH KHAN, 5 P. W. R. 1912 **861**

——— ——— ——— ———*Son contesting father's alienation—Debts not imaginary—Father not immoral or extravagant—Consideration—Burden of proof—Necessity—Alienor's holding a small one—mortgagee's suit against reversioners—Mortgage not wholly for necessity—Falling back on previous mortgage.*

Where a son contests an alienation made by his father in consideration of old debts and it appears that the debts are not imaginary and that the father was not immoral or extravagant, the burden of proving want of consideration lies on the sons.

It is for the alienee to prove clearly the necessity for an alienation. Necessity cannot be inferred merely from the facts that the alienor's holding was a small one and that he got into debt by degrees.

A mortgagee cannot, in a suit against the alienor's reversioners, obtain possession of even a fraction of the land unless he can prove that the transaction was wholly for necessity.

Ghulam Ghaus v. *Nath Bakhsh*, 24 P. R. 1903; 35 P. L. R. 1903, followed.

But where the consideration of a mortgage partially consists of an old mortgage which is for necessity, the mortgagee may fall back on the former mortgage. MIRAN BAKHSH *v.* GOUDE RAM, 89 P. W. R. 1912 **556**

——— ——— ———Vargal *or* Bargal Jats *of Jhelum District—Will by a sonless* Vargal.

A *Bargal* sonless Muhammadan *Jat* of the Jhelum District cannot validly bequeath his property by Will to his daughter's sons in presence of agnate collaterals. FATEH DIN *v.* ALLAH DITTA, 19 P. W. R. 1912 **77**

——— ——— ———*Village* abadi—Malik qabza *—Powers over houses and site occupied—Nature of* Malik qubza's *tenure.*

A *mailk qubza* is, as regards the land held by him, usually in the same position as a full proprietor in a village, with the exception that he sometimes has to pay *malikana* to such proprietors in the village and has no share in the *shamilat* land of the village.

A *malik qubza* is not a non proprietor in respect of the houses and sites in the village *abadi* held by him. He has the same powers of alienation and disposition over these houses and sites as the original proprietors have over their buidings and sites in the *abadi.*

Kirpal Singh v. *Kesree*, 67 P. R. 1869, relied upon.

The entire village *abadi* can very seldom be looked upon as *undivided shamilat* of the original proprietors. SAWAN SINGH *v.* JAFAR KHAN. 7 P. W. R. 1912; 13 P. L. R. 1912 **405**

Custom—contd.

———**Joint family**—*Two families living together without* Illatom *or other family arrangement, rights of—Equal rights claimed by custom—Validity of custom—Admissions, effect of, when made in ignorance of legal rights.*

There is no custom in the District of Nellore that when two families live together and there are intermarriages amongst the members thereof, the two families have equal rights in the properties which they hold and enjoy.

Such a custom may be legal if it originated in an arrangement of the parties concerned or is otherwise dependent on family arrangements.

A custom to be effective must be a territorial custom and isolated cases are of little value unless it be proved that the two families living together have been united together on equal terms.

An admission of the defendant in favour of the plaintiff in ignorance of her legal rights will not bind her, if, as a matter of fact, the plaintiff has no legal claim. ALLAREDDI SUBBAMMA *v.* NALLAPAREDDI, 11 M. L. T. 124; (1912) 1 M. W. N. 178 **870**

———**Pre-emption.** *See* PRE-EMPTION.

———**Succession**—*Khasias*—Sister to be preferred to brother **377**

——— ———Daughter—No collateral—Hindu Rajputs of Dasuya *Tahsil*, District Hoshiarpur—Evidence to prove agnatic relationship **290**

——— ——— ———Sister—Collaterals **711**

——— ——— ———Biloch Khosas *of Sanghar Tahsil, District Dera Ghazi Khan—Collaterals of 6th degree, whether exclude a daughter—Burden of proof.*

The *Riwaj-i-am* of a village provided as follows:—"No limit has been observed in the past as to the degree of relationship, but the 3rd degree has now been fixed in consultation as the limit up to which collaterals can exclude a daughter:"

Held, that such an arbitrary rule can have no weight.

Civil Appeal No. 76 of 1896, followed.

Where among *Biloch Khosas* of Tahsil Sanghar, District Dera Ghazi Khan, the contest was between the daughter of a late owner and his collaterals in the 6th degree, and the daughter admitted that collaterals up to the 3rd degree only could exclude her: *Held*, that it was for the daughter to prove that collaterals of the 6th degree did not exclude her. SAHIA *v.* USMAN **72**

——— ——— ———*Collaterals—Degree of relationship—Method of calculation—General rule—Mianwali Tahsil—Presumption.*

The general rule in the Punjab for calculating the degree of relationship of collaterals is that the calculation must be made from the *deceased* to the common ancestor of the claimant, the deceased and the ancestor being each counted as one.

Mianwali Tahsil must be presumed to be governed by the general Punjab rule. The rule prevailing in the Bannu Tahsil, *viz*, that the calculation must be made from the *collaterals claiming* to the common ancestor, each counting as one, cannot be applied to the Mianwali Tahsil. MUHAMMAD *v.* BAKKO, 19 P. R. 1912; 17 P. L. R. 1912; 39 P. L. R. 1912 **27**

Custom—contd.

——**Succession**—*Collateral—Descendants of last founder—Proprietors of village—Sister—Property non-ancestral—Collateral residing in another village—Burden of proof—Jats of* Mauza *Bhadal, District Lahore—Custom, proof of—Irresponsible expression of opinion—Evidentiary value.*

A collateral is not excluded from inheritance merely because he owns land in another village.

Nor can a collateral be excluded on the ground that his ancestor never held the land to which he claims to succeed.

Hamira v *Ram Singh*, 134 P. R. 1907 (F. B.); 74 P. L. R. 1908; 85 P. W. R. 1907, relied upon.

In the presence of a collateral, however remote neither the descendants of the last founder of the village nor the body of the village proprietors have any right of succession.

The burden of proving that a sister is entitled to succeed in preference to a collateral lies on her.

In order to prove a custom, oral evidence consisting of irresponsible expression of opinion unsupported by instances is of little value.

Instances of succession of *daughters* in the presence of collaterals are insufficient to prove a custom of succession of *sisters* in preference to the collaterals.

Hamira v. *Ram Singh*, 134 P. R. 1907 (F. B); 74 P. L. R. 1908; 85 P. W. R. 1907, followed.

Among Jats of *Mauza* Bhadal, District Lahore, a sister has no right to succeed, in the presence of a collateral however remote, even to the non-ancestral property of her deceased brother. HARNAMON *v.* SANTA SINGH **711**

——————*Daughter—Collaterals of 7th degree*—Chohan *Muhammadan* Rajputs *in Jagadhri Tahsil of the Ambala District—Declaratory suit—Land in possession of mortgagees and tenants—Specific Relief Act (I of* 1877*), s.* 42.

No custom exists among *Chohan* Muhammadan *Rajputs* of Jagadhri *Tahsil* in the Ambala District by which reversioners in the 7th degree can exclude a daughter from succeeding to ancestral land of her deceased father.

There is no general custom in the Punjab whereby daughters are excluded from inheriting their father's ancestral land in the presence of collaterals however remote. Usually, reversioners up to the 5th degree exclude daughters.

A suit for a mere declaration of title as owner by inheritance is maintainable where one party relies on mutation and the other on *girdawari* entries while the land is in possession of either the mortgagees, occupancy-tenants or tenants-at-will and it is not shown that defendant has realized the rent from the tenants. ABDUL KARIM *v.* SAHIB JAN, 13 P. W. R. 1912 **947**

————————*Daughters—Collaterals of sixth degree*—Pathans *of Mianwali Tahsil—Burden of proof—Method of computing degree of relationship.*

Among *Pathans* of the Mianwali *Tahsil*, daughters exclude collaterals of the 6th degree in matters of succession to the ancestral property of their father.

The mode of computing degrees of agnatic relationship among these *Pathans* is to count from the collaterals to the common ancestor both being included.

Custom—contd.

The words *warisan chhe pusht ke andar* mean collaterals up to end including the fifth degree and exclude the collaterals in the sixth degree.

The burden of proving a custom whereby remote collaterals such as those of the sixth degree exclude daughters rests on the party who asserts such a custom. TARI BAZ KHAN *v.* FATEH KHAN, 29 P. R. 1912 **316**

——**Succession**—*Daughter—Self-acquired property—Collaterals—Burden of proof*—Goriwal Jats *of Ludhiana District.*

The burden of proving that the collaterals of the propositus are entitled to succeed to his self-acquired property in preference to his daughter lies on the collaterals.

Among *Goriwal Jats* of the Ludhiana District, a special custom contrary to general custom, prevails whereby daughters are excluded by collaterals of the 4th degree as regards succession to self-acquired property.

The fact that a daughter is in possession of the deceased's self-acquired property under a mutation order is not material except perhaps as regards burden of proof. PARTAB SINGH *v.* PANJABU, 41 P. L. R. 1912; 25 P. R. 1912 **177**

————————Lambardar, *office of—Adopted son a collateral—Muhammadan Chauhan Rajputs of Madh, District Hissar.*

Among Muhammadan Chauhan Rajputs of *Mauza* Madh, in the Hissar District, the adopted son of a deceased *Lambardar*, who is also a distant agnatic relation of the deceased, is entitled to succeed his adoptive father as *Lambardar*, in the presence of a first cousin of the deceased. NURA *v.* NASIR DIN, 1 P. R. 1912 Rev.; 27 P. L. R. 1912; 5 P. W. R. 1912 Rev. **18**

————————*Owner dying without heir in a* thulla *or* patti *of a village—Other owners entitled to succeed—Waiver of claim.*

Where a proprietor dies leaving land in a *thulla* or *patti* of a village, and leaves no heir, the land should pass to the various branches of the owners in the *thulla or patti.*

The mere fact that members of one branch did not formally join in an appeal connected with mutation proceedings does not show that they have given up their claim. SUNDAR SINGH *v.* DEVA SINGH, 2 P. W. R. 1912 **863**

————————*Primogeniture, rule of—Muhammadan Law—Kunjpura State—Impartible principality—Rights of junior members—Maintenance—Partition—Withdrawal of* quasi-sovereign *powers, effect of—Property acquired subsequent to withdrawal of powers.*

The succession to the *zemindari* rights as well as the *Jagir* of Kunjpura Estate in the Karnal District is governed by the rule of lineal primogeniture. The Estate is an impartible principality. The junior members of the family are only entitled to maintenance and not to their shares under the Muhammadan Law.

This rule of succession applies as well to the properties acquired after 1849 as to the properties held before that year.

The withdrawal of *quasi-sovereign* civil and criminal powers previously exercised by the Chief of

Custom—contd.

Kunjpura State cannot have the effect of altering the custom under which the entire estate descends by the rule of primogeniture to a single male heir, IBRAHIM ALI KHAN *v.* MUHAMMAD AHSAN ULLAH, 11 M. L. T. 225; (1912) 1 M. W. N. 316; 50 P. W. R. 1912; 15 C. L. J. 352; 9 A. L. J. 390; 14 BOM. L. R. 270; 22 M. L. J. 478; 16 C. W. N. 625 **695 P. C.**

——**Succession** — *Religious institution*—Dharmsala—Mahantship—*Rule of succession — Necessity to ascertain — Right of owner's descendant to oust trespasser.*

In a dispute about succession to the *mahantship* of a *Dharmsala* or other *waqf* property, the first duty of a Court is to ascertain the rule of succession which obtains as regards the particular shrine.

Bhai Bhagat Singh v. *Harnam Singh*, 49 P. R. 1892, *Gyan Parkash* v. *Hazura Singh*, 3 P. R. 1899, followed.

The mere fact that plaintiff is a descendant of the original owner of the *Dharmsala* does not entitle him to oust a trespasser. PREM SINGH *v.* MOKAND SINGH, 30 P. W. R. 1912; 22 P. L. R. 1912 **62**

——————— Sehgal Khatris *of Gujranwala and Eminabad—Hindu law—Joint undivided property—Separation of two branches of a joint Hindu family—Separate and exclusive enjoyment of different portions of property by each branch for above 40 years —Presumption—Partition—Party sued unnecessarily —Costs.*

The onus of proving that *Sehgal Khatris*, residing in a town, who do not own agricultural property and have never carried on agriculture as a means of livelihood, are governed by custom, at variance with Hindu Law, in matters of succession to non-agricultural property situate in a town, is on the party who sets up such a custom. The *Riwaj-i-am* as well as the *Wajib-ul-arz* which govern agricultural *Khatris* do not apply to non-agricultural *Khatris*.

Where the following facts are proved:—

(1) that the two branches of a joint Hindu family separated in food and residence more than 40 years ago;

(2) that each branch held and enjoyed separately for over 40 years the two portions of a family property;

(3) that during the said period each branch treated as its exclusive property the share in its possession;

(4) that each branch alienated from time to time some fractions of the share in its possession and the other branch acquiesced in such alienations.

And there were also certain documents which taken together were inconsistent with the continuance of the family as joint;

Held, (1) that there is a justifiable inference that there was an agreement to partition the property in interest and right;

(2) that there was a disruption of the joint family;

(3) that, though there was no actual division of the property by metes and bounds, a separation in interest and right as regards the property did take place, and that thenceforth it was the subject of ownership in certain defined shares with the result that the character of undivided property and joint ownership was taken away from it, and;

(4) that such partition in law is as effectual as a partition by metes and bounds of undivided property held by the members of a joint Hindu family.

Where a defendant is sued unnecessarily and after dismissal of suit is made a respondent in appeal without just cause, he is entitled to costs in both the Courts. MEHR SINGH *v.* DEVI DYAL, 32 P. W. R. 1912; 19 P. L. R. 1912 **50**

——**Succession** — *Sister — Collaterals — Immoveable property acquired by father of last maleholder—Mortgagee's right in occupancy lands.*

A. died leaving two sons and two daughters. The sons died, one after the other, sonless. The collateral of *A.* got his ancestral land but his self-acquired immoveable property was mutated in favour of the unmarried daughter. On her death, the latter property was mutated in favour of a collateral. *A.'s* married daughter thereupon sued for possession of this property:

Held, that the plaintiff as sister of the last maleholder must give way to the collaterals as regards the succession to *A.'s* self-acquired immoveable property.

A mortgagee's rights in occupancy lands are to be regarded as immoveable property for the purposes of succession. SUNDAR SINGH *v.* HAR KAUR, 75 P. W. R. 1912, 77 P. L. R. 1912 **444**

——**Widow**—*Unchastity—Gift—Forfeiture by unchastity—Effect on donee—Forfeiture by re-marriage —Distinction—Succession—Daughter—No collateral —Hindu Rajputs of Dasuya* Tahsil, *District Hoshiarpur—Evidence to prove agnatic relationship.*

(*By the Full Bench*):—Where an unchaste widow, belonging to a tribe by whose custom unchastity involves forfeiture of the widow's estate, gifts to her lover the property inherited from her husband, the reversioner is entitled to immediate possession of the property. Such a case is not governed by the judgment in *Bainta* v. *Acchhar*, 188 P. L. R. 1905.

Per *Robertson, J.*—A distinction must be drawn between the nature of the forfeiture of a widow's estate by re-marriage and by unchastity. In the case of a forfeiture by re-marriage, throughout the province, the woman ceases altogether to be the widow of her deceased husband, loses all rights and every kind of interest in his estate and becomes a member of a different family. The case of forfeiture by unchastity, where it is established, is different. The woman does not cease to be the widow of her deceased husband, nor does she become a member of another family. By custom she forfeits a special form of maintenance recognized in the province, that is, the possession for life of her husband's estate.

Per *Johnstone and Chevis, JJ.*—The forfeiture which unchastity involves comes into place, as against the widow and also as against any person in whose favour she has alienated the land other than a person who is a *bona fide* alienee for consideration, with effect from the date of the unchastity and not merely from the date of institution of a suit by the reversioner.

(*By the Division Bench, Johnstone and Chevis, JJ.*)—Among Rajputs of Dasuya *Tahsil*, Hoshiarpur District, a daughter is entitled to succeed to the property of her father in the absence of collaterals.

The mere fact that a person belongs to the same *got* as the propositus is insufficient to make that person a collateral of the latter. A claim to succeed to property on the score of agnatic relationship should be supported by evidence showing the actual relationship,

Custom—contd.

Among Hindu as well as Muhammadan Rajputs of the Hoshiarpur District, the unchastity of a widow has the effect of forfeiting her life-estate.

In the case of forfeiture by unchastity, a widow becomes a trespasser directly the act of adultery is committed and the suit of the reversioner is to be regarded as a claim to dispossess a person who has, *prior to the institution of the suit*, ceased to hold any rights and become a trespasser.

Quære. Whether a female holding a life-estate is subject to control in her dealings with the property by another female next entitled to succeed as similar life-tenant? RAM DEVI *v* SHIB DEVI, 1 P. W. R. 1912 **290 F. B.**

——— **Widow**—*Unchastity — Forfeiture of life-estate—Burden of proof*—Jats *of Panipat* Tahsil—Riwaj-i-am *unsupported by instances—Evidentiary value.*

The burden of proving a custom by which a widow forfeits the estate of her husband by reason of her unchastity lies on the person asserting the custom.

Fatteh Singh v. *Kalu*, 107 P. R. 1888, followed.

The value of an entry in the *Riwaj-i-am* must depend largely, if not wholly, upon the instances quoted in support of it:

Held, in the present case, that plaintiff had failed to prove that among *Jats* of the Panipat *Tahsil* a widow forfeits her life-estate by reason of her unchastity. KURI *v.* DES RAJ, 57 P. W. R. 1912 **448**

Dacoity—Robbery—Pointing out place where stolen articles were concealed **783**

——— *Charge of dacoity—No details of offence—More than three dacoities, charge for—Evidence of three other dacoities—Inadmissible—Evidence Act (I of 1872), ss. 14, 15.*

Where accused persons charged with dacoity are not identified as being present at the scene of the dacoity, the charge must fail.

If the charge for dacoity omits to set out or indicate the particular dacoity in respect of which the accused are being tried, the conviction must be set aside.

An accused cannot be charged with more than three dacoities in all.

Evidence of other dacoities by accused is inadmissible either under section 14 or 15 of the Evidence Act. MANDI GHASI *v.* EMPEROR, (1912) 1 M. W. N. 49 **781**

Damage—Criminal conspiracy when gives rise to civil liability—Arrest of father to induce son to confess crime—Suit for damage for conspiracy—Special damage to be proved by plaintiff—Pecuniary loss to be proved **721**

Damages—Power of re-sale—Non-appropriation of goods to fulfilment of contract—Measure of damages **705**

——— Rent—True test **29**

——— Sale of goods without observing provisions of law **509**

——— Trespasser **493**

——— Wrongful attachment—Malice not necessary to be proved **799**

Death of party—Subsequent to termination of hearing before arbitrators—Effect on award **161**

Debutter lands — *Shebait* — Presumption of permanent tenancy **596**

Declaratory suit—Alienation by widow as guardian of daughter—Suit by reversioner for a declaration **489**

——— Land in possession of mortgagees and tenants **947**

——— *Partition in Revenue Court—Objection by co-sharer—Competency of Court to grant declaration when applicant not in possession of whole land—Possession of one co-sharer possession of all—Specific Relief Act (I of 1877), s. 42—Adverse possession—Burden of proof—Punjab Land Revenue Act (XVII of 1887), ss. 117 to 120.*

An applicant directed, in the partition proceedings regarding land before a Revenue Court, to establish his right to a share of the land, is entitled to maintain a suit for a mere declaration of title if he can show that he was ever in possession of any part of the common holding as a co-sharer.

The possession of one co-sharer is possession of another co-sharer unless the former can show a clear adverse title, adversely asserted by 12 years' adverse possession. PARS RAM *v.* MUHAMMAD YASIN KHAN, 1 P. W. R. 1912 **953**

Decree, construction of—Reference to judgment and pleading **82**

———, definition of **800**

———Determination of principle for ascertaining mesne profits **186**

———, form of—Suit for possession by mortgagee **559**

———, form of—Contract for sale—Subsequent sale to other vendees—Specific performance, suit for, by first contracting party—Subsequent vendees to execute conveyance to plaintiff—Absence of prayer in plaint **176**

——— in possessory suit—Evidence of title **407**

——— Suit for joint possession **79**

———, *amendment of—Application to correct decree to bring it into accordance with judgment—Obvious slip or mistake.*

An application to a Court to correct a decree so as to bring it into conformity with the judgment can be entertained only where the Court has made an obvious slip or mistake. Where the conclusions arrived at by a Court though they may be wrong are clearly set forth in its judgment, objections that they are wrong cannot be entertained at the announcement of the judgment. GUJJALAPADI SUBBA NAIDU *v.* GUJJALAPADI, 11 M. L. T. 33 **133**

——— *Co-plaintiffs—Members of joint family—Death of one plaintiff—Widow brought on record—Appeal against such order dismissed—Widow's right to succeed to her husband's share held time-barred in separate litigation—Practice—Decree in favour of other co-plaintiffs excluding widow.*

A., *B.* and *C.* who were members of a joint Hindu family sued for the recovery of a certain debt due to

Decree—concld.

them jointly. During the pendency of the suit C. died. His widow D. obtained a succession certificate in respect of his estate and was brought upon the record of this suit as his representative. A. and B. appealed against the order substituting D.'s name for her husband but the appeal was dismissed in default. Subsequently, there was separate protracted litigation between D. on the one hand and A. and B. on the other, with regard to D.'s claim to succeed to C.'s share in the family property. It was finally held in that suit that D's claim to succeed to C.'s share was time-barred. A. and B. thereupon applied for removal of D.'s name, as representative of C., from the record. The Court simply filed this application. But when the Court passed the decree in the suit, it directed that the decree was only in favour of A. and B. and not in favour of D.:

Held, that until D.'s name was duly struck out, the decree should have been in favour of D. also as C.'s representative. The fact that D. may have no enforceable right against the other plaintiffs to share in the decree, could not affect her right as representative of C. to be recognized for the purpose of this suit as a joint decree-holder in such capacity. All the co-plaintiffs were entitled to a joint decree, leaving it open to them to adjust their respective claims subsequently. NIHAL DEVI *v.* KISHORE CHAND **564**

Deed of Trust — Construction — Conduct of trustees after execution **882**

Defamation. *See* PENAL CODE, s. 499.

———*Words "most insolent upstart," whether defamatory.*

The plaintiff, a respectable Indian gentleman, obtained a money-decree against one Tulsi *chamar* who worked in a grass farm managed by the defendant. The plaintiff took out execution of the decree and the process issued by the Court somehow came into the hands of the defendant upon which he wrote the following words: —

The amount Rs. 41-2 has been lying in my office since the date of the judgment. It appears to me that this is a case of malicious prosecution and so it is a Government case and does not concern Tulsi whatsoever. The decree-holder is a most insolent upstart....."

Held, (*per Chamier, J.*)—That the words 'most insolent upstart' were not defamatory.

Held, (*per Karamat Hussain, J.*)—That the defendant was liable in damages to the plaintiff. BIRJNATH SARIN *v.* BYRNE, 9 A. L. J. 253 **506**

Degree of relationship—Methods of computing **316**

Dekkhan Agriculturists Relief Act (XVII of 1879), s. 10A—*Processual law—Retrospective effect—Applicable to pending appeal or second appeal—Appeal, whether a continuation of suit or a fresh proceeding—Evidence Act (I of 1872), s. 92—Oral evidence to prove ostensible sale-deed as a deed of mortgage—Admissibility.*

The law embodied in section 10A of the Dekkhan Agriculturists' Relief Act is one of procedure and, being retrospective in its effect, applies to pending proceedings.

If the section comes in force when a first appeal or a second appeal is pending, the Court has power to act upon its terms in deciding the appeal.

DeKkhan Agriculturists Relief Act—concld.

Quære—Whether an appeal is a stage of a suit or is a fresh proceeding?

Obiter dictum—Where section 10A of the Dekkhan Agriculturists Relief Act does not apply, oral evidence to prove that what purports to be a deed of sale is really a transaction of mortgage is admissible under proviso 1 to section 92 of the Evidence Act, only when the element of fraud or other similar element mentioned in the proviso exists to invalidate the deed. GOPAL GHELA *v.* RAJARAM AMTHA, 14 BOM. L. R. 14 **851**

Diary—Special diaries, object of **721**

Discharge *of accused by Magistrate—Revival of case by same Magistrate, if legal—Magistrate hearing case partly—Discharge of accused by another Magistrate for non-attendance of remaining prosecution witnesses—Criminal Procedure Code (Act V of 1898) ss. 253, 369.*

A Magistrate who discharges an accused person may on application made to him revive the case.

Mir Ahmad Hussain v. *Mohomed Askari*, 29 C. 726 (F. B.), followed.

A Bench of Magistrates examined three witnesses for the prosecution. On the next day fixed for hearing, the Sub-Divisional Magistrate withdrew the case to his own file and discharged the accused under section 253 of the Criminal Procedure Code as "no evidence is produced:"

Held, that the case must be sent back so that it may be heard with reference to the evidence already on the record. AMODINI DASSEE *v.* DARSON GHOSE, 38 C. 828 **776**

Divorce—*Petition of wife—Admission by husband—Corroborative evidence—Absence of collusion—Duty of Court to act on admission.*

In a divorce suit, where there is no collusion, it is the duty of the Court to act on the admissions of a party, especially when there is evidence to support and corroborate such admissions. ARNOLD *v.* ARNOLD, 38 C. 907 **491**

Divorce Act (IV of 1869), s. 57—*Decree nisi for dissolution of marriage—Second marriage within 6 months of the dissolution and during life-time of the former wife — Null and void.*

The second marriage of a Christian, contracted during the life-time of the first wife and within 6 months of a decree *nisi* for the dissolution of the first marriage, is null and void.

The decree of a High Court dissolving a marriage referred to in section 57 of the Divorce Act is the decree absolute not the decree *nisi*. JACKSON *v.* JACKSON, 9 A. L. J. 108 **958**

Divorce Suit—*Delay unexplained — Suit dismissed*

The petitioner became aware of the misconduct of his wife in 1891 but did not institute divorce proceedings till 1910. The only explanation which was attempted to be given of this gross delay was that he did not know the whereabouts of his wife and the co-respondent: *Held*, that proceedings for divorce ought to be instituted at the earliest possible moment and delay of a very much shorter period

Divorce suit—concld.

than that which had occurred in this case would have to be fully explained before the petitioner would be entitled to a decree.

Held, further, that the petitioner in this case had altogether failed to explain the delay. H. W. G. *v.* MRS. H. W. G. **617**

Document, proof of—Refusal to cross-examine—Document put in hands of witness—Right of adversary to see document **577**

Dower. *See* MUHAMMADAN LAW.

Drunkenness. *See* PENAL CODE, s. 85.

Ejectment. *See* LANDLORD AND TENANT.

——— ——— of under-*raiyats* **912**

——— ——— Raiyat *inducted by trespasser—Good faith.*

The general rule of law is, that no one can confer on another any right which is not his, and the case of a *raiyat* inducted into a piece of land by a trespasser, is an exception to it.

Binode Lal Pakrashi v. *Kalu Pramanik*, 20 C. 708 (F. B.), referred to.

But the exception should not be extended to a case where there is shown to have been an absence of good faith on the part of either the trespasser or the *raiyat*. RAJENDRA NARAIN CAHA *v.* ASHUTOSH SANYAL **194**

——— ——— **suit**—Notice—Denial of landlord's title **323**

——— ——— ———*Trespasser—Plaintiff bound to prove his own title.*

A plaintiff must prove his own title before he can oust a trespasser, even though the defendant has no title. PREM SINGH *v.* MOKAND SINGH, 30 P. W. R. 1912; 22 P. L. R. 1912 **62**

Enhancement of sentence—Reference after a long time **777**

Estoppel. *See* EVIDENCE ACT, ss. 115, 116.

——— ——— Compromise in execution—Subsequent application for execution on basis of compromise **81**

——— ——— Contract by minor--Misrepresentation as to age **956**

——— ——— Declaration of insolvency implying absence of fraudulent transfer—Opposing creditor bound by decision of Insolvency Court **568**

——— ——— against precise terms of enactment **326**

——— ——— Price overstated in sale-deed—Pre-emption decree on payment of market-value--Subsequent suit by vendor's reversioners—Pre-emptor not debarred from asserting real consideration **796**

——— ——— Purchaser of mortgaged property—Purchaser appearing as witness in mortgage suit **874**

——— ——— *Sanad Chiti*—Grant to tenant by Hindu Raja to re-excavate unclaimed tank—No mention of rent—Tank in possession of tenant's family as rent-free for more than sixty years—Liability to resumption or assessment of rent—Improvement **513**

Estoppel—concld.

——— ——— Grant to tenant to excavate unclaimed tank—No mention of rent **519**

——— ——— Statement by donor before mutation officer that the donee's name may be recorded, whether alone sufficient to effect transfer **436**

——— ——— ——— *Evidence Act (I of 1872), s. 115—"Thing"—Mere opinion as to legal effect of adoption—Essential of estoppel—Division of property by two adopted sons.*

A mere view or opinion on the legal effect of an adoption is not a "thing" within the meaning of section 115 of the Evidence Act.

In order to give rise to an estoppel it is necessary that the representation should be the actual cause of a new belief in the mind of the other party and of his action following on that belief.

Estoppel does not arise where both parties have equal means of knowledge both of the facts and of the law.

A. first adopted *B.* and subsequently adopted *C.* After the death of *A.*, *B.* and *C.* divided his property equally as the result of a law suit between them.

Held, that *C.* or his representatives were not thereby estopped from subsequently denying the validity of the adoption of *C.* and that section 115 of the Evidence Act did not apply to the case. TEK CHAND *v.* GOPAL DEVI **482**

——— ——— *Pleading—Non-transferable occupancy-holding—Mortgage without landlord's consent—Sale by mortgagor to third party—Purchaser taking fresh lease from landlord—Mortgagee's suit for sale—Plea of purchaser that mortgage invalid, if tenable.*

An occupancy-holding which was not transferable without the consent of the landlord, was mortgaged to the plaintiff. Defendant No. 1, who was the heir of the mortgagor, sold a part of this holding to defendant No. 6 with the consent of the landlord who subsequently gave a fresh lease to the defendant No. 6 at an enhanced rent. On a suit being brought on the mortgage, the defendant No. 6 pleaded that the mortgage was void as the holding mortgaged was not transferable without the consent of the landlord and no such consent had been obtained:

Held, (Per Chitty, and *Chatterjee, JJ., Cove, J. dissenting)*, that the defendant No. 6 was estopped from raising the plea of non-transferability. RADHA KANT CHAKRAVARTI *v.* RAMANAND SAHA, 16 C. W. N. 475; 15 C. L. J. 369 **698**

Evidence—Weight of negative evidence **678**

Evidence Act (I of 1872), s. 3 **577**

——— ——— **ss. 9, 11**—*Cess Act (IX of 1880 B. C.), s. 95—Absence of name of tenant—Admissibility of—Road Cess Return in evidence.*

The absence of recitals in a document may be used in evidence as against a person who is not a party to that document, under sections 9 and 11 of the Evidence Act.

Sagurmull v. *Manraj*, 4 C. W. N. ccvii (short notes), relied upon.

Therefore, the absence of the name of a party from the category of tenants mentioned in the Road Cess Return is evidence against him. IMRIT CHAMAR *v.* SRIDHAR PANDHAY, 15 C. L. J. 7 **120**

Evidence Act—contd.

——— ——— ——— **s. 11** **120**

——— ——— ——— **ss. 13, 83**—*Map prepared by Government of* Khas Mehal *lands—Boundary dispute—Admissibility.*

A map, more than 30 years old and prepared under the direction of Government as landlord is admissible in evidence, under section 13, though not as a public record under section 83, of the Evidence Act. UPENDRA NARAIN GHOSH *v.* CHAIRMAN OF THE CALCUTTA CORPORATION, 16 C. W. N. 116 **332**

——— ——— ——— **ss. 14, 15**—Charge of dacoity —Evidence of other dacoities **781**

——— ——— ——— **ss. 33, 34, 155 cl. (3)**—*Books of account—How to prove—Witnesses—Previous depositions—Mode of proof—Conflict of testimony—How to be tested—Presumption of marriage—Long course of treatment as wife—Evidence of co-habitation—Presumption of law—How to be repelled—Resemblance of child to putative father if competent—Admissibility of photographs of child and father—Negative evidence, weight of.*

It is essential in every case where reliance is placed upon books of account to establish that they have been regularly kept in the course of business; it is not sufficient merely to prove the correctness of the books. The entries themselves have to be proved. Mere assertions that particular pages or volumes were written by this or that writer, are not a sufficient compliance with the provisions of section 34 of the Evidence Act.

Hingu Miya v. *Heramba Chandra Chakravarti*, 8 Ind. Cas. 81; 13 C. L. J. 139, refered to.

In the case of witnesses who are dead, but who had deposed upon the matters in controversy in previous proceedings between the parties, the depositions may be admitted in their entirety. It is only essential to see that the requirements of section 33 of the Evidence Act are fulfilled.

Where a witness has been examined in a trial, but his previous deposition is relied upon to impeach his credit under section 155 clause (3) of the Evidence Act, the contradictory statements alone can be admitted in evidence.

Where divergent allegations are made by the parties and there is a conflict of oral testimony, the only safe course to adopt is to test the evidence in the light of facts either admitted or proved beyond the possibility of doubt.

Very little weight can be attached to the evidence of a a negative character.

Where there is *prima facie* evidence of co-habitation as man and wife, and a long course of treatment of the lady as a wife and the children as legitimate, the presumption of marriage can be repelled only by evidence of the clearest character; for, the presumption of law is not to be lightly repelled; it is not to be shaken by a mere balance of probability; the evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive.

The evidence of the resemblance of a child to its putative father is competent; and, therefore, the photographs of both the child and the father are admissible. IMAMBANDI *v.* MATASUDDI **678**

——— ——— ——— **s. 34** **678**

——— ——— ——— **s. 41** **568**

——— ——— ——— **s. 45** **577**

Evidence Act—contd.

——— ——— ——— **s. 57**—Matter of public history —Law governing temporal rights in Roman Chatholic Churches **599**

——— ——— ——— **s. 83** **332**

——— ——— ——— **s. 90**—*Document 30 years old —Presumption of genuineness—Discretion of Court —Court bound to assign reasons for view as to s. 90, Evidence Act—Erroneous reasons in law—Second Appeal, interference by High Court.*

Under section 90 of the Evidence Act, it is not obligatory upon a Court to assume that a document is genuine merely because it purports to be 30 years old and is produced from proper custody. The Court has a discretion in the matter which must be judiciously exercised.

Srinath Patra v. *Kuloda Prosad*, 2 C. L. J. 592, referred to.

If it is established that there is internal evidence to doubt the genuineness of a document, and if the recitals contained therein are inconsistent with admitted or proved facts the Court may call upon the party to produce evidence of execution.

A lower Appellate Court is bound to assign reasons for its views as to the applicability of the provision of section 90 of the Evidence Act; and where these reasons are erroneous in law, it is competent to the High Court to interfere in second appeal.

Trailokia v. *Shurno*, 11 C. 539, relied upon, IMRIT CHAMAR *v.* SRIDHAR PANDHAY, 15 C. L. J. 7 **120**

——— ——— ——— **s. 90**—*Document—Presumption of genuineness—Authority of executant of lease to execute document.*

Obiter dictum—The provisions of section 90 of the Indian Evidence Act merely establish that an ancient document was executed by the persons whose signatures it purports to bear; but that cannot and does not prove the authority of the executants to bind the landlord. MOHARAM SHEIKH CHAPRASI *v.* TELAMUDDIN KHAN, 15 C. L. J. 220; 16 C. W. N. 567 **606**

——— ——— ——— **s. 92** **375, 386**

——— ——— ——— **s. 92**—Oral evidence to prove ostensible sale-deed as a deed of mortgage—Admissibility **851**

——— ——— ——— **s. 92,** scope of—Admissibility of oral evidence—Third party **667**

——— ——— ——— **s. 92, proviso (4)**—Durpatni—*Original rent reduced by letter—Payment at lower rent for more than 30 years—Bengal Tenancy Act (VIII of* 1885), *s.* 88—*Division of* durpatni—*Written consent of landlord*—Dakhila *by landlord's agent showing division, if binding on landlord.*

A *durpatni* lease stated the annual rent to be Rs. 69. A few days after the landlord wrote to the lessee that as the rent of Rs. 69 was not supported by the state of things in the Mofussil, it should be reduced to Rs. 54. The rent was paid at that rate for over 30 years:

Held, that the landlord's transferee cannot claim rent at the higher rate.

A *dakhila* signed by the landlord's agent containing a recital that the rent in half share is Rs. 32, amounts to a consent in writing by the landlord to a sub-division of the *durpatni* within section 88 of the Bengal Tenancy Act. RAJ KUMAR SARKAR *v.* RAJANI KANTA CHAKRAVARTI **449**

Evidence Act—contd.

——— ——— ——— **s. 92 Provisos (2) and (4)**—*Mortgage by way of conditional sale—Oral agreement converting mortgage by conditional sale into an usufructuary mortgage—Civil Procedure Code Act (V of 1908), O. XLI, r. 23.*

When a case is remanded under Order XLI, rule 23 the Judge of the Court to whom the case is returned has authority to form his own conclusions irrespective of any finding arrived at by his predecessor at the original trial in respect of matters which were not touched by the Appellate Court.

In a suit for redemption of a mortgage by way of conditional sale evidence was adduced to show that the mortgagors and the mortgagee had entered into an oral agreement by which the latter was put in possession of the mortgaged share *plus* a further fractional share on the understanding that profits were to be appropriated in lieu of interest:

Held, that the alleged agreement, which in substance was one converting the mortgage by conditional sale into an usufructuary mortgage, is in no sense such an agreement as is referred to in proviso (2) to section 92 of the Evidence Act and the evidence adduced in proof of it was, therefore, inadmissible:

Held, further, that as the mortgage was created by a registered document, no such agreement could be proved under proviso (4) except by means of a duly registered document. AJODHYA PRASAD *v.* JAGDISH SINGH, 14 O. C. 321 **813**

——— ——— ——— **s. 101** **577**

——— ——— ——— **s. 103** **914**

——— ——— ——— **s. 114** **531**

——— ——— ——— **s. 114**—*Presumption, extent of—Document alleged to have been lost by one of the parties, but loss not proved.*

Q. sued *C.* to redeem a mortgage on payment of Rs. 115, a portion only of the mortgage-money. The balance, *Q.* stated, having been paid to the mortgagee. He further stated that some of the payments would be proved if the mortgage-deed were produced as they were endorsed on that document. *C.* did not produce the mortgage-deed but stated that it had been lost. He could not, however, prove the loss:

Held, that under the circumstances the presumption under section 114 of the Evidence Act could not be pushed to the extent that the mortgage-deed, if produced, would have proved that only Rs. 115 remained due on the mortgage, the rest having been paid off to the mortgagee. QUDRAT ULLAH *v.* CHUNNI LAL **60**

——— ——— ——— **s. 115**—Thing **482**

——— ——— ——— **s. 116**—*Estoppel—Licensee and Licensor—Suit for use and occupation—No relationship during period in suit.*

A licensee cannot be permitted under section 116 of the Evidence Act to deny that the licensor had a title to the possession of the property at the time when the license was given to him to enter, though there was no relationship of licensor and licensee subsisting between the parties during the period sued for. DUKHIMONI DASI *v.* TULSI CHARAN **512**

Evidence Act—concld.

——— ——— ——— **s. 130**—*Title-deed—Original not produced by witness on being summoned—Secondary evidence, right to use—Application for issue of warrant—Non-payment of process-fee—Whether right lost.*

Under section 130 of the Evidence Act a witness who is not a party to a suit cannot be compelled to produce his title-deeds to any property. Where, therefore, a person is directed by summons to produce the original of a document, and he does not do so the party who summoned him is entitled to use as secondary evidence a certified copy of the document. Where a party omits to pay the fee for the issue of a warrant against the person holding the original of a document, he does not thereby lose the right of using a copy as secondary evidence. IMRIT CHAMAR *v.* SRIDHAR PANDAY, 15 C. L. J. 7 **120**

——— ——— ——— **s. 132, proviso**—Voluntary statement without compulsion whether may be used against witness **925**

——— ——— ——— **s. 132** **217**

——— ——— ——— **s. 135** **577**

——— ——— ——— **s. 155 (3)** **678**

——— ——— ——— **s. 162** **286**

Evidence of title—*Decree in possessory suit.*

A decree based upon a possessory title is *prima facie* evidence of title to the land as against a stranger. KOILASH CHANDRA *v.* GAJENDRA NATH, 15 C. L. J. 1 **407**

Excise functions exercised by Central Provinces *Zemindars* **965**

Excise Act (XII of 1896), ss. 25, 26, 27—*Shops for sale of drugs closed by order of Collector—Suit by licensee—Jurisdiction of Civil Courts—Remedy of licensee.*

The appellant obtained a farm including 90 shops for the sale of drugs. One of these shops having been closed by order of the Collector under instructions from the Excise Commissioner, the appellant sued the Secretary of State for loss arising from breach of contract:

Held, that the Civil Courts had no jurisdiction to entertain the suit and that the appellant's sole remedy was to rely on the Chief Revenue Authority for such compensation as that Authority thought fit to award, LALU RAM *v.* SECRETARY OF STATE **566**

——— ——— **ss. 26, 27** **566**

Execution of decree—Acknowledgment—Several judgment-debtors—Acknowledgment by one, whether saves limitation against others—Application for execution for a certain sum—Acknowledgment of same—Subsequent application for additional amount not included in first application—Whether limitation saved in respect of additional amount **702**

——— ——— ——— Adjustment of decree out of Court—Certificate of adjustment—Recognition of payment **944**

——— ——— ——— Application to execute decree already under attachment, whether an application in accordance with law—Limitation **179**

Execution of decree—contd.

——————Arrangement between parties substantially adding to decree—Sanction of Court—Execution after coming into force of Civil Procedure Code, 1908—Enforceability **204**

——————Attachment—Devisee's interest—Probate taken by Administrator-General—Administrator-General not made party in execution **795**

——————Copy of decree or *vakalatnama* not necessary in execution proceedings **365**

——————Enlargement of time by acknowledgment **603**

——————Judgment-debtor, whether includes his assignee—Decree-holder, rights of assignee of—Assignee of the holder of attached decree, rights of, to execute decree **659**

——————Execution proceedings—Money-decree—Death of judgment-debtor—Ancestral property—Objection by judgment-debtor's heir on the ground of want of necessity—Objection to be decided in execution proceedings and not by separate suit **670**

——————Mortgage-decree. *See* MORTGAGE-DECREE.

——————Execution of rent-decree—Decree-holder auction-purchaser—Application to set aside sale—Order or decree are appealable—Court's power to extend time for making deposit under section 174, Bengal Tenancy Act—Act of Court not to prejudice any one—Five per cent. on purchase-money to be paid even when decree-holder is auction-purchaser—Copy of decree, or *vakalatnamah*, not necessary in execution proceedings—Poundage fee, refund of, on sale being set aside **365**

——————*Limitation Act (XV of 1877), Sch. II, Art. 179, cl. (4)—Application to Court to take step-in aid of execution—Deposit of Nazir's travelling allowance, if saves time—Time runs from date of application not from date of order.*

To bring a case within clause (4) of Article 179 of Schedule II of the Limitation Act of 1877, it is not sufficient for the decree-holder to show that he has taken a step-in-aid of execution of the decree: he has to establish that he has applied to the Court to take some step-in-aid of execution. The mere payment of Nazir's fees cannot by itself bring the case within the clause.

Time runs from the date of the presentation of the application, and not from the date on which the application is disposed of by the Court. MADAN MOHAN DEY *v.* GANGA CHANDRA **189**

——————*Application for execution—Order directing attachment of immoveables and dismissing petition otherwise—Subsequent application after lapse of three years—Limitation.*

Appellant decree-holder applied in 1900, in execution for attachment and sale of the judgment-debtor's property. The order passed on the application was, "immoveables attached; strike off petition, but the attachment will continue." On a subsequent date he applied for sale of the attached property, but the application was dismissed for non-

Execution of decree—contd.

payment of *batta* in 1901. In 1909, the present application for execution was made:

Held, that the application was not in continuance of the proceedings of 1900 and was barred. PARRY AND CO. *v.* VADIVELU PILLAY **160**

——————*Application for execution—Bar imposed by judgment-debtor—Removal of bar—Subsequent application to be treated as one in continuation of previous application—"Review of judgment"—Limitation Act (XV of 1877), Sch. II, Art. 179 cl. (3)—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 6, cl. (3).*

When a decree-holder is unable to proceed with an application for execution by reason of some bar imposed at the instance of the judgment-debtor or any other person, a subsequent application by the decree-holder of the same scope and character may be treated as in continuation of the previous application provided the subsequent application is presented after removal of the bar which interrupted the previous proceeding.

This principle is applicable to cases of applications for execution of rent decree.

A rent-decree was passed on May 23rd, 1904. The judgment-debtor made an application for amendment thereof, which was heard *ex parte*, and on February 25th, 1905, the original decree was materially altered. The decree-holder applied for execution of the original decree on August 26th, 1905, upon which the judgment-debtor objected that the decree could not be executed. The application for execution was then dismissed and the decree holder applied for a review of the order for amendment. On June 30th, 1906, the review was granted and the original decree was restored. The present application for execution was then made on January 20th, 1909:

Held, that the application was not barred: *first*, because the application of January 20th, 1909, may be treated as one in continuation of the application of August 26th, 1905: and *secondly*, because under clause (3) of Article 6 of Schedule III of the Bengal Tenancy Act, time ought to run from June 30th, 1906, when the decree-holder's application for review was granted. RAMESHWAR SINGH *v.* TIRPIT SINGH **140**

——————*Dismissal of execution proceedings in default—Restoration—Civil Procedure Code (Act V of 1908), s. 141, O. IX, rr. 8, 9—Civil Procedure Code (Act XIV of 1882), s. 647.*

Section 141 of Act V of 1908 does apply to proceedings in execution of decree. An application for execution dismissed in default can be restored. NIHAL CHAND v. CHANDA SINGH, 3 P. W. R. 1912; 82 P. L. R. 1912 **859**

Ex parte decree—Limitation—Application to set aside *ex parte* decree—Service of summons—Ignorance **642**

——————*Appeal by contesting defendants—Confirmation of decree of first Court—Application by defendants against whom ex parte decree was made to set it aside—Jurisdiction of primary Court to entertain application.*

Where an Appellate Court affirms a decree of the first Court, which was made *ex parte* against some of the defendants and on contest against the others, it is competent to the primary Court to set aside the ex

Ex parte decree—concld.

parte decree at the instance of those defendants against whom the decree had been made *ex parte* and who had not been made parties to the appeal preferred at the instance of the contesting defendants. HEDLOT KHASIA *v.* KA RAN KHASIANI, 15 C. L. J. 241 **377**

——————*Application for setting aside—Period of limitation expired—Review—"Other sufficient cause"—Civil Procedure Code (Act V of 1908), O. XLVII, r. 1 (1)—Limitation Act (IX of 1908), Sch. I, Art. 169.*

Where the period prescribed for making an application for setting aside an *ex parte* decree has expired, the party aggrieved by the decree is not entitled to ask for review of the judgment.

The Legislature having expressly provided a party aggrieved by an *ex parte* decree a method for obtaining justice, it is highly improbable that such person had another remedy also by way of review.

A party can only ask for a review of judgment on the ground of "other sufficient cause" if he is able to show that the judgment is incorrect. SANTU *v.* ARJAN DAS **318**

——————*Defendant's case partly gone into—Refusal of application for adjournment—Withdrawal of Counsel for defendant from case—Whether decree is* ex parte—Ex parte *decree obtained by fraud—Defendant's remedy*—Ex parte *final decree, after preliminary decree—Defendant unavoidably absent, whether decree is* ex parte—*Decree for accounts—Opportunity to defendant to prove what amount due.*

Where the case of a defendant is partially entered into and his Counsel applies for adjournment and on such adjournment being refused he withdraws from the case, and the Judge in his absence gives judgment on the merits of the case, such decree cannot be held to be *ex parte.*

Kadar Khan v. *Juggeswar Prasad Singh*, 35 C. 1023, followed.

If the decree was obtained by fraud, the defendant's remedy would be by way of review or by a suit properly framed for the purpose.

A decree for accounts is not a mere direction to inquire and report. It proceeds and must always proceed upon the assumption that the party calling for it is entitled to the sum found due. It is a decree affirming his rights, only leaving it to be ascertained how much is due to him from the party accounting; and such a decree directing the defendant to account is a final decree.

Janokey Doss v. *Brindabun Doss*, 3 M. I. A. 175 and *Rahimbhoy* v. *Turner*, 18 I. A. 6; 15 B. 155, relied upon.

After the passing of a preliminary decree for accounts, if the final decree be passed in the absence of the defendant who is unavoidably absent, the final decree would be held to have been passed *ex parte* and liable to be set aside and the defendant would have an opportunity of being heard on the question of how much is due. JASODA DASSI *v.* RAMESWARI DASSI, 14 C. L. J. 603 **374**

Expert evidence, how to be taken **577**

Explosive Substances Act (VI of 1908), s. 5—*Bomb found in joint family house—Whose possession—Liability of managing member—Presumption of liability—How to be rebutted.*

Explosive Substances Act—concld.

It is not the law that every person in a joint family should, merely on the ground that a bomb is found in the joint family residence, be liable to be tried for an offence under the Explosive Substances Act. If the article is found in a portion of the house, of which one member of the family has the exclusive use, then such member must *prima facie* be held to be liable. But if it is found in a portion of the house of which all the members of the family have the use, then *prima facie*, the managing head of the family is responsible. But in either case it is only a presumption which may be rebutted; and if the Police act on information showing that an article found in a house is in the exclusive possession of one member of the family and the article is found in a portion of the joint family residence of which all the members of the family have the use, then the head of the family is not liable to arrest merely on the ground that the article is found in a portion of the house, to which all the family can resort. PEARY MOHAN DAS *v.* WESTON, 16 C. W. N. 145 **721**

Family settlement, construction of **882**

Ferries Act (IV of 1878), s. 22—*Unauthorised collection by servants of lessee—Liability of lessee—Master and servant—Act done beyond scope of duty.*

B. as the lessee of a ferry employed *C.* to attend to the ferry and collect the tolls. *C.* in contravention of law extorted unauthorised and excessive toll from certain passengers and thereby committed an offence under section 22 of the Ferries Act. *B.* was prosecuted for this offence and convicted:

Held, that the conviction of *B*, who was not present and took no part in the extortion, was bad in law. EMPEROR *v.* BEHARI LAL, 8 A. L. J. 1324; 34 A. 146. **101**

Ferry contractor's servant—Excessive toll—Former's guilty connivance—Presumption **780**

Foreclosure. *See* REGULATION XVII OF 1806, s. 8.

Forest Act (VII of 1878), ss. 32, 54, 55—*Conviction for forest offence—Confiscation of forest produce even when not Government property—Produce to be made over to Forest Department—Practice.*

Where a person is convicted of an offence under section 32 of the Forest Act, the whole of the forest produce, in respect of which the offence was committed, may be confiscated, even though it may not be Government property. When confiscated, the produce should be made over in *specie* to the Forest Department of the Government. EMPEROR v. SADAPUR, 1 P. R. 1912 CR.; 37 P. L. R. 1912; 15 P. W. R. 1912 Cr. **924**

——————**ss. 54, 55** **924**

Forfeiture of pardon. *See* PARDON.

Fraud. *See* CIVIL PROCEDURE CODE, 1908, s. 48.

——————Price overstated in sale-deed—Pre-emption—Decree on payment of market-value—Subsequent suit by vendor's reversioners—Pre-emptor not debarred from asserting real consideration **796**

——————Interpretation of **88**

Fraudulent arrangement between decree-holder and judgment-debtor—Adjustment of decree in part—Arrangement not certified, effect of—Decree-holder's fraud—Estoppel against precise term of enactment 326

——————**transfer.** *See* PROVINCIAL INSOLVENCY ACT (III OF 1907) 68

Further evidence in appeal 131

General Clauses Act (X of 1897) 91

——————**s. 3 (23)** 260

——————**s. 6,** scope of 264

Gift. *See* MUHAMMADAN LAW—HANFI 986

——Completion of gift—Construction of deed—Will or gift 409

——of land out of holding to absentee relation—Whether *shamilat* included—Intention of parties—Status of full proprietor 172

by widow—Forfeiture by unchastity—Effect on donee 290

Guardian. *See* GUARDIANS AND WARDS ACT; HINDU LAW—GUARDIAN; MINOR.

——————. *See* MUHAMMADAN LAW—GUARDIAN 976

——————Minor—Buddhist Law 373

——————Specific performance—Contract by minor's guardian for purchase of immoveable property 331

——————**and ward**—*Necessity for appointment of guardian—Minor having no property—Order not* bona fide—*Legality of order—Jurisdiction to make order.*

A guardian was not needed for the protection of the person of a minor girl; she had no property of which a guardian could take charge. The machinery of the law was set in motion by one *R.* who induced his servant, the maternal grandfather of the minor, to make an application for appointment of himself as her guardian in order that she might be ultimately married to his son:

Held, that orders passed in proceedings so instituted and conducted, even if they were nominally in conformity with statutory provisions, could hardly be regarded as invested with the efficacy of legal orders made in *bona fide* judicial proceedings, and that the orders were wholly without jurisdiction and absolutely null and void. SUBHADRA KOER v. DHAJADHARI GOSSAIN, 15 C. L. J. 142; 16 C. W. N. 444 893

Guardians and Wards Act (VIII of 1890), ss. 7, 17—*Guardianship of minor—Right to minor's custody—Welfare of the minor to be considered—Legal rights.*

In an application for appointment as guardian of the person of a minor, the welfare of the child is the paramount consideration, although regard must also be had to the recognised rights of guardianship under the law.

The question whether there is any misconduct on the part of an applicant disqualifying him from being the guardian of a minor is only subsidiary to the question whether it is in the best interests of the minor that he should be appointed guardian.

The claims of persons recognized as having preferential rights of guardianship should be discarded where the Court comes to the conclusion

Guardians and Wards Act—concld.

that the best interests of the child will not be secured by their being declared or appointed guardians.

In this case, the High Court refused to appoint as guardian a person who resided outside the limits of its ordinary Original Civil Jurisdiction. MUTHUVEERAPPA CHETTI v. PONNUSWAMI CHETTY, 10 M. L. T. 477; (1911) 2 M. W. N. 561; 22 M. L. J. 68 16

——————**s. 17** 16, 453

——————**ss. 24, 43**—*Order directing a third party to pay a certain sum to the minor's guardian, not warranted by any provision of the Act—Jurisdiction—Order not to be treated as a decree in a suit—Scope and nature of jurisdiction conferred by the Act discussed.*

On an application under sections 24 and 43 of the Guardians and Wards Act by the guardian of a Hindu female minor praying for permission to give the minor in marriage to a certain person, and for an order directing the step-mother of the girl, who was in possession of her deceased father's estate, to pay Rs. 800 for the expenses of the marriage, the District Judge without framing any issue and taking any evidence, sanctioned Rs. 300. Against this order, the step-mother presented both a Civil Miscellaneous Appeal and a Civil Revision Petition to the High Court:

Held, that so much of the order as directed the appellant to pay Rs. 300 to the petitioner for purposes of the minor's marriage was not warranted by any provision of the Guardians and Wards Act, and that it was made without jurisdiction under the said Act and, therefore, must be set aside under section 115, Civil Procedure Code.

The power vested in the District Court under the Guardians and Wards Act is totally dissimilar to its powers as a Court of ordinary Civil Jurisdiction. An order purporting to be made under, but which in fact is not warranted by, the provisions of that Act cannot be treated as a decree in a suit. The two jurisdictions are totally distinct, though exercisable by the same official. It is not a case of exercise of the same jurisdiction by different forms of procedure.

The jurisdiction or power conferred upon the District Court by this Act is of a very special and limited character, and the procedure prescribed under the Act, which is of a summary character, is very different from the procedure laid down by the Civil Procedure Code for the trial of suits. KOMMA SOMAKKA v. KODIDALA PEDDA RAMIAH (1911) 2 M. W. N. 519 251

ss. 29, 30—*Sale by guardian without permission of Judge—Benefit of minor—Transaction honest—Whether sale liable to be set aside.*

Under sections 29 and 30 of the Guardians and Wards Act, 1890, the sale of a minor's property by his guardian without the permission of the Court is voidable, and is liable to be set aside even if it had benefited the minor and was a perfectly honest transaction. KARIM KHAN v. SALAMUDDI 594

——————**s. 30** 594

——————**s. 43** 251

——————**ss. 47, 48** 326

High Court—*Criminal case—Rule discharged under misapprehension of facts—Judgment not signed —Re-hearing of case.*

A judgment or order of the High Court is not complete until it is sealed, and until this is done, it may be altered by the Court without any application for review. AMODINI DASSEE *v.* DARSON GHOSE, 38 C. 828 **776**

Hindu Law—Agreement to sell by divided brother—Court's power to order performance **471**

——— ——— ———Family settlement—Consideration **458**

——— ——— ———Family trading firm—Right to sue on contract—Parties **873**

——— ——— **Adoption**—Impartible estate **7**

——— ——— ———*Second adoption invalid—Simultaneous adoption of two persons invalid—Adopted son's position in the natural family.*

Under Hindu Law, the adoption of a second son during the life-time of a previously adopted son is invalid.

If a person adopts two persons simultaneously both the adoptions are invalid.

A person whose adoption is legally invalid remains in the family of his natural father. TEK CHAND *v.* GOPAL DEVI **482**

——— ——— **Alienation**—*Brahmans* of village Chirah, District Rawalpindi—Presumption **709**

——— ——— ———Impartible estate **7**

——— ——— ———*of ancestral land for maintenance and marriage expenses—Validity.*

An alienation of ancestral land by the managing member of a Hindu family to provide for the maintenance and expenses of the marriage of his step-sister is valid. SEENI AMMAL *v.* ANGAMUTTU NADAR, (1912) 1 M. W. N. 99 **802**

——— ——— ———*Impartible estate—Custom —Adoption—Date from which adopted sons' rights begin—Alienation by full owner prior to adoption cannot be defeated—Necessity—Duty of lender—Recitals—Presumption—Adoption by widow—Consent of* sapindas*—Adoption not to the last male holder, validity of.*

The holder for the time being of an impartible estate, although the line of succession is governed by the same rules as if the property were joint family property, has unrestricted power to deal with the estate.

The rights of an adopted son do not relate back to a period earlier than the date of his adoption. Therefore, an adopted son cannot defeat an alienation made before his adoption by a *full* male owner of the estate.

Per *Phillips, J.*—When a lender is dealing with a borrower (member of a joint Hindu family) who is not absolute owner of the estate mortgaged as security for the loan, it is incumbent on the lender to satisfy himself by reasonable inquiry that the loan is for the benefit or necessity of the estate, for otherwise his charge on the estate in the hands of the next holder is liable to be defeated, but if he inquires fairly and honestly, the real existence of an alleged and reasonably credited necessity is not a condition precedent to the validity of the charge and he is not bound to see to the application of his money.

The recitals in the bond and representations of the borrower are in themselves *prima facie* evidence

Hindu Law—contd.

of necessity, and if a large portion of the loan is for the benefit of the family, it may be presumed that the balance also was borrowed for the same purpose.

The assent of the *sapindas* to an adoption by a widow validates it, from whatever motive the consent was given.

When an estate is divested by an adoption not made to the last male holder but to a prior male holder of the estate, the adoption is not valid and does not divest the existing holder of the estate.

Thayammal v. *Vanka Rama*, 10 M. 205 and *Padma Kumari Debi* v. *Court of Wards*, 8 C. 302; 8 I. A. 2.9; referred to.

Inalienability of a partible estate must be proved by custom. SINNACHAMI *v.* RAMASAMY CHETTIAR, 10 M. L. T. 463; (1911) 2 M. W. N. 539; 22 M. L. J. 85 **7**

——— ——— **Alienation**—*Manager's power to sell family property for purchasing other property—Necessity—Propriety and reasonableness of sale - What the issue should be—Burden of Proof—What the alienee must show.*

A Hindu father or manager is competent to sell the joint family lands for the purpose of purchasing other lands if the sale does not injuriously affect the interests of the other members of the family.

The issue in such cases should be "whether the sale was a *proper* and *reasonable* act," instead of "whether the sale was for actual *necessity*."

If a sale is positively beneficial to the family, it may be supported as against the other members of the family who are not entitled to have it set aside on mere sentimental considerations. But the *propriety* and *reasonableness* would be judged without ignoring the fact that the alienation is an absolute sale of family property.

Where necessity is not established it would lie on the alienee to show that, for some reason other than necessity, the alienation was beyond doubt, or a reasonable one not affecting the interests of the other members in any way.

No hard and fast rule can be laid down for determining the propriety and reasonableness of such a sale of ancestral immoveable property but it must be shown, *inter alia*,—

(*i*) that the new lands are at least not inferior in quality and value to the old lands;

(*ii*) that though the new lands are not superior in value to the old lands, the family would otherwise gain by the change;

(*iii*) that the family would not lose by parting with ancestral lands and purchasing new lands. KRISHNASAWMI DOSS, *In re*, (1912) 1 M. W. N. 167; 11 M. L. T. 182 **648**

——— ——— ———*by widow—Alienation as guardian of dauyhter—Act prejudicial to reversioners —Declaratory suit by reversioners—Specific Relief Act (I of 1877)*, s. 42.

Section 42 of the Specific Relief Act does not restrict the right to declaratory relief by reversioners to cases of alienation by the widow herself. It confers a right of action on reversioners to have their reversionary right declared whenever any act done by the widow jeopardises that right.

Where a Hindu widow who had a widow's estate alienated the property as guardian of her daughter:

Hindu Law—contd.

Held, that the widow must be deemed to have concurred in the alienation and to have prejudiced the reversioners who were, therefore, entitled to institute a suit to have their reversionary rights declared. SUNKARA RAMIAH *v.* SUNKARA SUBBAMIAH, (1912) 1 M. W. N. 70 **489**

——— **Alienation**—*Widow—Future necessity—Suit based on succession and possession—Declaration as to reversionary rights, whether can be granted—Discretion—Practice—Pleadings.*

Where a Hindu widow's husband's brother challenges an alienation by her on the allegations that he succeeded to the property alienated by survivorship and was in possession of it, on both these allegations being found against him, he cannot be allowed to change his cause of action and ask that he may be given a declaratory decree to the effect that the alienation by the widow would not affect his reversionary interests in the property.

A Hindu widow has no right to sell her husband's property for a consideration to be received by her in future, unless there is any urgent necessity in the *near* future. VELAPPA GOWNDEN, *In re*, (1912) 1 M. W. N. 196 **640**

——— *Gift made by widow—Suit for declaration by a remote reversioner—Nearest reversioner being entitled to life-estate only—Gift in favour of nearest reversioner—Suit by remote reversioner to have it declared invalid, whether maintainable.*

N., a Hindu, died leaving a widow *W.*, a daughter *R.* and a daughter's son, *K. W.* made a gift of her husband's property in favour of *R.*'s son *K. U.*, a remote reversioner, sued for a declaration that the gift was not binding on him:

Held, that the suit was maintainable, because a remote reversioner presumptively entitled to the full ownership of the property can maintain such a suit where the immediate reversioner is a female who would take only a life-estate. RAJA DEI *v.* UMED SINGH, 9 A. L. J. 158 **632**

——— *by widow—Suit by reversioners—Refund of purchase-money to alienee and delivery of property to plaintiff—Alienee's right to interest from date of widow's death—Excess extent discovered on later measurement—Compensation.*

A Hindu widow having alienated property belonging to her husband, her reversioners sued the alienee after her death, for recovery of the property. On measurements, the lands were found to comprise a larger extent than was shown in the sale-deed by the widow. The Courts found for plaintiff and directed delivery of property on his refunding the purchase-money to the defendant. The Court allowed compensation to defendant for the excess lands:

Held, (1) that as the excess of land in extent was only the rectification of a mistake in the sale-deed, defendant was not entitled to any compensation;

(2) that plaintiff was entitled to interest at 6 per cent on his purchase-money from the date of widow's death. NALLASAWMI PILLAI *v.* RAMASAWMI PILLAY **450**

——— **Debt**—*Son's pious liability to pay father's debt—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 120.*

Hindu Law—contd.

The liability of a son to pay his father's debt arises from the moment when the father fails to discharge his obligations and such a claim is governed by Article 120 of the Limitation Act. CHAMPA LAL *v.* SHAM SUNDAR MALI **530**

——— **Gift** *to undivided brother's daughter—Valid against donor's son.*

A daughter cannot claim as of right a share of the property belonging to her father.

The moral obligation to provide for her whenever possible is fully recognized by the Hindu community and will support in law any disposition for the purpose made by the father.

There is no distinction between a gift made to the daughter of the donor and one made by him as managing member to the daughter of any of his co-parceners.

A deed of gift executed by the plaintiff's father in favour of the first defendant, the daughter of the donor's deceased undivided brother, is valid and binding against the plaintiff, the donor's son, according to the Hindu law, provided it be of a reasonable amount.

It must be left to the Court in each case to decide whether the gift is reasonable in all the circumstances under which it is made. PUGALIA VETTORAMMAL *v.* VETTOR GOUNDAN, (1912) 1 M. W. N. 89; 11 M. L. T. 103 **475**

——— **Guardianship.** *See* HINDU LAW—MARRIAGE.

——— *Minor made Christian—Right of Hindu father to nominate a guardian for his minor child—Welfare of minor—Discretion of Court—Guardians and Wards Act (VIII of 1890), s. 17—Minor brought up in a certain style of living—Delay in presenting the application, effect of.*

A Hindu father is entitled to appoint a guardian for his child by Will or by word of mouth to the exclusion of the mother.

Soobah Pirthee Lal Jha v. *Soobah Doorgah Lal Jha*, 7 W. R. 73, referred to.

This right the father would not lose by becoming a Christian.

Under section 17 of the Guardians and Wards Act, the Court has to decide the question of guardianship with reference to all the considerations set forth in the section. Where, in the opinion of the Court, it would be injurious to the minor to give effect to the father's wishes, the Court will interfere, even in his life-time.

Mokoond Lal Singh v. *Nobodip Cunder Singh*, 25 C. 881; 2 C. W. N. 379, referred to.

N, the father of the minor, had all his sons baptized by the respondent, a missionary. He also wished to be baptized himself, but the respondent refused to baptize him as *N.* was living with a concubine. *N.* was living away from his wife and, sometime before his death, delivered the minor to the respondent to be brought up by the latter. The minor was brought up by the respondent in Christian style of living. Three years later, petitioner, the mother of the minor, applied to be appointed guardian of the minor:

Held, that, under the circumstances, the minor should not be removed from the respondent's custody. ALBRECHT *v.* BATHEE JELLAMMA, 11 M. L. T. 53; (1912) 1 M. W. N. 53; 22 M. L. J. 247 **453**

Hindu Law—contd.

——— ——— **Joint family**—Joint undivided property—Separation of two branches of a joint Hindu family—Separate and exclusive enjoyment of different portions of property by each branch for above 40 years—Presumption—Partition—Party sued unnecessarily—Costs **50**

——— ——— ——— ———*Joint family—Bond in favour of managing member—Right to sue—Manager's right to sue in his own name without impleading other members—Right of other members to receive payments—Appeal—Court-fee—Payments disallowed by first Court—Prayer for declaration as to who is entitled to money—Prayer for reduction of amount of decree—Court-Fees Act (VII of 1870), Sch. II, Art. 17 VI—Parties.*

A bond was executed in favour of some members of a joint Hindu family as obligees. These members brought a suit for recovery of the money due on the bond. The other members of the family were not impleaded as parties. The defendant had made certain payments to the other members on account of the debt. He pleaded that the debt was due to all the members of the family and that the payments should be allowed towards the debt. The Court of first intstance held that the payments could not be regarded as payments made to the plaintiffs and decreed the whole claim. The defendant appealed, affixing a Court-fee stamp of Rs. 10 on his memorandum of appeal:

Held, that the memorandum of appeal was sufficiently stamped so far as the prayer for a final declaration as to who was entitled to the money was concerned, but that the defendant must pay *ad valorem* Court-fee on the amount of payments by which he sought the decree of the lower Court to be reduced.

If a contract is made on behalf of a joint Hindu family by the managing member, the latter is entitled to sue on the contract in his own name without making the other members of the family parties to the suit.

In the case of such a contract, no other member of the family is competent to interfere or to give receipts in connection therewith.

Kishen Parshad v. *Har Narain Singh*, 15 C. W. N. 321; 8 A. L. J. 256; 9 M. L. T. 342; 13 C. L. J. 345; 21 M. L. J. 378; 13 Bom. L. R. 359; 33 A. 272, (P. C.); (1912) 2 M. W. N. 395; 9 Ind. Cas. 739, followed.

Where a debtor executes a bond in favour of some members of a joint Hindu family under the impression that the contract is with all the members of that family and has no notice or reason to believe otherwise, he is justified in making payments to members of the family other than the obligees and should be given credit therefor. KIRPAL SINGH *v.* SANT SINGH, 71 P. R. 1911 **305**

——— ——— ———*Joint family business—Manager's power to contract debt—Presumption as to the debt being for benefit of family—Burden of proof—Family necessity.*

There is no presumption that a debt contracted by the Manager of a firm of family is contracted for the benefit of the firm or family, and a plaintiff who seeks to bind the other members of the joint family will have to prove that it was a debt contracted for their benefit, or with their consent, or that there was an urgent family necessity therefor. GANPAT RAI *v.* MUNNI LAL, 9 A. L. J. 54; 34 A. 135 **34**

Hindu Law—contd.

——— ———**Joint family**—Mitakshara—*Joint family property, alienation of, by some members—Consent of all not taken—Validity—'Antecedent debt'—Necessity—Limitation Act (IX of 1908), Sch. I, Art. 91—Declaration.*

Article 91 of the Limitation Act does not apply to a suit by one member of a joint Hindu family for a declaration that a mortgage of the joint family property effected by the other members of the family, without the consent of the plaintiff, is invalid and does not bind the family property.

In dealing with the question whether or not a particular family is joint, the principal thing to be regarded is jointness of estate. Separation in food or worship may be evidence of partition but it is not conclusive evidence.

Where an alienation of the joint family property is made by several brothers of the family and the act is challenged by another brother, the question of "antecedent debt" does not arise. The defence of "antecedent debt," is available only in cases where sons are seeking to avoid an alienation made by their father.

In a joint family governed by the *Mitakshara* law one sharer has no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint family property in order to raise money on his own account and not for the benefit of the family. BINDA PRASAD *v.* GAYA PRASAD SINGH **547**

——— ——— ——— Mitakshara — *Manager, powers of—Alienation by manager—Necessity—Appeal, Second—Finding of necessity not a pure question of fact.*

The question whether necessity has been established for an alienation of family property is not a pure question of fact and, a decision that necessity has been proved can be challenged in second appeal.

In ascertaining whether there was necessity for an alienation by a managing member, the actual pressure on the estate, the danger to be averted or the benefit to be conferred on it, are the things to be regarded. A *bona fide* lender is not affected by previous mismanagement of the estate.

A lender is bound to inquire into the necessities for a loan and satisfy himself as well as he can that the manager is acting for the benefit of the estate.

Hanooman Persad Panday v. *Musammat Babooee*, 6 M. I. A. 393; 18 W. R. 81, relied upon.

Where a part of family property was proclaimed for sale, and the money advanced on a mortgage of such property was actually used to avert the sale and the lender dealt with a person who had for years managed the property of the family and who had obtained the assent of several members of the family to the mortgage:

Held, that, under the circumstances, there was legal necessity for the mortgage and for collateral security which was not excessive.

Per Karamat Husain, J.—The exceptional power given by Hindu Law to the manager of a joint family of transferring family property for family purposes must be limited to the narrowest possible compass. In those cases only in which there is an immediate and pressing need, in which it is impossible to meet the need without making a particular transfer, and in

Hindu Law—contd.

which there is no time to obtain the consent of the other members of the family, the transfer should be held to be binding on the members who have not consented to it. DIRG BIJAI SINGH *v.* BHAN PARTAB SHAH SINGH, 9 A. L. J. 63 **945**

——— **Joint family**—Mitakshara—*Sale in execution of a decree on a mortgage executed by father—Son not a party to the mortgage—Right of son's widow to impeach the sale—Decree, execution of.*

A Hindu joint family consisted of a father and four sons, one of whom was a minor. The father executed a mortgage on the basis of which the mortgagee brought a suit for sale and obtained a decree in execution of which the property was sold. The minor son died leaving a widow:

Held, that it was not open to the widow of the minor son to say that her husband's share could not be mortgaged by his father and could not pass to the auction-purchaser at a sale in execution of the mortgage decree. SOHNI v. MOHAN KUER, 9 A. L. J. 23 **944**

——— ——— ——— ——*Mortgage by a co-parcener of his undivided interest—Mortgagee's equitable rights*—Bona fide *transferee without notice—Transfer of Property Act (IV of* 1882*)*, *s.* 43.

C. an undivided co-parcener subject to the *Mitakshara* Law made a mortgage of his undivided interest in favour of the plaintiffs-appellants. Subsequently there was a partition and the separated share of *C.* passed by mortgage and sale to the defendants-respondents who were found to have taken the transfers without notice of the prior mortgage in favour of the plaintiffs-appellants.

Held, that the plaintiffs-appellants are not entitled to have it declared that the separate share of *C.* in the hands of the defendants-transferees is subject to a charge in their (appellants') favour.

Although an undivided co-parcener subject to the *Mitakshara* Law cannot make a valid alienation of his undivided interest, yet the Courts acting upon the principle that a person should not be allowed to profit by his wrong have given relief in equity to the alienee by giving him a charge for his money upon the separated interest of the co-parcener from whom he took his transfer. But such equitable right cannot be enforced against persons who have taken *bona fide* for value and without notice. BHAGANNAH *v.* CHANDI SINGH, 14 O. C. 295 **466**

——— ——— ——— *Mortgage by father—Suit on the mortgage—Sale of property—Sons not made party—Son's right to redeem subsequent to auction sale.*

Per *Chamier*, J.—Where a decree for sale is obtained on a mortgage executed by a Hindu father, which is binding on his sons, and the property is sold in execution of the decree and purchased by the mortgagee, a son of the mortgagor, who is not made a party in the suit on the mortgage, cannot, subsequent to the auction-sale, be allowed an opportunity of redeeming the mortgage.

Balwant Singh v. *Aman Singh*, 33 A. 7; 7 Ind. Cas. 112; 7 A. L. J. 852, followed

Per Karamat Husain, J.—A son, who is not made a party to the suit, can redeem the mortgage after the Court sale even if the mortgage is binding on him under the Hindu Law.

Hindu Law—contd.

The right to redeem a mortgage is quite distinct from the right to get back a share in a property sold in execution of a decree upon a mortgage.

A private sale by the father in a joint Hindu family or an auction-sale by a Court is binding upon his sons, because of their pious duty to pay their father's debts, and not because a sale has taken place. As there is no pious duty to abstain from redeeming the mortgage made by the father, an auction-sale cannot extinguish the right to redeem. When they claim redemption, they in fact come forward to perform the pious duty cast upon them by the Hindu Law and an auction-sale cannot stand in their way. BALDEO SINGH *v.* HIRA LAL, 9 A. L. J. 67 **951**

——— ——**Joint family**—*Possession of property by a female of a joint Hindu family not entitled to the property—Adverse possession*—Stridhan—*Inheritance.*

S. and *R.* were two brothers living in joint Hindu family. *R.* died before *S.* leaving a widow *Musammat* Larai. *S.* died a fortnight afterwards. Larai, the widow of *R*, got possession of the property as against the mother of *S.* and remained in such position for over twelve years:

Held, that the possession of *Musammat* Larai was adverse to the rigtful owner and that the property became her *stridhan.*

Kashi Ram v. *Musammat Amri*, 32 A. 189; 7 A. L. J. 153; 5 Ind Cas. 207, referred to.

On Larai's death it devolved upon her heir as *stridhan.* MAGHLI *v.* LADLI **644**

——— ——— ——— ———*Property in hand of a member of Hindu family—Presumption that property is joint—Nucleus of family property—Manager of family doing banking business, powers of.*

Where it is proved that there was a nucleus of joint Hindu family property, any property in the hands of a member of such family should be presumed to be family property.

A person who, on behalf of a joint Hindu family carries on the family banking business as manager thereof can, not only enter into contracts and give discharge so as to bind his co-parceners, but may also sue and be sued alone without the other members of the family being joined with him in the suit. GANPAT *v.* BALMAKUND **206**

——— ——— ———*Separation between members—Effect of separation of one member.*

Where it is proved that at the time of the separation of one member of a joint family, other members of the family had also received their respective shares in the family property, there is no presumption that they still continued to hold the property so received as members of the joint family. RAMADHAR *v.* SHEO NARAIN **717**

——— ——**Marriage**—*Orphan girl—Guardianship abandoned by paternal relations—Maternal uncle celebrating girl's marriage—Right to recover expenses from parental family—Marriage during period of pollution.*

A maternal uncle of a Hindu girl of marriageable age, whose parents are dead and whose paternal grandfather and paternal uncle have abandoned her

Hindu Law—contd.

guardianship, is justified in giving the girl in marriage and is entitled to recover the expenses, incurred by him in connection with the marriage, from the family property in the hands of the girl's paternal grandfather and paternal uncle.

The fact that the marriage is celebrated while the paternal family of the girl is in a state of pollution owing to the confinement of a lady in the family, does not disentitle the maternal uncle from recovering the expenses of the marriage.

However improper it may be, according to the Hindu ceremonial law, to celebrate a marriage during a period of pollution, the marriage is not on that account invalid. VENKADAM NARAYANA IYER *v.* SIVA SUBRAMANIA IYER, 22 M. L. J. 49 **985**

——— ——— **Mitakshara** — *Interest— Liability of grandson to pay interest on grandfather's debt --Joint decree against father and grandfather— Distinction between interest at birth and that acquired by survivorship.*

A decree was passed against the grandfather and the father of the appellant, a Hindu governed by the *Mitakshara*, for recovery of possession of land with mesne profits, costs and interest:

Held, that, although a grandson may not be liable to pay interest on the grandfather's debts, yet, as the decree was passed against both the grandfather and the father, the latter was liable for the whole of the interest and mesne profits decreed and that, therefore, the appellants is liable for the same.

Held, also, that, after the death of the grandfather and father, there did not remain any distinction between interest which was vested in the appellant at his birth and the interest that he acquired by survivorship and that, therefore, the decree-holder should not be compelled to proceed first against what was the share of the grandfather and the father at the time of the decree, and only in the event of that being insufficient, to proceed against the interest that then belonged to the appellant. RAMDEO PROSAD *v.* GOPI KOERI, 16 C. W. N. 383; 15 C. L. J. 256 **349**

——— ——— **Mortgage** — Suit against joint Hindu family for sale of mortgaged property One of the members not made defendant within limitation—Objection as to non-joinder taken at earliest opportunity, effect of—Dismissal of suit—Limitation **197**

——— ——— ——— **by father**—*Son's liability—Interest—Mortgagee to prove necessity of borrowing money at exorbitant rate of interest —Burden of proof.*

In a suit brought by a mortgagee on foot of a mortgage, executed by a Hindu father, the mortgagee should prove not only that there was necessity for borrowing the money but that there was necessity for borrowing it at the exorbitant rate of interest stipulated in the bond. NATH MAL DAS *v.* DALIP SINGH **401**

——— ——— ——— *Interest—High rate of interest—Necessity to borrow money at high rate—Burden of proof on plaintiff—Suit against son—Discretion to reduce interest.*

Where a suit against descendants is brought to enforce a mortgage executed by their ancestor in which there is a stipulation for payment of a high rate of interest, it lies on the plaintiff to prove that there was necessity not only for borrowing the money but for borrowing it at the exorbitant rate mentioned in the deed.

The principle which governs the case of a mortgage by a Hindu widow or by the guardian of a minor should be applied to the case of a Hindu minor.

Where no necessity for borrowing at an exorbitant rate is proved, a Court would be justified in reducing the stipulated rate of interest to a reasonable rate as well as in refusing to allow compound interest, especially where the plaintiff has made a long delay in instituting his suit. NAND RAM *v.* BHUPAL SINGH, 8 A. L. J. 1294; 34 A. 126 **5**

——— ——— **Partition**—*Co-widows.*

A Hindu co-widow is entitled to have her husband's property partitioned. CHITTER KUAR *v.* GOURA KUAR, 9 A. L. J. 105 **320**

——— ——— ——— Impartible estate. *See* HINDU LAW—SUCCESSION **269**

——— ——— ——— Partition *karar* — Agreement to give one brother Rs. 5,000 for daughter's marriage—Pro-notes executed in pursuance of such agreement—Consideration —Family settlement—Pro note binding on minor members **458**

——— ——— **Shebait**—*Alienation by* Mohant—*Suit to set aside alienation—Burden of proof—Power of* shebait—*Alienation when to be justified—What has to be established to justify alienation.*

The question as to the party on whom the onus of proof lies in a suit to set aside an alienation of endowed property, is one not capable of a general and inflexible answer.

Where, at the time of such alienation, the plaintiff was joint Manager of the properties of the endowment and had special means of knowledge as to the funds available for the purpose of the management, it was for him to prove that there was no necessity for the alienation made by the *Mohant* in possession. The power of a *shebait* in respect of an alienation of endowed property is analogous to that of the Manager of the property of an infant.

The alienation of the *corpus* ought only to be resorted to as an extreme measure in the absence of other reasonable means of providing for the means of the endowment.

Nataraja Desikar v. *Palaniappa Chetty*, 20 M. L. J. 969; 9 M. L. T. 83; 9 Ind. Cas. 281, referred to.

What has to be established to justify such an alienation is that, for the needs of the endowment, no other means was available short of an absolute alienation of the property. It is not enough to find that the sum paid by the transferee was applied for the purposes of the endowment. Where there was no finding that the needs of the endowment at the time the alienation was made might not have been met by other means than an absolute transfer of a portion of the endowed property, the sale was held to be void. JAGARNATH DAS *v.* BIBI RUPA **85**

——— ——— ——— *Endowment—Suit by* shebait *to recover property of idol as inalienable from transferee—No dedication—Burden of proof.*

Hindu Law contd.

Shebaits who have themselves sold property said to belong to an idol as their own, cannot, in a suit to recover the property as inalienable, content themselves with showing that the property was usally called the *debuttar* and throw on their opponent the almost impossible task of proving the negative, namely, that there had been no dedication. The plaintiffs, *shebait's*, must prove that land was dedicated and inalienable. MADAN MOHAN *v.* MANMATHA NATH BOSE **425**

——— ——— ——— **Shebait** — *Lease, permanent, granted by* shebait—*Effect of lease.*

The effect of a permanent lease of certain land granted by a *shebait*, will enable the grantee to hold the land during the continuance of the grantor's interest. PRAHALAD CHANDRA GHOSE *v.* BEHARY LAL MOOKERJEE **686**

——— ——— ——— *Succession - Deed of endowment* - Shebait *to succeed* - "Shishya sishyanukrame," *meaning of.*

Where a deed establishing an idol directed that the *shebaitship* should on the death of the first *shebait* descend from disciple to disciple of the first *shebait.*

Held, that one disciple of a *shebait* may succeed another disciple in the line of the original *shebait*, and that the maker of the endowment did not intend that one disciple should be succeeded by his own disciple and not by a brother disciple of the previous *shebait.* GOPAL CHANDRA CHAKRABARTI *v.* RADHARAMAN DAS BABAJI, 16 C. W. N. 108 **329**

——— ——— **Stridhan**—Inheritance **614**

——— ——— **Succession** — Self-acquired property left to one daughter as owner and to the other daughter in the event of her decease Absolute estate acquired by survivor **571**

——— ——— ——— *Impartible estate - Rule of primogeniture—Owner devising the estate to his widow—Next reversioner disputing the Will Probate --Compromise - Construction—Character of the estate taken by the next reversioner.*

One *R S.*, who was in possession of an impartible estate, succession to which was governed by the rule of primogeniture, died without male issue, leaving a Will by which he left his entire estate absolutely to his widow, who applied for a grant to her of Probate of the Will. The next reversioner, *S. S*, filed objections to Probate being granted, and instituted a suit against the widow claiming that the Will was null and void as against him and the estate and that absolute possession over the entire estate should be awarded to him. A decree in the suit was made in accordance with the terms of a compromise between the parties whereby it was provided, *inter alia*, that the widow should remain in possession during her life time of the entire estate left by *R. S.* exercising the powers of a *gaddi nashin* without the power of alienation, that *S. S.* should receive an annual allowance; that on the death of the widow *S. S.* or any representative of his should be the absolute owner of the estate and should occupy the *gaddi*, and that should it be indispensably necessary to raise any money on the estate by way of a loan the parties to the compromise should in concurrence with each other borrow an amount and re-pay the

Hindu Law-- contd.

same from the profits of the estate. The Will was subsequently admitted to Probate. *S. S.* predeceased the widow of *R. S.* The widow of *S S.* brought the suit claiming proprietary possession of the estate as against her husband's distant cousin in the male line and certain other members of his family :

Held, that the rights of the parties to the suit depended on the construction of the compromise, but not upon the Will of *R. S*, and that the fact that after the compromise the Will was admitted to Probate did not affect the rights of *S. S.*

Held, also, that the compromise did not change the character of the estate, which as an impartible estate devolved on *S. S* on the death of *R. S.*; that by the compromise *S. S.* reserving to himself the said annual income out of the estate gave to the widow of *R. S.* a bare interest for her life in his ('*S. S*') impartible estate, and that on the death of *S. S.* the estate as an impartible estate devolved, subject to the life-interest of the widow of *R. S*, on the heir of *S. S.* according to the rule of primogeniture, and not on the widow of *S. S.* LEKHRAJ *v.* HARPAL SINGH, 11 M. L. T. 1; (1911) 1 M. W. N. 16; 9 A. L. J. 40; 16 C. W. N 217; 15 C. L. J. 72; 14 BOM. L R 33; 34 A. 65 **269 P. C.**

——— ——— **Widow**- Devise to widows and daughters—Widows' share to go to daughters on their death - Nature of widow's interest—Tenancy-in-common—No right of survivorship between widows —Nature of daughter's interest—Absolute estate **550**

——— ——— ——— *Alienation—Necessity—Sale of property to get money for child's marriage not likely to take place for years - Future maintenance—Consent of near reversioners* - Locus standi *of remoter reversioners to contest alienation.*

It is not open to a widow governed by Hindu Law to sell immoveable property inherited from her husband in order that she may retain a sum of money for the marriage of her child, which marriage is not likely to take place for many years to come. Nor can she alienate property to provide for her future maintenance.

Where the nearest reversioners of a widow's husband acting in good faith and with due regard to the interest of the family, give their consent to an alienation by the widow, a more distant reversioner has no *locus standi* to contest ths alienation. TEK CHAND *v.* GOPAL DEVI **482**

——— ——— ——— ——— *Gift—Donee paying debt of donor's husband—Suit to set aside the gift by presumptive heir—Declaration that debt paid by donee was a charge upon the property, whether could be made in the suit.*

A Hindu widow made a gift of her husband's property in favour of *B.* After the gift was made *B.* paid certain debts which were due from the husband of the widow who made the gift *A.* the presumptive heir to the widow's husband brought a suit to have the deed of gift declared void and ineffectual as against him. *B.* pleaded that the debts which he had paid might be declared a charge upon the property:

Held, that *B.* was not entitled to such a declaration in this suit, as the question whether *B.* was entitled to a charge in the property was irrelevant in the present suit.

Hindu Law—contd.

If *B.* was hereafter held to be entitled to retain possession after the death of the widow, it will not be because he had any title to the property under the deed of gift but because being lawfully in possession under the gift during the life-time of the widow, he discharged a debt which was binding on the reversionary heir. GHANSHAM SINGH *v.* TEG BAHADUR SINGH, 9 A. L. J. 496 **191**

——— ——— **Widow**—*Grant to widow—Nature of estate.*

Under the Will of a Hindu certain of his relatives were to receive the profits of certain property in fixed shares from generation to generation. There being some trouble in distributing the profits among the maintenance-holders, the executors of the Will decided to get rid of their burden by handing the property over absolutely to the respective legatees who had charge on it. The result was a compromise under which the widow of a maintenance-holder, who had died before the compromise, got a share of the property along with others:

Held, that the grant to the widow was limited to her life, as she took in a different quality from that of the males, and that she had no absolute power to dispose of the property granted to her. DURGA SHANKAR *v.* RAM RATAN **544**

——— ——— ——— ——— *Savings from husband's estate—Widow's right in savings—Accumulation—True test—Widow's intention*—Howdah, *of husband's estate, sale of, to stranger—Re-purchase by widow—Widow's right to it—Rents not realised from tenants of husband's estate—Whether accumulation—Widow's rights therein.*

If a Hindu widow makes no attempt to dispose of the savings from her husband's estate, they follow the estate from which they arose.

The Court will determine in each individual case whether the property in dispute is in the nature of accumulation or is merely a saving held in suspense by the widow with intent to be appropriated for her personal use later on.

The true test is to determine the intention of the widow. Did she intend to treat the disputed property as part and parcel of the estate of her husband, or did she treat it as a temporary saving liable to be applied by her subsequently for her own purposes?

Where a *howdah* seat on an elephant), which was originally a part of the estate of a Hindu widow's husband, had been sold to a stranger and the widow subsequently re-purchased it, the inference is that she intended to treat it as a part of her husband's estate.

Rents not realised from the tenants of husband's estate are not to be treated as temporary savings liable to be applied in satisfaction of any personal debt of the widow, but they are a part of the estate of the husband. BHAGABATI *v.* SOHODRA KOER **691**

——— ——— ——— *Widowed daughter-in law—Maintenance—Residence with family of deceased husband—Not to leave husband's house for immoral purpose—Amount of maintenance, how to determine.*

Neither a Hindu widow nor a widowed daughter-in-law is bound to reside with the family of her deceased husband in order to entitle her to separate maintenance.

Hindu Law—contd.

All that is required of a widow or a widowed daughter-in-law is that she is not to leave her husband's house for improper or unchaste purposes; and she is entitled to retain her right to maintenance unless she is guilty of unchastity after she leaves that residence.

The amount of maintenance ought not to be determined with reference to the value of the family properties at the time of the death of the husband of the lady:

Adhibai v. *Cursondas*, 11 B. 199 and *Modhavrav* v. *Gangabai*, 2 B 639, relied upon.

The amount of maintenance is to depend upon the extent of the property, the position of the family, the nature of the claim alleged, the number of members of the family and other special circumstances of each individual case. SUKAN SAHU v. GANGAJALI **136**

——— ——— **Yajman Vritti**—*Nature of property—Impartible and inalienable—Custom recognizing partition and alienation—Burden of proof—partition, essentials of—Enjoyment of* vrit *by rotation—Will of a share of* vrit—*Succession to* vrit.

A. and *B.* members of a joint Brahmin family, entered into an agreement in 1825 whereby the *vritti* was declared to be common, half the produce to be taken by *A.* and half by *B.* In 1857, the descendants of *A* and *B.* made a further agreement by which they divided up their *Yajmans* into groups and each member was to administer to each group turn by turn. The later document recited that the parties previously used to enjoy the *vrit* jointly, but from the date of the document they divided it among themselves to be enjoyed by a system of rotation according to the different quarters of the town. The proceeds of the *vrit* were enjoyed by the members of the family *per stirpes* and not *per capita*. In 1905. *C.*, the sole representative of *B.'s* branch, died bequeathing his share of the *vrit* to his sister's son and the son of his brother's daughter.

Held, (by the Court), that there had been no such partition of the *vrit* as to entitle *C.* to alienate his share. *C* had no exclusive right in his share of the *vrit* which he could bequeath by Will to persons who would have no right to it as survivors of a joint family. Consequently, on *C.'s* death, his share devolved by succession to the surviving members of the family.

In order to effect partition, it is not sufficient that the co-parceners should alter the mode of holding their property. They must alter and intend to alter their title to it they must cease to be joint owners and become separate owners

In every case of alleged partition, the question is one of intention, namely, whether the intention of the parties, to be inferred from the instruments which they have executed and the acts they have done, is to affect a division such as to alter the status of the family.

Durga Pershad v. *Kundan Kaswar*, 13 B L. R. 235; 21 W. R. 214; 1 I. A. 551 (P. C.), followed.

The legal effect of a document cannot be controlled or altered by evidence of the subsequent conduct of the parties.

Balkishen Das v. *Ram Narain Sahu*, 30 C. 738 at p. 752; 7 C. W. N. 578, followed.

It is a well recognized principle of Hindu Law that *vrit* is both impartible and inalienable.

Hindu Law—concld.

The burden of proving a custom in derogation of ordinary Hindu Law rests upon him who asserts it.

There exists no general custom recognizing the partition of *vrit* and its restricted alienation to persons standing in the time of succession.

as a general principle, *vrit* is neither alienable nor partible. Alienation is prohibited on the ground of public policy, and because it includes a right of personal service. But a distribution of duties by a system of rotation has been recognized as permissible; so also the relinquishment of duties by one member in favour of other members of the family. The old text law has been modified by custom in particular families; but whenever such custom is alleged, it must be proved.

Vrit has a two-fold aspect; from the point of view of the *Brahmin* who collects it, it may be merely money, but from the point of view of the *yajmans*, it connotes priestly services

In dealing with the right of *vrit*, the Court must bear in mind that it is dealing not only with a right to collect fees but also with a priestly office.

(*Per Pratt, J. C.*, dissenting):—The *vrit* in suit was not only partible but had actually been the subject of partition.

It would take but slight evidence to displace the rule of Hindu Law that *vrit* is impartible and inalienable, and such evidence was supplied by judicial decisions recognizing the partition and alienation of *vrit* and by the previous agreements in the family of the parties. MANGHIRMAL *v.* VITHALRAM, 5 S. L. R. 107 **225**

Hundi—Liability of drawer—Notice of dishonour —Oral demand after maturity **255**

Husband and wife—Restitution of conjugal rights, suit for—Cruelty as defence—Jurisdiction of Civil Court—Legal cruelty, criterion of—Husband charging wife with murder and prostitution **609**

Illatom—Two families living together without *illatom* arrangement **870**

——— ———, *what constitutes.*

It is not sufficient to constitute a person an *Illatom* that he lives in his father-in-law's house, assists his widow after her husband's death and is employed by her to pay the *circar kist.*

To constitute a person an *Illatom*, a specific agreement is necessary.

Quære.—Whether a female could, after her husband's death, when her husband's daughter was already married, constitute that daughter's husband an *Illatom* son-in-law? GADIYAM NARAYUDU *v.* MALLAVARAPU VENKAMMA, 11 M. L. T. 121; 22 M. L. J. 265 **866**

Immoveable property—Mortgagee's right in occupancy-holding—Succession **444**

Improvements—Well sunk by tenant without consent of landlord—Mandatory injunction—Damage not alleged—Maintainability of suit **554**

Indemnity mortgage—*Sub-mortgage—Amendment of plaint—Discretion of Court.*

Plaintiff mortgaged his property to 1st defendant, who sub-mortgaged it. After discharge of morgage, plaintiff was sued by sub-mortgagee for his amount and a decree was obtained against plaintiff. Plaintiff filed an appeal against that decree and while it was pending, instituted the present action against 1st defendant for indemnity, praying for the amount of the decree or, in the alternative, for the deposit of the amount in Court. After the institution of the suit and during the pendency of this second appeal plaintiff satisfied the sub-mortgagee's decree and prayed for the amendment of his plaint by mention of that fact:

Held, that though plaintiff's suit for indemnity while he had not sustained the loss, was not sustainable, he was entitled to the alternative prayer for deposit in Court;

(2) that the amendment prayed for, should be allowed. VARIANGATTIL PAKSSERI RAMAN MENON *v.* SANKARA PATTAR, (1912) 1 M. W. N. 37 **203**

Injunction—Person building on other's land in spite of protest—Pecuniary compensation—Adequate relief **862**

——— ——— not to dispense with services of managing agents—Master and servant—Contract of service—Specific performance **868**

——— ———Well sunk by tenant without consent by landlord—Damage not alleged—Mandatory injunction **554**

——— ———, *suit for—Encroachments on land reserved for common use—Limitation—Burden of proof —Unreasonable delay in suing—Limitation Act (IX of 1908), Sch. I, Art. 120—Specific Relief Act (I of 1877), s. 54.*

In a suit for a perpetual injunction directing defendants to restore to its original condtion certain land encroached upon by them, which was originally reserved for the common use of the proprietors, it is for the plaintiffs to prove that the encroachments were made within six years before suit.

Kanakasabai v. *Muttu*, 13 M. 445; *Waziran* v. *Babu Lal*, 26 A. 391, followed.

A mere surmise by the Court that the encroachments are "recent" is insufficient for holding that they took place within six years.

Persons, who have patiently allowed encroachments to take place and have not taken action within a reasonable time, cannot be said to have suffered such injury as would justify the Court in interfering on their behalf under section 54 of the Specific Relief Act. GANDA SINGH *v.* NATHU RAM, 77 P. W. R. 1912 **661**

Insanity. *See* PENAL CODE, s. 84.

Insolvency. *See* PUNJAB LAWS ACT, s. 25.

——— ——— ——— *Jurisdiction—Powers of Insolvency Court to decide question of fraudulent transfer of property in British India—Declaration of insolvency implying absence of fraudulent transfer—Opposing creditor bound by decision of Insolvency Court—Estoppel—Evidence Act (I of 1872), s. 41—Insolvent Debtor's Act (11-12 Vic Ch. 21).*

An Insolvency Court in British India has jurisdiction to decide all matters incidental to those proceedings, including the question whether any property in British India has been fraudulently transferred by the petitioner before it.

Even where an Insolvency Court fails to make any declaration under the last paragraph of section 41 of

Insolvency--concld.

the Evidence Act, the estoppel against an opposing creditor arises, as the estoppel is not limited to the provisions of section 41.

A applied to the Bombay Insolvency Court under the Insolvent Debtor's Act to be declared an insolvent. *B*, a creditor of *A*, opposed the application on several grounds including the fraudulent transfer of property in Amritsar. The Bombay Court declared *A*. an insolvent and discharged him from all the liabilities in respect of debts or claims.

B. subsequently sued in the Amritsar Court for a declaration that the property was liable for his debt:

Held, (1) that the Bombay Court must be taken to have held that there was no fraudulent transfer of the property in suit;

(2) that as the parties were before the Bombay Court and *B*. accepted the jurisdicton of that Court by filing objections to the petition, *B*. was bound by the decision of the Bombay Court and could not subsequently raise the plea that the transfer of the property in suit was fraudulent and void. RAM NARAIN *v.* DURGA DAT **568**

Insolvent Debtor's Act 11 & 12 Vic. Ch. 21 **568**

Interest. *See* CONTRACT ACT, s. 74.

——— ———Liability of Hindu grandson to pay interest on grandfather's debt **349**

———·——Mortgage by Hindu father High rate of interest **5**

———*Mortgagor's right to interest on profits—Bengal Regulation (XV of 1793), s 10—Mortgage redeemed and cancelled—Limitation Act (XIV of 1859), s. 1 (12) & (15)—Limitation—Suit for redemption more than 12 years after satisfaction of mortgage—Right of mortgagor to take accounts from mortgagee for surplus profits—Rate of interest allowed to mortgagee—Mortgagee's possession after mortgage-debt is paid off—Adverse possession—Redemption—Usury Laws Repeal Act (XXVIII of 1855).*

A usufructuary mortgage was executed while Bengal Regulation XV of 1793 was in force. In the mortgage-deed, it was provided that the mortgagee should enter into possession, collect the rents and pay the Government revenue and, after defraying all collection charges, should retain the surplus in lieu of his interest. At the time of redemption, no account was to be taken. The mortgage was subject to Bengal Regulation XV of 1793:

Held, that the mortgagee was not entitled to more than 12 per cent. per annum interest on the principal debt and was liable to account for the surplus collection and profits to the mortgagor at the time of redemption, the provisions in the mortgage-deed to the contrary notwithstanding.

The possession of a mortgagee does not become adverse to the mortgagor merely because the mortgagee remains in possession after the mortgage-money has been satisfied out of the usufruct or has been otherwise paid off. The provision in section 10 of Regulation XV of 1793 that a mortgage shall be deemed to be *cancelled and redeemed* does not mean redeemed in the full sense of the word.

On the passing of the Limitation Act XIV of 1859, a mortgagor's right to redeem became subject of

Interest—concld.

section 1 (15) of the Act and a suit for redemption of a mortgage effected before the passing of that Act is within time if brought within 60 years of the mortgage.

The mortgagor is entitled to interest on the annual surplus profits. A rate of 12 per cent. per annum is a fair rate to allow in such cases. HABEEBULLAH *v.* ABDUL HAMID, 9 A. L. J. 131 **963**

——— ———*Suit by co-sharer against* lambardar—*Profits—Interest preceding suit and* pendentoe lite—*Burden of proof.*

In a suit by a co-sharer against a *lambardar* for profits, the plaintiff would ordinarily be entitled to interest for the period during which the *lambardar* withheld the profits and also for the period the suit was pending. It would be for the *lambardar* to show that special circumstances existed which relieved him of liability for the payment of interest. ABDUL GHANI *v.* ABDUL MAJID **116**

Interlocutory judgment—Right of successor to re-consider **264**

Interpleader suit—*Suit by tenant to determine who is landlord—Whether suit maintainable—Civil Procedure Code (Act V of 1908), s. 88—Specific Relief Act (I of 1877), s. 42—Previous rent decree—Subsequent suit by tenant for declaration that previous plaintiff is not tenant's landlord—Res* judicata.

The present defendant No. 1 sued the present plaintiff for recovery of rent of the disputed property. The plaintiff resisted the claim on the ground that she held the land as tenant not under the then plaintiff but under the present defendant No. 2. The Court found that the present plaintiff held the land under the present defendant No. 1 and a decree was made in favour of the latter. The plaintiff has now brought this suit for a declaration that she was the tenant under defendant No. 2 and not under the defendant No. 1:

Held, that, as the suit was in the nature of an interpleader suit, it was not maintainable:

Held, further, that the suit was not maintainable under section 42 of the Specific Relief Act, as the defendant No. 1 was not interested to deny that the plaintiff was a tenant in respect of the disputed land, and as the plaintiff did not ask for an injunction to restrain defendant No. 1 from executing the decree she obtained.

Held, also, that the present suit was barred by the rule of *res judicata* by the decree in the previous suit, as it was not open to the present plaintiff to seek for a declaration that she is not the tenant of defendant No. 1. NANJI KOER *v.* UMATUL BATUL **40**

Interpretation of Statutes—Curtailment of the jurisdiction of a superior Court **223**

——— ——— ———Express powers granted to a Company—Exclusion of other powers by implication **237**

——— ——— ——— ———Procedure Acts **264**

——— ——— ———*Meaning clear—Intention of Legislature.*

When the meaning of an Act is clear and free from ambiguity, it is idle to speculate as to the intention of the Legislature. DOULATRAM *v.* HALO KANYA, 5 S. L. R. 155 **244**

Interpretation of Statutes—concld.

——— ——— ——— *Penal enactments.*

Criminal statutes are to be construed strictly. It is not merely unsound but unjust to read words and infer meanings that are not found in the text. NGA PO CHEIN *v.* EMPEROR, 4 BUR L. T. 261 **390**

——— ——— ——— *Plain meaning—Assumption as to fixity of law—Hardship.*

The language of a codifying enactment must receive its natural meaning, without any assumption as to its having probably been the intention to leave unaltered the law as it existed before.

Norendro Nath Sircar v. *Kamal Basini Dasi*, 23 C. 563; 23 I. A. 18, followed.

The argument of hardship resulting from a plain interpretation of a statute is always a dangerous one to listen to. If, in all cases of ordinary occurrence, the law, in its natural construction, is not inconsistent or unreasonable or unjust, that construction is not to be departed from merely because it may operate with hardship or injustice in some particular case. MANSOOR v. MAHOMEDIN, 5 S. L. R. 125 **234**

Intoxication. *See* PENAL CODE, ss. 84. 85.

Jagir—*Grant—Succession—"Aulad wa ahfad," meaning of.*

A grant was made in favour of one *K.* for life and after him to his *'aulad wa ahfad,'* that is, to his issues and descendants:

Held, that the grant was not limited to the grantee's male descendants only. NURULLAH KHAN *v.* HAYAT-UNNISSA **155**

Jail Code—*Rules in Jail Code, whether have force of law.*

The rules contained in the Jail Code are framed by the Local Government under the powers contained in the Prisons Act and subsequently sanctioned by the Governor-General in Council Rules when so framed and approved have the same force as the statute, and it is not open to any person to set aside the provisions of such rules PEARY MOHAN DAS v. WESTON, 16 C. W. N. 145 **721**

Joinder of charges. *See* CRIMINAL PROCEDURE CODE, ss. 233 TO 239.

Joint property. *See* CO-OWNERS.

Joint trial of persons charged with giving false evidence in same judicial proceedings **215**

——— ——— Separate breaches of trust and falsification of accounts on different dates **213**

Judge chosen as arbitrator—Decision final **898**

Judgment—Delivery of, on holiday **463**

——— ——— **of High Court** not complete till signed **776**

——— ——— ——— *of affirmance by Court of Appeal, contents of—Civil Procedure Code (Act V of 1908), O. XLI, r. 31.*

Where the Court below has delivered a good judgment, it may be difficult, if not impossible, for the Appellate Court to support it with independent reasons; and, in such a case, there is nothing to be gained by mere repetition or paraphrase, and an expression of concurrence with the finding of the Court below may be sufficient. But there must, of course, be at least enough in the appellate judgment to show that the Court of Appeal has really applied its mind to the case and formed an opinion of its own on the points arising in it. RAJENDRA NARAIN SAHA v. ASHUTOSH SANYAL **194**

Judgment—concld.

——— ——— **-debtor** whether includes his assignee **659**

Judicial pressure, effect of **898**

Jurisdiction. *See* VALUATION OF SUIT.

——— ——— ——— **of Appellate Court,** if can be given by consent of parties **170**

——— ——— ——— Equitable mortgage—Deposit of title-deeds of Calcutta and Mofussil properties—One mortgagor having no interest in the Calcutta properties—Jurisdiction of High Court to heir suit **429**

——— ——— ——— *Ex parte* decree—Appeal by contesting defendants—Confirmation of decree of first Court—Application by defendants against whom *ex parte* decree was made to set it aside—Jurisdiction of primary Court to entertain **377**

——— ——— ——— of Karachi Small Cause Court—Suit under O. XXXVII not exceeding Rs. 1,000—Exclusive jurisdiction of Small Cause Court—No jurisdiction conferred on Sind Judicial Commissioner's Court by O. XXXVII **244**

——— ——— ——— Magistrate presiding at meeting of Municipal Board sanctioning prosecution—Order for further inquiry **222**

——— ——— ——— Minor having no property—Power to appoint guardian **898**

——— ——— ——— Order directing third party to pay a certain sum to the minor's guardian **251**

——— ——— ——— Partition suit—Valuation **903**

——— ——— ——— Power of District Judge to assign cases to Additional Judge **384**

——— ——— ——— Powers of Insolvency Court to decide question of fraudulent transfer of property in British India **568**

——— ——— ——— Sanction to prosecute—Refusal of sanction by Munsif—Appeal to the District Judge—Transfer of appeal to Sub-Judge—Jurisdiction of Sub-Judge to hear appeal **1007**

——— ——— ——— Tribunal of Appeal—Power to determine and apportion compensation—Power to decide question of title **855**

——— ——— ——— *Assumption of jurisdiction in irregular manner—Objection not taken at proper time—Waiver—Transfer of pending execution case—Sale held irregularly—No application by judgment-debtor to set aside sale—Transferee of judgment-debtor, whether competent to question sale—Civil Procedure Code (Act XIV of 1882), ss. 244, 311.*

Where a Court assumed jurisdiction in an irregular manner and not in a matter over which the Court would not acquire jurisdiction under any circumstances, the objection to assumption of jurisdiction may be waived, and if not taken when the jurisdiction is assumed, it will be considered as waived.

Jurisdiction—contd.

A pending execution proceeding was transferred by the Judge from the Court of a Munsif to that of a Sub-Judge who held a sale and no objection was taken at the time to the Sub-Judge's jurisdiction :

Held, that even if the Judge was not competent to transfer the case, yet the objection to the jurisdiction of the Sub-Judge not having been taken at the proper time must be considered as waived; the sale, therefore, was not liable to be set aside on the ground that the Sub-Judge had no jurisdiction to hold the sale.

A judgment-debtor should take appropriate proceedings for the reversal of an irregular sale, under sections 244 and 311 of the Code of 1882. If he does not take any such step, his transferee is bound by the same estoppel and cannot question the sale. HEWA MAL *v.* KARUNAMOY GUPTA **542**

——— ——— ———*Offence committed in British India —Accused committed to Sessions—Subsequent transfer of the place where offence was committed to a Native State—Appeal — Revision—Criminal Procedure Code (Act V of 1898)*, s. 435.

The accused were charged with the commission of an offence within the British territory and were committed to the Sessions Court at Mirzapur. Subsequent to the commitment, the place where the offence had been committed was transferred to the State of Benares.

The High Court, however, transferred the case from the Court at Mirzapur to the Sessions Court at Benares for trial.

The Sessions Judge of Benares held that he had no jurisdiction to try the case. The Government appealed against the order and also applied in revision against it:

Held, that no appeal lay inasmuch as there was no order of acquittal, but that the High Court could interfere under section 435 of the Criminal Procedure Code in revision.

Held, further, that the constitution of the State of Benares did not deprive the Court at Mirzapur of jurisdiction to dispose of criminal appeals then pending in it or cases which had been committed to it for trial. At the time of the constitution of the State of Benares, the accused were in British India in the custody, in point of law if not in fact, of a Court competent to try them. Consequently, the Sessions Judge of Mirzapur had jurisdiction to try the case and it was properly transferred to the Court of Sessions in Benares who had the jurisdiction to try the case. EMPEROR *v.* RAM NARESH SINGH, 9 A. L. J. 51 ; 34 A. 118 **921**

——— ——— ———*Place of suing—Contract—Place of performance—Civil Procedure Code (Act V of 1908)*, s. 20.

A contract was to be performed by the defendants sending certain goods to Ranchi, where they were to be accepted by the plaintiff :

Held, that the contract was to be carried out at Ranchi and the Court at Ranchi had jurisdiction to entertain a suit for damages for breach of the contract. BHUTTACHARYA & Co. *v* CAWNPORE WOOLEN MILLS CO. LD., 16 C W. N. 325 **943**

——— ——— ———*Suit by vendee for possession — Decree on payment of sum exceeding Court's pecuniary jurisdiction.*

Jurisdiction - contd.

In a suit for possession of land brought by a vendee against his vendor, a Court has no jurisdiction to pass a decree for possession on payment of a sum which exceeds the pecuniary limit of its jurisdiction. DHIAN SINGH *v.* DHIAN SINGH, 51 P. W. R. 1912 **312**

——— ——— ——— **of Civil Court**—Act under sovereign power—Act of executive Government **965**

——— ——— ——— Claim to the emoluments of village carpenter—Proprietary rights **322**

——— ——— ——— Shops for sale of drugs closed by order of Collector—Suit by licensee—Remedy of licensee **566**

——— ——— ——— Suit for restitution of conjugal rights - Cruelty as defence **609**

——— ——— ——— **of Civil or Revenue Court** - Declaration of a person as a mere *thekadar* **809**

——— ——— ——— Mortgage with possession —Mortgagor undertaking to assist mortgagee in recovering produce—Suit for recovery of possession **539**

——— ——— ——— Suit to avoid transfer by tenant **909**

——— ——— ———*Revenue payable by defendant—Government recovering from plaintiff—Suit to recover money from defendant—Registration of Civil Court's decree as that of Revenue Court—Practice—Court finding no jurisdiction—Disposal on merits —Punjab Tenancy Act (XVI of 1887), ss. 77 (3) (l), 100—Punjab Land Revenue Act (XVII of 1887), s. 158 (2) (XIV).*

A suit for the recovery from defendant of a sum of money recovered from the plaintiff as land revenue by Government, when it was in fact payable by the defendant, is excluded from the cognizance of a Civil Court by section 158 (2) (XVI) of the Punjab Land Revenue Act and is exclusively cognizable by a Revenue Court.

Where a Revenue suit has been tried by a Civil Court not having any powers on the Revenue side and the defendant has all along objected to the Civil Court's jurisdiction, decree of the Civil Court should not be ordered to be registered as that of a Revenue Court. In such a case, all the proceedings should be set aside and the plaint returned for presentation to the Revenue Court.

Where a Court is of opinion that it has no jurisdiction, it should at once decline to exercise jurisdiction and should not proceed to dispose of the suit on the merits. RUKMAN DEVI *v.* SAIN DAS, 45 P. W. R. 1912 **401**

——— ——— ———*Suit for declaration of non-liability to pay* bakri *and* thana patti *dues—Allegation of absence of custom—Punjab Land Revenue Act (XVII of 1887)*, s. 158 *(2) (VI)—Punjab Tenancy Act (XVI of 1887)*, s. 77 (3) *(i)*.

A suit by the *malikan kabza* and non-proprietary residents of a village and owners of houses occupied by them for a declaration that they were not liable to pay *bakri* and *thana patti* dues as there was no custom for the realization of such dues in their

Jurisdiction - contd.

district or village is not cognizable by a Civil Court. KARM ILAHI v. SULTAN ALAM, 79 P. R. 1911 **812**

——— ——— ——— **of Civil or Revenue**—*Suit for eviction—Plaintiff alleging forcible dispossession—Test—Examination of plaintiff—Defendant proving to be a tenant—Practice—Dismissal of suit.*

A suit to evict defendant from land of which he is alleged to have taken forcible possession from plaintiff is cognizable by a Civil Court.

In ascertaining whether a suit is cognizable by a Civil or by a Revenue Court, it is not enough merely to look at the plaint.

The real test in such cases is to examine the plaintiff and see whether, according to the plaintiff, the defendant took the land from plaintiff in the first instance for cultivation, or whether the defendant got possession in the first place by force.

If, on inquiry, the Civil Court finds that the defendant is, as a matter of fact, tenant and not a trespasser, the Civil Court should dismiss the suit. BELA SINGH v. LABH SINGH, 48 P. W. R. 1912 **298**

——— ——— ——— ——— *Suit for fixation of rent due from occupant of water-mill Water-mill not land—Punjab Tenancy Act (XVI of 1887), s. 3—Tenant*

A suit for the fixing of rent due from the occupant of a water-mill is cognizable by a Civil Court.

The site of a water-mill cannot be said to be used for agricultural purposes or for purposes subservient to agriculture. The occupant of such a mill does not holding "land" as defined in the Punjab Tenancy Act. His rights are, therefore not governed by the Act. DEVTA JAMLU v. HARI DAS, 39 P. L. R 1912: 47 P. W. R. 1912 **348**

——— ——— ——— ——— *Suit for recovery of arrears of rent sold to plaintiff by landlord—Punjab Tenancy Act (XVI of 1887), s. 4.*

A suit to recover arrears of rent in respect of agricultural land by a person to whom the landlord has sold the right to recover the arrears is cognizable by a Civil Court. GANPAT RAI v. SARDARA, 67 P. W. R. 1912 **511**

——— ——— ——— *Suit by tenant for share of produce, forcibly removed by landlord—Punjab Tenancy Act (XVI of 1887), ss. 50, 77 (i)—Practice—Civil or Revenue Court returning plaint—Reference to Chief Court.*

When a plaint has been returned once by a Revenue Court for presentation to a Civil Court, the Civil Court, if it thinks that the suit is cognizable by a Revenue Court, should at once refer the question of jurisdiction for decision to the Chief Court. So, too, if a Revenue Court disagrees with the opinion of the Civil Court, it should at once refer the question of jurisdiction.

A suit by a tenant for his share of the produce forcibly removed by the landlord is cognizable by a Revenue Court. HETA RAM v. CHANDAN, 49 P. W. R. 1912 **447**

——— ——— **of Revenue Court** - suit for interest on rent due **71**

——— ——— **of Small Cause Court.** *See* SMALL CAUSE SUIT.

Jury, trial by. *See* MISDIRECTION.

——— **trial**—*Charge to Jury—Misdirection—Penal Code (Act XLV of 1860), ss. 379, 411—Theft—Receiving stolen property—Possession of stolen property—Presumption—Conviction for theft.*

Where the accused was found in possession of stolen property three weeks after the theft:

Held, that the proper presumption was not that he committed the theft, but that he received the property, knowing or having reason to believe it to be stolen.

Where a Sessions Judge directed the Jury, in a case, where the accused was found in possession of stolen property, that the presumption was more in favour of the possessor being the thief than the receiver unless there was evidence to the contrary and that no presumption as to the latter should be made unless, besides the discovery of the stolen property, there was something to show that the accused received it knowing it to be stolen:

Held, that there was misdirection.

As to which of the two presumptions should be drawn in any particular case, whether of theft or of receipt of stolen property, would depend on the circumstances, the length of time that has elapsed after the theft, how much of the stolen property is found in possession of the person in question, the circumstances which led to the discovery, and other facts connected with the discovery of the property.

It is not necessary to raise a presumption in favour of the possessor of the stolen property being the receiver, that there should be evidence that he knew it to be stolen. GORLE KANDUNGADU, *In re*, (1912) 1 M. W. N. 97 **828**

Kabuliat, construction of **423**

Kasavaryamtenure - *Kasavaryamdar* doing *gurukkal* services to the temple—Whether holding under the temple—Presumption—Onus of proof **660**

Khas possession, *joint—Existence of tenants settled by co sharer, when sufficient answer to claim for* khas *possession—Acquisition of occupancy-right by tenant.*

The mere fact that there are tenants on the land, who have been settled there by the other co-sharers is not itself a sufficient answer to the claim for joint *khas* possession, unless, in addition, rights have been acquired which would constitute a complete defence, as, for instance, the acquisition of an occupancy-right. ATAL BAJADAR v. MADAN DAI **694**

Khasias - Custom—Succession—Sister to be preferred to brother **377**

Kudhi Kamini cess - Biswadar's *liability to pay—Burden of proof—Custom—Revision.*

In the Rohtak District, a *biswadar*, whatever his caste, is not liable to pay the *Kudhi Kamini* cess.

There is no presumption of a custom in that District that a man becomes exempt from payment of the cess *only* when he has become the owner of the plot of ground on which his house stands.

Where a Collector assumes without proof the existence of such a custom the Financial Commissioner will interfere on the revision side.

Where certain *Sunars* became *biswadars* by purchase:

Held, that they were not liable to pay *Kudhi Kamini* cess.

The burden of proving that a *biswadar* should pay *Kudhi Kamini* lies on the *Lambardars*. LAHRI v. SHIV NATH, 2 P. W. R. 1912 Rev. **865**

Kunjpura State —Impartible principality—Rights of junior members—Maintenance—Partition—Withdrawal of *quasi-sovereign* powers, effect of—Property acquired subsequent to withdrawal of powers **695**

Lambardar -Succession **18**

Land Acquisition —Deposit of widow's share in Court on objection of daughters—Withdrawal of objection—Subsequent death of widow—Jurisdiction—Determination of question of succession to deceased widow—Daughter not claiming her own share left by Will—Recognition as heir of deceased widow in acquisition proceedings—Application of s. 18 to question of succession of deceased claimant and investment of money—Investment in securities when to be made **550**

Land Acquisition Act (I of 1894), ss. 3, 10, 49 —*Collector of Land Acquisition whether subject to High Court's extraordinary jurisdiction—Owner—Under-tenant—Reference, application for, when to be made.*

A Land Acquisition Deputy Collector is subject to the extraordinary jurisdiction of the High Court; and where the Deputy Collector commits an error in not making a reference under section 49 of the Land Acquisition Act, the High Court has jurisdiction to set it right.

Administrator-General of Bengal v. *The Land Acquisition Deputy Collector*, 12 C. W. N. 241, followed.

An under-tenant is interested in the acquisition of the land and is an "owner" for the purposes of section 49, and, therefore, competent to apply under that section for a reference to the Civil Court.

It is open to him to make a substantive application for a reference at some time before the award is actually made. KRISHNA DAS ROY *v.* LAND ACQUISITION COLLECTOR, PABNA, 16 C. W. N. 327 **470**

——— ——— ——— ——— ———s. 10 **470**

——— ——— ——— ——— ———s. 18 **550**

——— ——— ——— s. 30—*Apportionment of compensation between* zemindar *and occupancy-tenant.*

Where an occupancy holding is acquired under the Land Acquisition Act and a certain sum is awarded as compensation therefor the compensation should be apportioned between the landlord and the occupancy-tenant in accordance with the values of their respective interests in the holding, and if possible something should be awarded to the landholder on account of the possibility that he may have rent of his occupancy-tenant enhanced. HARDEY NARAIN *v.* POWELL **420**

——— ——— ——— ——— ———ss. 30, 31 (2)—*Reference to District Judge—Order passed by District Judge with consent of parties—Time given to one party to institute suit for determination of right to compensation money within a fixed period—Suit instituted within fixed time but withdrawn—Compliance with condition as to time—Jurisdiction of Court other than that of District Judge to determine right to compensation money under the circumstances.*

On a reference to the District Judge under section 30 of the Land Acquisition Act, by consent of parties the Judge passed an order for payment of compensation-money to one of them after four months, if, in the meantime, the other party did not institute a suit to establish his right to the money. The other party did institute a suit within four months, but it was withdrawn on objection as to non-joinder with leave to institute a fresh suit and then the present suit was instituted in proper form:

Held, (1) that the condition in the Judge's order was complied with on the institution of the first suit;

(2) that as the District Judge's order was passed by consent of parties, the Munsif had jurisdiction to entertain the suit for the determination of the right to money awarded as compensation under the Land Acquisition Act. PITCHUVIER *v.* PERUMAL KONAN, 11 M. L. T. 160; (1912) 1 M. W. N. 163 **651**

——— ——— ———s. 31 (2) **651**

——— ——— ———s. 32 **550**

——— ——— ———s. 49 **470**

Land Acquisition Collector whether subject to extraordinary jurisdiction of High Court **470**

Landlord and Tenant. *See* BENGAL TENANCY ACT; PATTA.

——— ——— ———*Durpatni*—Original rent reduced by letter—Payment at lower rent for more than 30 years—Division of *durpatni*—Written consent of landlord—*Dakhila* by landlord's agent showing division, if binding on landlord **449**

——— ——— ———*Agricultural* raiyat *letting out homestead portions—Incidents of sub-tenancy to be governed by Bengal Tenancy Act, not by Transfer of Property Act—Contract for grant of new lease on expiry of nine years—Effect of Contract—Ejectment of under-*raiyat *after term.*

Where the land included in the holding of an agricultural *raiyat*, consists partly of agricultural and partly of homestead lands and the portion which is used as homestead is let out for use as homestead, the under tenant is an under-*raiyat* within the Bengal Tenancy Act, and the provisions of the Transfer of Property Act have no application.

Biburam Roy v *Mohendra Nath Samanta*, 8 C. W. N. 454, relied upon.

A contract of tenancy between a *raiyat* and an under-*raiyat* that upon the expiration of the first nine years of the tenancy, a new settlement of rent would be made, and till such settlement was made, rent would continue to be paid at the rate mentioned in the contract, is valid in law, so far as the contracting parties are concerned.

The effect of the clause for the grant of a new lease upon the expiry of the term of the first nine years, is to prevent the landlord from seeking to eject the under-*raiyat* upon the expiry of the nine years. ABDUL KARIM *v.* ABDUL RAHMAN, 16 C. W. N. 618 **364**

——— ——— ———*Co-sharer's suit for entire rent making other co-sharers parties—Decree for his share of rent only—Whether decree a rent decree or money decree—"Decree", meaning of—Reference to pleadings and judgment, if allowable.*

A co-sharer landlord brought a suit for the entire arrears of rent making his co-sharers *pro forma* defendents and praying for a declaration that the decretal amount should be a charge upon the tenure

Landlord and Tenant—contd.

in arrears. The Court held that as the plaintiff's share of the rent was separately collected, his co-sharers were not necessary parties and that the claim for their share of the rent was untenable. A decree was passed for the plaintiff's share of the rent to be realised from the assets of the tenant who had in the meantime died. This decree was not appealed against:

Held, that, although the suit was rightly framed as a suit for rent and a decree properly passed would be capable of execution under the special procedure of the Bengal Tenancy Act, yet in the present case the Court passed a money-decree only and it was incapable of execution as a rent-decree under the Act.

A Court can refer to the pleadings and judgment in order to ascertain the real meaning of a decree. PROMODA NATH v. ALAMGIR KHAN **82**

——— *Damages—Rent—True test—Wilful omission by defendant to cultivate land according to agreement—Suit for compensation whether suit for rent—Money value of crops—Small Cause Court—Jurisdiction.*

Whether a suit is one for damages or for rent, must depend upon the nature of the claim put forward. If what the plaintiffs claim is the money value of the crops to be delivered by the tenants to the landlords on account of use and occupation of the land held by them, its true nature is rent.

Panchu Chakar v. *Nagendra Nath Pal Chowdhury*, 8 Ind. Cas. 96; 12 C. L. J. 480, relied upon.

Where the allegations in the plaint are that the defendants agreed to cultivate the land, but they wilfully omitted to raise any crops and that consequently the plaintiffs were deprived of their share of the crops:

Held, that the share of the crops which the defendants are alleged to have undertaken to deliver to the plaintiff was rent, and the suit was not triable by a Small Cause Court. LALJI PANDAY v. BERHAMDEO PANDAY, 16 C. W. N. 89 **29**

——— *Ejectment—Notice—Denial of landlord's title before suit.*

No notice for the determination of a tenancy, even if a notice is required by the terms of the lease, is necessary for maintaining a suit for the ejectment of a tenant, where the tenant has, before institution of the suit; denied the landlord's title and the validity of the lease. ZIA-UD-DIN v. GOBIND RAM, 76 P. R. 1911 **323**

——— *Grant to tenant by Hindu Raja to re-excavate unclaimed tank No mention of rent—Liability to assessment of rent Estoppel.*

In 1866, a Hindu Raja granted a *sanad* for the re-excavation for an old tank and the grantee re-excavated it at a considerable expense. The tank is still used as a tank and supplies drinking water. In the *sanad* no mention is made about any rent. In a suit for assessment of rent:

Held, that the plaintiff is estopped from claiming any rent so long as the tank is used for the purposes contemplated by the parties in 1866. ASALAT KHAN v. BIRENDRA KISHORE **519**

——— Ijardar—*Purchase of occupancy-holding*—Statue *of tenant inducted into land by* ijardar *purchaser—Bengal Tenancy Act (VIII of* 1885*)*, *ss.* 22, *sub-s.* (3), 49—*Ejectment.*

Landlord and Tenant—contd.

If an *ijardar* purchases an occupancy-holding he acquires it as a non-occupancy holding. If he settles a tenant, he must be taken to have settled in his character as purchaser and not in his character as *ijardar*, and, therefore, the tenant will be an under-*raiyat*, and liable to be ejected after his tenancy has been terminated by a notice to quit under section 49 of the Bengal Tenancy Act. SHEONANDAN SINGH v. DEO SARAN SINGH **598**

——— *Improvements—Well sunk by tenant without consent of landlord—Mandatory injunction—Damage not alleged—Maintainability of suit—Presumption—Oudh Rent Act (XXII of* 1886*)*, *ss.* 22 to 28—*Transfer of Property Act (IV of* 1882*)*, *s.* 108—*Specific Relief Act (I of* 1877*)*, *ss.* 54, 55, 56.

A landlord is not entitled to maintain a suit for mandatory injunction to restrain a tenant from the construction of a well upon his holding, merely upon the ground that such construction was being effected without his consent or against his will. He must allege and prove some sort of damage to himself and further that the damage is of such a nature that the equities of the case would not be met by pecuniary compensation.

It is contrary to the policy of the Oudh Rent Act that the interference of the Civil Courts should be invoked upon an allegation that the tenant is using the land in a manner not approved of by his landlord.

The construction of a well by a tenant upon his holding should *prima facie* be regarded as beneficial, unless and until the contrary is proved.

It cannot be presumed that the construction of a well upon a holding is likely to be destructive or permanently injurious to the same or is on the face of it an act amounting to the use of the land for a purpose other than that for which it was leased.

When it appears doubtful that the provisions of the Oudh Rent Act do not completely cover a case, the Court may resort to the general principles laid down in section 108 of the Transfer of Property Act.

Section 23 of the Oudh Rent Act contemplates the possibility of a tenant's making an improvement upon his holding without the consent of his landlord. The only result of not following the procedure prescribed by the Act is that the tenant is not entitled to claim compensation for improvements effected without the written consent of the landlord. RAGHUNANDAN SINGH *v.* JARAO **554**

——— Kabuliat—*Construction—Condition to pay paddy rent, in default to pay certain sum—Whether the sum or market value of paddy payable.*

A tenant by a *kabuliat* agreed to pay a certain sum and 50 *aris* of paddy as rent, and in default, "to pay the price thereof, Rs. 19-4:"

Held, that, in the event of the paddy not being delivered, the landlord could not get more than what was fixed in the *kabuliat* that is, he could not recover the actual market-value of the paddy. ATUL CHANDRA DUTT *v.* ESON ALI **423**

——— Kasavaryam *tenure—Kasavaryamdar doing* gurukkal *services to the temple—Whether holding under the temple—Presumption—Onus of proof.*

Defendant was holding suit land under *Kasavaryam*

Landlord and Tenant—contd.

tenure, and it was not proved that he was holding under any particular *mirasidar*. He was, however, doing *gurukkal* service in the temple:

Held, that, in the absence of proof of title in the temple, no presumption arose that the defendant was holding under the temple, though the temple was the only person whom the defendant was serving. VEERAPPA CHETTYAR, *In re* **660**

——— ——— ——— *Lease by two lessors—Surrender of lease by one lessor.*

R executed an usufructuary mortgage in favour of one *F.* in 1903 in respect of certain property. In the same year *F.* executed a lease in favour of *R.* in respect of the same property. Subsequently *F.* died and was succeeded by *K.* and *S.*, *K.* being entitled to ¾ths and *S.* being entitled to ¼th of the mortgagee right of *F.* In 1907, *R.* executed another mortgage in favour of *K.* alone superseding the entire mortgage and the entire lease of 1903:

Held, that under the circumstances the mortgage of 1907 could not affect the lease of 1903. KASHMIRE *v.* RAMSARAN **416**

——— ——— ——— *Non-transferable occupancy-holding—Sale in execution with consent of co-sharer landlord—Consent, after sale, of non-consenting landlord.*

An occupancy-holding which is not transferable by custom, can be sold in execution with the consent of the landlord.

Ananda Das v. *Ratnakar*, 7 C. W. N. 572, relied upon.

But that consent must be by the whole body of landlords.

The landlords may consent even after the sale.

Dawarka Nath v. *Tarini Sankar*, 11 C. W. N. 513; 5 C. L. J. 294; 34 C. 199, relied upon.

Where a decree-holder applied for the sale of a non-transferable occupancy holding in execution of a money-decree, with the consent of co-sharer landlord to the extent of 15¼ annas and an order for the sale of that share of the holding has been made, the High Court did not think it necessary to interfere, as the non-consenting landlords may give their consent after the sale. SHUKURUDDIN *v.* HEMAGENI DEBI, 16 C. W. N. 420 **192**

——— ——— ——— *Non-transferable occupancy-holding—Purchase by co-sharer landlord—Joint khas possession, claim for, by other co-sharer—Bengal Tenancy Act (VIII of 1885), s. 22 (2).*

Section 22 clause (2) of the Bengal Tenancy Act does not apply to a non-transferable occupancy-*jote*.

Therefore, where a co-sharer landlord purchases a non-transferable occupancy-*jote*, his co-sharer is entitled to recover *khas* possession of the *jote* jointly with the purchaser co-sharer, on the ground that the *jote* must be treated as having been abandoned. LAKHI KANT DAS *v.* BALABHADRA PROSAD DAS **336**

——— ——— ——— *One suit for arrears of rent of several tenures—Decree in such suit, effect of—Execution of such decree—Special procedure in Bengal Tenancy Act.*

It is competent to a landlord to bring one suit for the total rents of several tenures held by the same tenant and no objection can be taken to the decree passed in the suit. But the special procedure prescribed in the Bengal Tenancy Act cannot be adopted in executing such a decree which must be executed as an ordinary decree under the Civil Procedure Code. RASHMOHINI DASI *v.* DEBENDRA NATH SINGHA, 16 C. W. N. 604 **604**

——— ——— ——— *Permanent tenancy—Inference from facts—Question of law—Civil Procedure Code (Act V of 1908), s. 100.*

Where it is established that the original tenant and his successor have been in occupation of land for over sixty years, that the rent has never been varied, that the tenancy has been treated by the landlord as heritable, and that the land was let out for residential purposes:

Held, that the inference is legitimate that the tenancy in its inception was permanent and that it was not essential that there should be permanent structures on the land, although their existence would be a very important factor:

Held, also, that the question is really a mixed question of fact and law: the question is one of fact to this extent that the High Court will not interfere with the findings as to the length of the tenancy, the fixity of rent and other matters; but in so far as the Court is invited to draw an inference as to the nature of the tenancy from the facts found, the question is one of law. MOHORAM SHEIKH CHAPRASI *v.* TELAMUDDIN KHAN, 15 C. L. J. 220; 16 C. W. N. 567 **606**

——— ——— ——— *Previous suit for rent—Denial of relationship of landlord and tenant—Dismissal of rent suit—Subsequent suit for possession—Whether defendant can urge tenancy—*Res judicata.

If it has been held by a competent Court that no relationship of landlord and tenant exists between the plaintiff and the defendant, it is not open to a Court, in a subsequent suit, to go into that question at all, whether it has been rightly or wrongly decided by the first Court.

Therefore, where in a suit for rent by the plaintiff against the defendant, it was found that the relationship of landlord and tenant did not exist, and the plaintiff then brought a suit for possession:

Held, that the defendant cannot urge his tenancy to defeat the suit. ANNADA PROSAD *v.* SHAM SUNDAR **688**

——— ——— ——— Sanad Chiti—*Grant to tenant by Hindu Raja to re-excavate unclaimed tank—No mention of rent—Tank in possession of tenant's family as rent-free for more than sixty years—Liability to resumption or assessment of rent—Improvement—Estoppel—Limitation—Tank, excavation of—Duty of zemindar—Limitation Act (IX of 1908), Sch. I, Art. 130.*

In 1850, *sanad* was granted by a Hindu Rajah for the re-excavation of an unclaimed and silted up tank within his *zemindari*, to a tenant who re-excavated it at considerable expense, and ever since it has been in the exclusive possession of the tenant's family rent-free and it still supplies good drinking water. In the *sanad*, there was no provision for the payment of any rent, and nothing was said as to the duration of the grant. In a suit for *khas*-possession of the tank or assessment of rent in respect of it, by the present Rajah:

Landlord and Tenant—contd.

Held, that the *sanad* being a license to effect improvements, could not be revoked after the improvement had been carried out, that as the tank was still being used as a tank, the particular purpose which the parties had in view when it was re excavated was not exhausted, and, therefore, the time had not arrived for the plaintiff to re enter or to insist upon the payment of rent and that consequently the suit was premature, but that it was not barred by limitation as that question did not arise:

Held, also, that as the grantor of the *sanad* had encouraged and created an expectation in the grantee that he would be allowed to enjoy the improved tank without let or hindrance, the plaintiff was estopped from bringing the suit. BIRENDRA KISHORE *v.* AKRAM ALI, 16 C. W. N. 304; 15 C. L. J. 194 **513**

——— ——— ——— Sanjidar, *position of—Denial of owner's right by* sanjidar—*Repudiation—Acquiescence by landlord—Suit by landlord for ejectment as trespasser—*Sanjidar *resiling from repudiation—Liability to eviction—Grant of* muafi *rights by Government Effect, on landlord's suit.*

A *sanjidar* is a person who performs certain services in connection with *takyas* and in consideration thereof is given certain land to hold as a tenant under the owners.

Although a tenant cannot, by any unilateral act on his part, determine a tenancy that subsists between him and his landlord, yet if the landlord acquiesces in the tenant's repudiation of that relationship, the landlord is entitled to evict the fomer tenant as a mere trespasser and to apply to the Civil Court for his eviction as such.

It is not open to the Court to hold that a contractual relationship which is disowned by both parties, still subsists as between them, at all events, so far as those parties are concerned.

A *sanjidar* under the plaintiffs was granted certain *muafi* rights by Government. In a suit in 1907, the *sanjidar* filed a written statement, in which he repudiated the relationship of landlord and tenant which plaintiffs alleged to subsist between them and him, and asserted that he himself was the full proprietor of the property held by him The plaintiffs accepted this repudiation of the relationship and sued to evict the *sanjidar* as a trespasser. The *sanjidar* gave up the position adopted by him in the former suit and in the present suit admitted plaintiffs' proprietary rights, claiming to be a *sanjidar* not liable to ejectment.

Held, (1) that the plaintiffs were entitled to eject defendant The cause of action accrued to the plaintiff upon the denial by defendant of their title as owners and his belated repentance could not put an end to the right which accrued to the plaintiffs on that cause of action.

(2) That the fact that the defendant was granted *muafi* rights by Government did not debar the plaintiffs from suing for his eviction, because they were in no way concerned with what occurred between Government and the defendant. MUHAMMAD BADAR KHAN *v.* CHIRAGH SHAH, 16 P. L. R. 1912, 43 P. W. R. 1912 **32**

——— ——— *Suit for assessment of tank—Tenant's claim to hold rent-free Limitation—Limitation Act (XV of 1877), Sch. II, Art. 139.*

Landlord and Tenant—concld.

Where a tenant claimed a rent-free title to the knowledge of the plaintiff and no suit for resumption or assessment of rent was brought until more than 12 years after:

Held, that the suit was barred by limitation BIRENDRA KISHORE *v.* ROSHAN KHAN, 15 C. L. J. 203 **518**

——— ——— ——— *Suit for resumption or assessment by landlord—Tenant's claim to hold rent-free—Adverse possession of tenant—Claim to hold land as rent-free—Limitation—Limitation Act (XV of 1877), Sch II, Art 139.*

In a suit for possession or assessment of rent by a landlord, it appeared that the tenant defendant more than 12 years before the suit claimed to hold the land as rent-free; the plaintiff's agent denied this. The record of rights which was then being prepared contained the denial and an entry was made to the effect that no *jama* had been fixed:

Held, that a title completely hostile to the plaintiff was set up by the defendant, and the record of rights did not negative the claim made by the tenant, for it did not signify that the land was liable to pay rent, that there was a clear assertion of adverse title, which had been submitted to for more than 12 years, and that the suit was, therefore, barred by limitation. BIRENDRA KISHORE *v.* DILWAR ALI **517**

——— ——— ——— *Usufructuary mortgage—Non-transferable holding—Abandonment—Usufructuary mortgagee placed in possession—Payment of rent by tenant—Decree for ejectment.*

A usufructuary mortgage of a part of a non-transferable holding is not equivalent to abandonment. *Mahomed Taqi* v. *Choa Lal*, 7 Ind. Cas. 750; 13 C. L. J. 494, relied upon

Consequently, when the tenant of such holding executes a usufructuary mortgage in favour of a third party, and places him in possession, there is no repudiation of the relationship of landlord and tenant as between himself and the person under whom he holds the land. And if, after the execution of the usufructuary mortgage, the tenant has paid rent to the superior landlord and has throughout expressed his willingness to hold himself responsible for due payment of rent, it cannot be suggested that there has been any severance of his connection with the land.

Therefore, in such a case the landlord is not entitled to a decree for ejectment. MOHADEO PERSHAD *v.* PACHKARI, 16 C. W. N. 322 **941**

Lease. *See* PATTA; TRANSFER OF PROPERTY ACT s. 106.

——— by two lessors—Supersession of lease by one lessor **416**

——— *Construction—Absence of fraud or common mistake*

Where with due regard to the boundaries named in a lease, a certain plot is included in the lease, the lessee is entitled to the possession of the plot, in the absence of fraud or common mistake to vitiate the document. SOMARUDDI MOLLAH *v.* PORT CANNING AND LAND IMPROVEMENT CO. LD., 16 C. W. N. 225 **481**

Lease—concld.

——— *for term—Death of lessee—Expiry of lease—Changes in title* pendente lite—*Regulation Act (I of 1886), s. 8 sub-s.* (1) *cl.* (*b*), *ss.* 39, 62—Khasias—*Inheritance—Sister to be preferred to brother.*

The Court may for the sake of justice take into consideration changes in title *pendente lite.*

Ram Ratna v *Mohant*, 6 C. L. J. 74; 11 C. W. N. 732 and *Ramyad* v. *Bindeswari*, 6 C. L. J. 102, followed.

A lease for a term of years does not terminate with the life of the grantee.

The mere recognition by the lessor of a wrong person as successor of the original grantee does not prejudice the position of the lawful successor.

Section 8, sub-section (1), clause (*b*) of Regulation I of 1886 applies to a case in which a person has acquired land, not merely because it has been directly settled with him by the Government, but also because he has obtained it from the original grantee by transfer, succession or otherwise.

The clause includes a case in which a person has before the Regulation acquired land by inheritance from a person with whom it had been settled by the Government under a lease for term not less than ten years.

Amongst the *Synting Khasias* a sister inherits the property of her brother in preference to a brother.

One *T*, a *Khasia* obtained a settlement of certain lands from the Government on October 21st, 1884, for a term of ten years. *T.* died shortly after, and left behind him a brother *H.* and two sisters *S.* and *L.* immediately after his death, his brother in 1886 got his own name entered as his successor-in-interest and continued in possession. In 1895 the two sisters sued for recovery of possession:

Held, that the case is completely covered by clause (*b*) of sub-section (1) of section 8 of Regulation I of 1886, that upon the death of *T.* and in spite of the hostile act of his brother, his sisters became owners of the interest originally vested in him, that as soon as the Regulation came into force on July 1st, 1886, the sisters became landholders within the meaning of clause (*b*) of sub-section (1) of section 8 and were entitled to claim settlement from the Government, that although they did not do so, their rights have not been affected by the settlement made with their brother and that they are entitled to recover the property from the hands of the brother. HEDLOT KHASIA *v.* KA RAN KHASIANI, 15 C. L. J. 241 **377**

Legal Practitioner—Pleader and client. *See* LEGAL PRACTITIONERS ACT, s. 27.

Legal Practitioners Act (XVIII of 1879), s. 13—*Attesting—Will after testator's death—Misconduct—Extenuating circumstances—Lenient punishment.*

Immediately after the death of a person, a *muktear* was pressed by persons interested in establishing a Will, to sign it as an attesting witness. He took time to consider the matter. Subsequently in a moment of weakness he signed as an attesting witness; Will bore what purported to be the signature of the deceased and which was like his genuine signature with which the *muktear* was familiar as his officer, and which signature was subsequently found to be genuine by the Court. The

Legal Practitioners Act—concld.

muktear was examined by the Probate Court, but he made no attempt to perjure himself and freely disclosed what he had done. He had been a member of the profession for over 25 years and had borne a good character and was sincerely repentant:

Held, that although his conduct was wholly unworthy of the profession, yet under the circumstances he should be dealt with mercifully. RUDRA PROSAD, *In re*, 14 C. L. J. 606 **397**

——— ——— ——— ——— ——— ——— **s. 23**—Magistrate holding inquiry is a Court **1006**

——— ——— ——— ——— ——— ——— **ss. 27, 28**—*Pleader and Client—Fee payable by party to his own Pleader—Agreement to pay fee, how to be made—Agreement in contravention of s. 27, if of avail to Pleader either as plaintiff or as defendant.*

Section 27 of the Legal Practitioners Act has no reference to the fees payable by a party to his own Advocate Pleader or Vakil. That payment is regulated by the agreement between the parties concerned. Section 28 deals with those agreements and lays down that they must be in writing signed by the client and filed within a specified period in a proper Court. That section is not restricted in its application to cases where the agreement is for payment of fees in excess of the fees prescribed by section 27.

If an agreement set up by a Pleader is in contravention of section 28 of the Legal Practitioners Act, it is of no avail whether the Pleader seeks to enforce the agreement as plaintiff or relies upon it as defendant in answer to a claim by the client. KEMINI MONI DEBI *v.* KHETTRA MOHAN **43**

Letters of Administration. *See* PROBATE AND ADMINISTRATION ACT.

——— ——— ——— ———, application for—Inquiry as to extent of estate **433**

Letters Patent (Cal.), cl. 12 429

——— ——— ——— **(Mad.), s. 13**—*Application for transfer of suit from Presidency Small Cause Court to High Court to be made to a Judge on the Original Side.*

An application for the transfer of a suit from the Presidency Court of a Small Causes to the High Court is governed by section 13 of the Letters Patent and must be made to a Judge sitting on the Original Side of the High Court. SREENIVASIER *v.* BALAKRISHNA DEVAI, (1912) 1 M. W. N. 150; 11 M. L. T. 159; 22 M. L. J. 187 **860**

Legitimacy—Presumption of marriage—Long course of treatment as wife—Evidence of cohabitation—Presumption of law—How to be repelled—Resemblance of child to putative father if competent—Admissibility of photographs of child and father **678**

——— ——— ———Sikh Jat *abducting sweeperess—Subsequent conversion of both to Muhammadanism—Marriage under Muhammadan Law—First husband taking no steps to assert marital rights—Legitimacy of issue of second marriage.*

A, a *Sikh Jat*, abducted a sweeperess *B* whose husband was living. *B.*'s husband prosecuted *A.*, for abduction. Some time after that, *A.* and *B.* turned Muham-

Legitimacy—could

madans and went through the usual form of marriage prescribed by Muhammadan Law. They lived as man and wife for a long series of years and subsequent to his complaint for abduction. *B.*'s first husband never took any steps to assert his marital rights. As the result of the marriage of *A* and *B.* a son *C.* was born to them. *C.* lived with *A.* and was treated by him as well as his brotherhood as his legitimate son:

Held, that there was a strong presumption that *B.*'s first husband had repudiated or divorced her before *A.* married her, and consequently *C.* was the legitimate son of *A.* SHERU *v.* JAWAHIR SINGH **662**

Licensee and Licensor—Suit for use and occupation—No relationship during period in suit **512**

Lien—Order by Sessions Judge that he has no jurisdiction to try the case **921**

———of vendor for purchase-money **992**

Limitation. *See* EXECUTION OF DECREE.

————Application to set aside *ex parte* decree—Service of summons—Ignorance of proceedings **642**

————Belated pleas of limitation how to be dealt with **792**

————Death of party—One of legal representatives brought on record—No bar by time against bringing other representatives **313**

————Illegal attachment and sale—Suit for restitution and declaration **96**

————Mortgage suit against joint Hindu family—One of the members not made defendant within limitation—Whole suit to be dismissed **197**

————Mortgagee's right to possession on default on payment of interest—Mortgagor pleading payment within twelve years **559**

————Partnership account—Account stated or settled—Long acquiescence **23**

————Right to recover moveables from trustees **599**

————Suit for damages for conspiracy **721**

————Suit to enforce son's pious liability to pay father's debts **530**

————Suit for injunction—Encroachments on land reserved for common use **661**

————Suit for money due on registered bond **440**

————Suit for redemption more than 12 years after satisfaction of mortgage—Usury Laws Repeal Act **963**

————Redemption suit—Mortgagee alleging transaction to be sale—Mortgagor contending fraud and asserting mortgage—Donees from mortgagee **375**

————Suit for resumption or assessment by landlord **513, 517, 518**

————Suit to set aside alienation by unauthorised guardian **976**

Limitation—contd.

————Vendee transferring property to another person before institution of suit—Second vendee impleaded after expiration of period of limitation—Appeal—Power of Appellate Court to refuse to entertain plea of limitation **792**

————*Adverse possession—Partition—Possession subsequent to partition—Remedy of the person to whom land is allotted—Limitation Act (IX of 1908), Sch. I, Art. 144—Punjab Land Revenue Act (XVII of 1887), s. 122.*

Where upon partition of land a particular field is allotted to *B.* but it remains in possession of *A.*, *A.* begins to hold adversely against *B* from the date of partition and if *B.* wishes to preserve his rights, he must take action within the time allowed by law.

B. can during the first three years, apply, under section 122 of the Land Revenue Act, to the Revenue Court to be put in possession of the field allotted to him or can, during the following nine years, bring a suit in the Civil Court for possession.

A suit brought more than 12 years after the confirmation of the partition is barred by time. FATEH DIN *v.* NIKKA, 81 P. R. 1911 **790**

————*Alienation—Alienor alienating and dying 12 years before suit—Mutation effected within 12 years—Suit for possession by reversioner—Punjab Limitation Act (I of 1900), scope of Limitation Act (XV of 1877), Sch. II, Art. 144—Punjab General Clauses Act (I of 1898), s. 4.*

A. effected an alienation in 1887 and died in 1894. Mutation in respect of alienation was not effected till 23rd February 1897. On 20th February, 1909, the customary heirs of *A.* brought this suit for possession of the property alienated:

Held, that the suit was barred under Article 144 of the Indian Limitation Act, the Punjab Limitation Act of 1900 being inapplicable to the case.

If the last male owner alienated and died before Act I of 1900 came into force, the reversioner must sue within 12 years of the alienor's death, regardless of when mutation was effected upon the alienation. TULSI *v.* MADHO RAM, 30 P. R 1912 **343**

————*Appeal—Time spent in obtaining copies—Sufficient cause—Duty of the Copying Department—Limitation Act (IX of 1908), ss. 5, 12—Rules and Orders of the Chief Court, Vol. I, r. XXIII (1) and (2).*

It is the duty of the Copying Department, under rule XXIII (1) and (2) of the Chief Court Rules and Orders, Vol. I, to inform the applicant of the date on which the copy is ready for delivery, and, if necessary, to call the applicant on three successive days.

Where it is not shown that the applicant was aware of this date, the date of actual delivery is to be reckoned as the date on which the copy was ready.

The omission of the Copying Department to inform the applicants of the date on which the copy is ready or to call him for delivery of copy, is a reasonable cause for delay in filing an appeal. SARKHARA *v.* NAWAB, 11 P. W. R. 1912 **850**

————*Execution proceeding—Acknowledgment of debt—Insolvency petition—Setting out debt the subject-matter of execution proceedings—Saving of limitation—Limitation Act (XV of 1877), s. 19.*

Limitation—concld.

Under the last part of explanation (1) to section 19 of the Limitation Act, it is not necessary that the acknowledgment under the section should be addressed to the person entitled to the property in respect of which the acknowledgment is made.

Therefore, where a judgment-debtor filed, within three years before an application for execution, a petition of insolvency in which he set out a list of his debts including the one which formed the subject-matter of the execution proceedings:

Held, that the statement in the insolvency petition was an acknowledgment under section 19 of the Limitation Act, and that the application for execution was not barred. RAM PAL SINGH *v.* NANDLAL MARWARI, 16 C. W. N. 345 **603**

——— ———*Mortgage suit—Sons of mortgagor not impleaded within limitation—Dismissal of suit even against the mortgagor.*

In a suit upon a mortgage the sons of the mortgagor were not made parties to the suit within limitation:

Held, that the suit could not be dismissed against the mortgagor because his sons had not been impleaded in time. BALA PROSHAD *v.* PARTAB SINGH **38**

———————*Principal and agent—Accounts—Suit for rendition of accounts against agent's heirs—Rendition of accounts, meaning of—Refusal, what constitutes—Limitation Act (XV of 1877), Sch. II, arts. 62 89, 120.*

The refusal by an agent to render accounts, mentioned in Article 89 of the Limitation Act, 1877, must be an *express refusal on a definite date* and not merely a virtual refusal to be inferred from the omission or failure on his part to fulfil a promise made by him to render the account to the principal in answer to a demand by the latter.

Rendition of accounts by an agent means something more than merely sending the accounts or making over account-books to the principal; it means and includes submitting and explaining accounts to the principal and paying over to him any balance which might be found due from the agent upon the taking of accounts.

A suit for rendition of accounts, against the heirs of a deceased agent, as regards the receipt by him of the rents and profits of the principal's property which was under his control during his life-time, with a prayer for realization of the amount due from the deceased's estate, is governed by Article 120, and not by Article 62 or by Article 89 of the Limitation Act, and limitation begins to run from the date of the agent's death. FATMA *v.* IMTIAZI JAN, 1 P. R. 1912; 33 P. W. R. 1912 **930**

Limitation Act (XIV of 1859), s. 1 (12) (15) **963**

———————**(XV of 1877), s. 14** **377**

———————**s. 18** **63**

———————**s. 19** **603, 702**

———————**Sch. II, art. 3** **541**

———————**art. 44**—Suit to set aside alienation by unauthorised guardian **976**

Limitation Act—(1877)—concld.

———————**Sch. II, art. 62**—Suit for rendition of account against agent **930**

———————**art. 89**—Suit for rendition of account against agent—Refusal, what constitutes **930**

———————**art. 91** **982**

———————**art. 109**—Suit for profits by a Muhammadan **791**

———————**art. 116**—Suit for money due on registered bond **440**

———————**art. 118**—*No declaratory suit instituted—Suit for possession whether barred by the Article.*

The omission to bring a suit, within the period prescribed by Article 118 of the second Schedule of the Limitation Act, 1877, to obtain a declaration that an alleged adoption was invalid, or never, in fact, took place, is no bar to a suit for recovery of possession of property from the person relying on his adoption. MUHAMMAD UMAR KHAN *v.* MUHAMMAD NIAZ-UD-DIN KHAN, 6 P. W. R. 1912; (1912) 1 M. W. N. 77; 11 M. L. T. 76; 9 A. L. J. 137; 15 C. L. J. 172; 12 P. L. R. 1912; 22 M. L. J. 240; 14 Bom L. R. 182; 16 C. W. N. 458; 39 C. 418 **344**

———————**art. 120**—Suit for rendition of account against agent's heirs **930**

———————**art. 120**—*Illegal attachment and sale—Suit for restitution and declaration—Limitation—Cause of action.*

Where property has been wrongfully attached in execution of a decree and has subsequently been sold in pursuance of such attachment, a suit for a declaration that the attachment was illegal and for restitution is within time if brought within 6 years from the date of sale, though more than five years from the date of attachment. Though the attachment gives a cause of action for a declaratory suit, the sale gives a fresh cause of action as, till then, the title in the property does not pass from the owner. ANANTARAZU GARU *v.* NARAYANARAZU GARU, (1911) 2 M. W. N. 531; 10 M. L. T. 504; 22 M. L. J. 108 **96**

———————**art. 127** does not apply to Muhammadans **791**

———————**art. 144** **343**

———————**art. 144**—Suit to set aside alienation by unauthorised guardian **976**

———————**art. 158**—*Application to set aside award—Limitation runs from date of submission of award and not from date of notice—Civil Procedure Code (Act V of 1908), Sch. II, para. 15.*

The period of limitation under Article 158 of the Limitation Act, 1908, for making an application to set aside an arbitration award is 10 days computated from the time when the award is submitted to the Court, and not from the time when the notice of the submission of the award is served on a party. MANSOOR *v.* MAHOMEDIN, 5 S. L. R. 125 **234**

———————**art. 173A** **424**

———————**art. 179 (3)** **140**

———————**art, 179 (4)** **189**

Limitation Act (IX of 1908), ss. 2 (7), 14—*Suit against Public Officer without prior notice Dismissal of suit—Subsequent suit after notice—Exclusion of period taken up by first suit—"Good faith"—"Cause of a like nature"—General Clauses Act (X of 1897), s. 3 (20)—Civil Procedure Code (Act V of 1908), s. 80.*

A. brought a suit on 7th April 1909 for damages for certain acts done by *B* in his official capacity in July and August 1908. The suit was dismissed on 30th May 1910 as not being maintainable for want of prior notice to *B*. *A.* thereupon gave *B.* the required notice and instituted the present suit for the same relief on 16th September 1910. *A* claimed to exclude from the prescribed period of limitation the period during which the first suit was under trial:

Held, that *A.* was not entitled to the exclusion of this period under section 14 of the Limitation Act.

In view of the well-known and old standing procedure requiring previous notice to a Public Officer of an intended suit in respect of acts purporting to be done by such Public Officer in his official capacity, and the clear and unqualified terms of section 80 of the Civil Procedure Code, *A.* could not be said to have acted *in good faith* in bringing the previous suit within the strict definition of the term in section 2 (7) of the Limitation Act or even the wider sense attached to the term in section 3 (20) of the General Clauses Act.

Mathura Singh v. *Bhuwani Singh*, 22 A. 248 at p. 253, doubted.

Obiter dictum.—The want of notice under section 80 Civil Procedure Code, is not a "cause of a like nature" with defect of jurisdiction within the meaning of section 14 of the Limitation Act. MANGHANMAL v. FERNANDEZ, 5 S. L. R. 181 **260**

——— ——— ——— ——— **s. 5** **850**

——— ——— ——— ——— **s. 5**—*Appeal filed one day beyond time—Delay in office of Court to deliver copy—Sufficient reason—Misapprehension of fact—Second appeal—Right of appellant to raise question.*

By reason of the delay in the office of the Court, copies of judgment and decrees of the first Court were delivered to the appellant late so that the appeal in the lower Appellate Court was filed one day beyond time. The lower Appellate Court, misapprehending the fact as to the delay in filing the appeal, dismissed the appeal as time-barred:

Held, that this was a case which eminently required the exercise of the discretion of the Court under section 5 of the Limitation Act.

An appellant is not debarred from urging in second appeal that the lower Appellate Court has improperly held that no sufficient cause existed for delay in filing the appeal, when it is found that the lower Appellate Court misapprehended the facts. BALMAKUND v. KUNDAN LAL, 9 A. L. J. 15 **943**

——— ——— ——— **s. 5**—*Pauper appeal barred technically—"Sufficient cause" for extending time.*

Against a decree dated 18th May 1908, the defendant applied to the Chief Court on 16th June, 1908, for leave to appeal as a pauper. An inquiry as to his financial condition having been ordered on 24th February 1909, the District Judge reported that he was a pauper. After that his father died leaving property which he inherited. Upon this the

Limitation—(1908)—contd.

Chief Court held that he was not a pauper and in compliance with the Court's order he paid the necessary Court-fee on 21st June 1909:

Held, that under the circumstances, the appellant was entitled to the benefit of section 5 of the Limitation Act. SHADI KHAN v. BEEBEE UMDAN BEGAM, 34 P. W. R. 1912 **73**

——— ——— ——— ——— **ss. 5, 12**—*"Time requisite for obtaining copy"—"Sufficient cause"—Extension of time on the ground of appeal being a strong one—Application for copy returned for presentation at another place—Time allowed for journey.*

An appeal was decided by the Additional Divisional Judge of Ferozepore sitting at Ludhiana on the 25th of July, 1910. The appellant applied for copy of judgment and decree at Ludhiana on 21st October, 1910. As the records had been sent to Ferozepore, his application was returned to him the same day for presentation at Ferozepore, only a few hours' journey from Ludhiana. The application for copy was not presented at Ferozepore till 24th October. Copy was supplied on 25th October and the appeal was presented to the Chief Court on the 27th:

Held, (1) that the appeal was one day out of time;

(2) that a full day could not be allowed for the journey to Ferozepore from Ludhiana;

(3) that the order for presentation of the application at Ferozepore was perfectly justified:

(4) that there was no ground for extending the time under section 5 of the Limitation Act, as the appellant waited till the full period of 90 days was on the eve of expiring before he took any steps to obtain copy.

Indulgence can be shown to one party in a civil case only at the expense of the opposite party and the plea that an appeal is a strong one and likely to succeed is no ground for showing indulgence to the appellant. LAL SINGH v. PALA SINGH, 65 P. W. R. 1912 **714**

——— ——— ——— **s. 12** **714, 850**

——— ——— ——— **s. 14**—Suit against Public Officer without prior notice—Dismissal of suit—Subsequent suit after notice—Exclusion of period taken up by first suit—"Good faith"—"Cause of a like nature" **260**

——— ——— ——— ——— **s. 31**—*Foreclosure of mortgage of 1869—Limitation.*

A mortgage by conditional sale was executed on 26th March 1869, it being provided that interest on the mortgage-debt should be paid annually and that the mortgagor would be bound to deliver possession to the mortgagee in case of default in payment of the interest. The term of the mortgage was six years, the condition being that if the mortgage was not redeemed by that time the transaction would be deemed a sale. The mortgagee brought a foreclosure suit in May 1910.

Held, that the suit was within time. JAFRI BEGAM v. GHASU KHAN. **504**

——— ——— ——— **Sch. I, art. 10** **645**

——— ——— ——— **arts. 23, 36**—suit for damages for conspiracy **721**

——— ——— ——— **art. 83** **979**

Limitation Act – (1908) concld.

——— ——— **Sch. I art. 91** 375

——— ——— ——— ——— **art. 91**—Suit by member of joint family for declaration of invalidity of mortgage 547

——— ——— ——— ——— **art. 120**—Suit for damage for conspiracy 721

——— ——— ——— ——— **art. 120** 530, 661

——— ——— ——— ——— **art. 130** 513, 517, 518

——— ——— ——— ——— **arts. 134, 142** 375

——— ——— ——— ——— **art. 144** 790, 852

——— ——— ——— ——— **art. 148** 375

——— ——— ——— ——— **art. 158** 520

——— ——— ——— ——— **art. 164**—*Service of summons—Ignorance of proceedings—Limitation.*

Article 164 of Schedule 1 of the Limitation Act (IX of 1908), applies only when the petitioner had knowledge of the decree in cases where summons was not duly served on him

It does not apply where the defendant alleges that he was duly served but that he had no knowledge of any of the proceedings. SANKA AIYAR v. SUBBIAH IYER, (1912) 1 M. W. N. 361 642

——— ——— ——— ——— **art. 169** 318

Lis pendens inapplicable to moveable property 849

——— ——— ——— Mortgage executed during pendency of suit in which mortgagor's title to the property is in question—*Res judicata* 641

Loan—*Promise to pay implied—Bond—Mode of payment prescribed, whether creditor limited to that mode only—Personal obligation to re-pay—Limitation Act (XV of 1877), Sch. II, Art. 116—Money due on registered bond—Time begins to run when.*

Every loan implies a promise to re-pay, and an unqualified admission of indebtedness is equivalent to an express covenant and creates a personal obligation.

Ethel Georgina Kerr v. *Clara B. Ruxton*, 4 C. L. J. 510, relied upon.

Where in a bond a mode of payment was provided but it was laid down that the debtor would be responsible for any deficiency:

Held, that the creditor was not limited to that mode alone, if it was found insufficient to satisfy the debt, and that a suit was maintainable as upon a personal obligation to re-pay the money borrowed.

A suit to recover money due on a registered bond, is a suit for compensation for the breach of a contract in writing registered, within the meaning of Article 116 of the second Schedule to the Limitation Act of 1877.

Nobocoomar v. *Siru Mullick*, 6 C. 94 and *Hussain Ali* v. *Hafiz Ali*, 3A. 600; relied upon.

And the time within which the suit must be instituted is six years from the date when the contract is broken, or where there are successive breaches, from the date of the breach in respect of which the suit is instituted, or where the breach is continuing from the date when it ceases.

Loan – concld.

Where a bond indicated that the debtor was to be allowed seven years for the re-payment of the loan and that if the debt remained unsatisfied at the end of that period, the creditor might recover damages for breach of contract and the creditor was put in possession of certain property belonging to the debtor, by which the debt was to be satisfied:

Held, that, the obvious intention of the parties was that their liabilities should be adjusted on the expiry of the term, and that the creditor was not bound to sue whenever he failed to realise a sum mentioned in the bond at the precise point of time when it was assumed to be recoverable from a tenant. RAM NARAIN SINGH v. ODINDRA NATH, 15 C. L. J. 17 440

Local inspection—*Criminal case—Omission to place on record results of inspection, if fatal—Irregularity—Prejudice—Local inspection, several kinds of—Criminal Procedure Code (Act V of 1898), s. 293—Mere local observation, if, can override necessity of evidence—Note of inspection to be placed on record—Omission, effect of.*

It cannot be said that in all cases, an omission to place on record the results of a local inspection is a fatal error of jurisdiction apart from any prejudice which it may cause to the accused.

Joy Coomar v. *Bundhoo Lal*, 9 C. 363; 12 C. L. R. 490, relied upon.

Where a Magistrate made no note at the time of his local inspection, as he should have done, but embodied the result of his inspection in his judgment delivered four days later and when what he saw must have been fresh in his memory:

Held, that his omission to make a note at the time, though irregular, could not be said to have caused any failure of justice.

There are three kinds of local inspections (1) those authorized or directed by the Criminal Procedure Code and which are governed by the rules and limitations imposed by that Code (2) those which are in the nature of a view by the Jury laid down in section 293 of the Code, and the Magistrates, having the functions of both Judge and Jury in cases decided by them, may view the place in any case, to follow or understand the evidence, and 3) those held by the Magistrates to satisfy themselves on certain disputed points

Mere local observation cannot be allowed to override the necessity for evidence and a case cannot be decided merely on an observation made by the Court locally.

It is not a positive rule of law that a note must be placed on the record on the spot at the time of the local inspection, and if the omission has not prejudiced any party, the irregularity cannot exclude the relevant and important matter—the Magistrate's local inspection.

A Magistrate cannot import into his judgment matters of opinion and inference based on circumstances not on the record. ALIA RAI v. JHINGUR TEWARI, 16 C. W. N. 426; 15 C. L. J. 403 844

Local investigation, *application for—Refusal—Discretion.*

A suit was instituted on April 28th, 1906, the issues were settled on November 21st, and after several adjournments, the case was set down for May 11th, 1907 when an application for a local investigation was for

Local investigation - concld.

the first time made, but was refused. The case was disposed of on August 12th:

Held, that the Court's refusal of the application, as it was filed too late, was not such an arbitrary exercise of discretion as can properly be interfered with on second appeal. RAJENDRA NARAIN SAHA v. ASHUTOSH SANYAL **194**

Lower Burma Land and Revenue Act (II of 1876), ss. 18, 19,—Rr. 51, 52, 68, 69—*Failure to comply with notice of ejectment—Demarcated grazing land — Admission of receipt and disobedience of notice—Prosecution bound to prove illegal encroachment—Application of Rules.*

In a prosecution for failure to comply with a notice of ejectment from land said to form part of demarcated grazing ground, an admission by the accused of the receipt of notice and of his failure to comply with it does not amount to an admission that he has committed an offence, as it does not imply that the accused admits his liability to ejectment. The prosecution must prove not only that the accused was served with a notice and disobeyed it but that he was actually occupying the land in contravention of rules under the Land and Revenue Act.

Rules 51 and 52 only refer to land available for temporary occupation under section 19 of the Act, and do not apply to demarcated grazing grounds.

Rule 69 deals with persons who encroach on grazing grounds. MADAR SAHIB v. EMPEROR, 4 BUR L. T. 259 **388**

——— ——— ——— ———s. 19 **388**

——— ——— ——— ——— rules under,—Rr. 51, 52, 68, 69 **388**

Lunacy, inquiry into **216**

Madras City Municipality Act (III of 1904), ss. 262, 420 *Keeping a pandal without license—"shall be made," meaning of—Absence of proof that accused constructed the building—Acquittal.*

The expression "shall be made," in section 262 of the Madras City Municipality Act, means only 'shall be constructed' and does not mean 'shall be composed of.'

The mere existence of a *pandal*, etc., with inflammable materials does not in the absence of proof that the accused constructed it constitute an offence EMPEROR v. ANDIASAVALOO NAIDOO, (1912) 1 M. W. N. 84 **832**

——— ——— ——— ———s. 420 **832**

Madras Civil Courts Act (III of 1873), s. 14—*Interlocutory order—Revision.*

The High Court has jurisdiction to interfere with interlocutory orders of subordinate Courts. CHALASAMY CHETTY v. CHALASAMY RAMASWAMI **903**

Madras Estates Land Act (I of 1908), Sch. A **71**

Madras Hereditary Village Offices Act (III of 1895)—*Whether applicable to Gadala service, inam—Palanquin bearing service, sale of—Public policy.*

Madras Act III of 1895 does not apply to a Gadala service *inam*.

The sale of a service *inam*, the service consisting of bearing a palanquin of the *zemindar*, is not contrary to public policy. YIMANI SITARAM SASTRULU v. GORA RAMUDU, (1911) 2 M. W. N. 588 **190**

Madras Hereditary Village Offices Act—concld.

——— ——— ——— ——— ——— ———ss. 3, 21—*Claim to the emoluments of the office of village carpenter—Proprietary estate—Jurisdiction of Civil Courts.*

Civil Courts have no jurisdiction to entertain claims to emoluments of the office of village carpenter in a proprietary estate. Such offices are governed by section 3 clause (4) of Act III of 1895 MUTAYALA PAPAYYA v. KOSURI MORAMALLU, 11 M. L. T. 11; (1912) 1 M. W. N. 7; 22 M. L. J. 156 **322**

——— ——— ——— ———s 21 **322**

Madras Rent Recovery Act (VIII of 1865), ss. 10, 12, 41, 49, 70 - *Ejection of tenant by illegal order of Revenue Court—Suit for possession and damages under section 12—Suit for damages alone maintainable—'Proceedings,' meaning of.*

A *ryot* who was ejected from his land by an alleged illegal order of a Revenue Court passed under section 10 of Madras Act VIII of 1865, sued the landlord for possession and for damages under section 12 of the Act:

Held, that the suit for possession was not maintainable, but that the suit for damages was.

The expression proceedings in section 49 of the Act is not restricted to proceedings taken by a public officer or Court POLINA ACHANNA v. MADIPATI VENKATARAMANA, (1911) 2 M. W. N 585; 10 M. L. T. 542; 22 M. L. J. 127, **175**

——— ——— ——— ——— ss. 12, 41, 49, 70 **175**

Maintenance, *See* CRIMINAL PROCEDURE CODE, s 488; HINDU LAW—WIDOW.

——— ——— ——— allotment for *tawazhi*—Partibility—Construction of *karar* **791**

——— ——— ——— Kunjpora State—Right of junior members **695**

——— ——— ——— Mopla wife **300**

——— ——— ——— grant—*Grant to two ladies and half the amount to son of one after death of both ladies—Construction—Survivorship—Succession Certificate Act (VII of 1889), s. 4—Grant silent as to interest—Interest whether may be decreed.*

K. executed an *ekrarnamah* in favour of two ladies *R.* and *P.* providing that they were to receive Rs. 650 as maintenance, and that after the death of both, one-half of the amount was to be continued as maintenance to the son of *P.* should she have a son:

Held, upon a construction of the document that the grant was to the two ladies as if they constituted one grantee with right of survivorship *inter se*, that so long as the two ladies lived they would be jointly entitled to Rs. 650 and upon the death of either, the other as survivor would be entitled to the whole sum of Rs. 650, and that upon the death of both, the allowance would be reduced, namely, Rs. 325 would be continued in favour of the son of *P.* if any:

Held, further, that on the death of *P.* the sum which had occurred due to her would be treated as property in respect whereof the survivor would be entitled to succeed by survivorship and not by inheritance, and that, therefore, no succession certificate was necessary to be taken out by the survivor in order to entitle her to a decree.

Maintenance Grant—concld.

Beejraj v. *Bhyropersaid*, 23 C. 912, referred to.

Held, also, that, although the *ekrarnamah* does not provide for payment of interest upon default, it is open to the Court to award interest in the shape of damages for unlawful detention of money MATHURA PRASHAD *v.* RUKMINI KOER **148**

Malabar Law—*Temple—Uraima of Karnavan of a tarwad—Renouncement of* Karnavanship—*Renewal of lease*—Bona fides.

When the *Karnavan* of a tarwad is as such the Uralan of a Devasom, and he renounces his *Karnavanship* he ceases to be the Uralan also. The Uraimaship is incident to the *Karnavanship* and unless the Uraimaship is expressly reserved in such cases it passes to the next *Karnavan*.

A renewal of a lease of Devasom properties is not binding on the Devasom if it is not granted *bona fide* in the usual course of management. KARIPPALA *v.* MUCHAI MANAKAL, 10 M. L. T. 526 **233**

Malice—Wrongful attachment—Malice not necessary to be proved **799**

Malik Qabza—Powers over houses and site occupied **405**

Marriage. *See* LEGITIMATE.

——— Second marriage by Christian within 6 months—Decree nisi **958**

Marumakkatayam Law—Marriage gifts—Effect of death or divorce of the wife **236**

——— Moplas—Maintenance **300**

Master and Servant—Act done beyond scope of duty **101**

——— Ferry contractor's servant—Levying of excessive toll **780**

——— Contract of service—Specific performance **868**

——— Servant acting outside the scope of his authority—Liability of master—Secretary of State for India—Liability for illegal removal by Railway servant **237**

——— *Neglect by servant in common employment—Liability of Master—Duty of Master to employ competent servant and use fit machinery.*

In India a servant has no cause of action against his master for the neglect of another servant in the common employment of the same master and this notwithstanding the fact that the nature of the employment of the servant suffering the injury and the servant whose neglect causes the damage is very dissimilar. It is the duty of the master, however, to employ competent servants and to provide proper appliances for the carrying out of the work. BALANCHETT *v.* SECRETARY OF STATE, 9 A. L. J. 173 **417**

——— *Tort by Government servant—No cause of action against Government.*

Where a tortious act is committed by a servant of Government, owing to carelessness, there is no cause of action against the Government. RAMASAWMI AIYENGAR *v.* MUTHUSAWMI AIYER, (1912) 1 M. W. N. 42 **799**

Merger—Mortgage—Subsequent purchase—Intention to keep the mortgage alive **619**

——— Novation of contract—mortgage-deed executed in consideration of previous bond—Deed not registered—Waiver—Right to sue on previous bond **858**

Minor. *See* GUARDIANS AND WARDS ACT.

———. *See* MUHAMMADAN LAW—GUARDIAN **976**

——— Guardian—Buddhist Law **373**

——— Specific performance—Contract on behalf of minor—Minor's benefit **673**

——— Suit against—Guardian *ad litem* confessing judgment—Subsequent suit for possession by minor not barred—Inquiry into consideration and necessity—Negligence of guardian **20**

——— *Contract—Misrepresentation as to age—Burden of proof—Estoppel.*

In a suit brought on a promissory-note, the defendant pleaded that he was a minor at the date of the execution of the note:

Held, that the burden of proving that the contract was a valid one and not void *ab initio* lay upon the plaintiff.

The plaintiff should have proved that the defendant was not a minor at the time of execution.

A minor is not estopped from pleading infancy by reason of the fact that he had been guilty of fraudulent misrepresentation regarding his age. KANHAYA LAL *v.* GIRDHARI LAL, 9 A. L. J. 103 **956**

——— *Guardian or Manager of minor—Contract for purchase of immoveable property—Specific performance—Mutuality, want of—Powers of minor's Manager and of his guardian.*

It is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property. And, as the minor is not bound by the contract there is no mutuality and the minor cannot obtain specific performance of the contract on attaining majority.

Quære—Whether there is any difference between the position and powers of a manager and those of a guardian of a minor. MIR SARWARJAN *v.* FAKHRUDDIN MAHOMED, 16 C. W. N. 74; (1912) 1 M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 14 Bom L. R. 5; 39 C. 232; 21 M. L. J. 1156 **331 P. C.**

——— *Guardian—No one to be appointed guardian without his consent—Proposal of guardian—No consent to act—Whether competent to Court to appoint him guardian—Married woman, if could be appointed guardian* ad litem—*Effect of appointment—Civil Procedure Code (Act XIV of 1882), s. 457—Civil Procedure Code (Act V of 1908), O. XXXII, r. 4 (3).*

No person can be appointed to act as guardian *ad litem* of an infant, without his consent.

Jadow v. *Chhagon*, 5 B. 306, relied upon.

Therefore, where the mother of a minor was proposed as guardian *ad litem* but she never consented to act as such, it is not competent to the Court to appoint her guardian *ad litem* of her minor son.

Where a married woman is appointed guardian *ad litem* for an infant defendant in contravention of the provisions of section 457 of the Code of 1882, he must be taken to have not been represented

Minor—concld.

for the purposes of the suit: in fact, he is in the same position as if he was not made a party to the suit at all. The contravention of the statute is not merely an irregularity, but renders the proceedings a nullity in so far as the infant is concerned. NARSINGH NARAIN v. JAHI MISTRY, 15 C. L. J 3 **414**

Mischief—Unlawful assembly—Intention—Making ditch through Railway—Motive—Letting water run off fields of accused **826**

Misdirection. *See* JURY TRIAL.

——— *Trial by jury—Right of private defence, when commences—Trespassers carrying away crop—Police Station at distance of nine miles—Rulings cited to jury.*

The right of private defence of property commences when reasonable apprehension of danger to the property commences; and if persons have begun to cut and carry away one's crop, it cannot be said that he is bound to go nine miles to fetch the Police. It was, therefore, misdirection on the part of the Judge to leave it to the jury to say whether the fact that the *thanah* was only nine miles distant from the place of occurrence, did not take away the right of private defence. The same consideration applies to the remedies in the Civil Court if the Judge refers to them.

No rulings or authorities are even to be cited by the Judge to the jury, nor are they to be asked to differentiate or form any opinion whatever on any authorities. Such procedure constitutes misdirection. MEHER SARDAR v. EMPEROR, 16 C. W. N. 46 **218**

——— **to Jury**—Absence of evidence that accused caused grievous hurt—Hurt caused by some of the robbers—Direction to convict **282**

Misjoinder of causes of action—*Suit before new Civil Procedure Code—Second appeal after new Code—Powers of Appellate Court—Civil Procedure Code (Act XIV of 1882), s 578—Civil Procedure Code (Act V of 1908), s. 99—Second appeal—Interference on the ground of misjoinder—Power of Appellate Court—Practice—Plaintiff to get relief on his own right.*

The High Court will not interfere with the judgment of a lower Court on the ground that there has been a misjoinder of causes of action

Section 99 of the Civil Procedure Code (Act V of 1908) regulates the procedure of an Appellate Court and applies to all appeals heard after the Act came into force, although at the time of the institution of the original suit the old Civil Procedure Code was in force which contained no provision corresponding to section 99.

Where an Appellate Court overruled a plea of misjoinder of causes of action and passed a decree on the merits of the case: it was *held* that the Court of second appeal should not reverse that decision on the ground of misjoinder. An Appellate Court has to try the suit and has the same functions and the same powers as the Court of first instance subject to any limitation expressly imposed by the Legislature.

No relief ought to be granted to a plaintiff except as to his own rights. TEJ MAL v. JAGAPPILLA PAPAYAMMA, 11 M. L. T. 25; (1912) 1 M. W. N. 50; 22 M. L. J. 225 **788**

Mortgage. *See* INTEREST **963**

——— by way of conditional sale—Oral agreement converting mortgage by conditional sale into an usufructuary mortgage **813**

——— Consideration, part-payment of—Suit for foreclosure, maintainability of—Contract and conveyance, difference between **573**

——— by co-tenants—Subsequent surrender by heirs of one tenant—Mortgage with consent of one landlord—Suit by both landlords to eject mortgagee—Surrender, effect of **982**

——— by father—Suit on the mortgage—Sale of property—Sons not made party—Son's right to redeem subsequent to auction sale **951**

——— Foreclosure. *See* REGULATION XVII OF 1806, s. 7.

——— Mortgagor leaving a portion of money for payment to previous mortgagee—Non-payment to previous mortgagee—"Reasonable time" how to be determined—Incomplete mortgage—Demand—Acquiescence—Payment of interest **559**

——— Personal liability of mortgagor **304**

——— *Adverse possession—Mutation as owner, effect of—Sale of equity of redemption—Registration—Limitation Act (IX of 1908), Sch. I, Art, 144—Registration Act (III of 1877), s. 17.*

A person entering into possession of land as a mortgagee is not at liberty to set up adverse possession against the mortgagor by merely obtaining in his favour mutation of names as owner until he succeeds in proving that he actually purchased the equity of redemption.

Nabab Mir Sayad Alam Khan v. *Yasin Khan*, 17 B. 755, followed.

A deed of sale of immoveable property, which is subject to mortgage, is not compulsorily registrable under section 17 of the Registration Act if the sale consideration excluding the mortgage-money is less than Rs. 100. LEHNA SINGH, v. SANTA SINGH, 9 P. W. R. 1912 **852**

——— *Assignment—Suit by assignee—Mistake as to date of mortgage in assignment-deed—Right of plaintiff to prove that suit mortgage was assigned.*

Where a deed assigning a mortgage contains a mistake as to the date of the mortgage-deed, it is open to the assignee, suing on the mortgage to show that what he purchased is the mortgage sued on, and the date mentioned in the assignment-deed is a misdescription NATESA PILLAY v. MUNUSAWMY NAICKEN **313**

——— *Decree for sale not providing successive periods for redemption—Failure to redeem—Prior and puisne mortgagee—Right to bring separate suit—Payment by puisne mortgagee of decree on prior mortgage—Shield as against subsequent incumbrancers—Amount payable.*

Where in a suit for sale on a mortgage, the decree gives the subsequent mortgagees the right to redeem the mortgage on which the suit has been brought, but it does not provide successive periods within which different parties might redeem each other, the decree cannot debar one of the subsequent mortgagees from enforcing his mortgage in a subsequent suit.

Mortgage—contd.

Where one of the subsequent transferees pays off the amount due under the decree, he or his heirs can hold the mortgage on foot of which the decree was obtained as a shield against the other puisne mortgagees.

A transferee who pays off the decree is entitled to claim the amount due under the mortgage on which the decree was obtained and not merely the sum due under the decree. KANHAI LAL *v.* HULAS SINGH, 9 A. L. J. 29 **939**

——— *Equitable mortgage – Deposit of title-deeds of Calcutta and Mofussil properties—One mortgagor having no interest in the Calcutta properties—Jurisdiction of High Court to hear suit—Letters Patent, cl. 12—Transfer of Property Act (IV of 1882), s. 59.*

More than one person deposited the title-deeds of certain Calcutta and *mofussil* properties by way of equitable mortgage. One of them had no interest in the Calcutta properties. A suit was brought in the Calcutta High Court, to enforce the mortgage:

Held, that as the documents were pledged by the authority of all the mortgagors as security for the re-payment of a debt which they jointly incurred, and as part of the property was within the local limits of the jurisdiction of the High Court, it was not relevant to inquire what interest each mortgagor has in the properties; the fact that one of them has no interest in the Calcutta properties, would not affect the jurisdiction of the High Court on the mortgage. MATIGARA COAL CO. LTD. *v.* SHRAGERS LTD., 38 C. 824 **429**

——— *executed and attested on certain date, but registered subsequently—Another mortgage of same property registered in the meantime—Priority—Registration Act (III of 1877), ss. 47, 50.*

A mortgage deed was duly executed and attested on January 19th, 1908. Another mortgage of the same property was executed and registered on January 22nd and on January 23rd the first mortgage-deed was registered and on that day the date of the deed was altered by the mortgagor from 19th to the 23rd January:

Held, that, the first mortgage should have priority over the second mortgage. JADUNANDAN PRASAD SINGH *v.* KOER KALYAN SINGH, 15 C. L. J. 61; 16 C. W. N. 612 **653**

——— *executed during pendency of suit in which mortgagor's title to the property is in question*—Lis pendens—Res judicata.

A mortgage, executed during the pendency of a suit in which the mortgagor's title to the property is in question, is subject to the result of the suit. If the suit is decided against the mortgagor, any subsequent suit by the mortgagee on the basis of the mortgage would be barred as *res judicata*. KOLPATI KUAR *v.* RAJDHARI LAL **641**

——— *Interest—Delay in suing—Redemption by co-mortgagor of part of property—Right of mortgagee to allow partial redemption—Jurisdiction of Civil or Revenue Court—Mortgage with possession—Mortgagor undertaking to assist mortgagee in recovering produce, status of.*

Mere delay in suing is no sufficient reason for refusing to allow a mortgagee full interest at the stipulated rate.

Mortgage—contd.

A mortgagee is legally entitled to allow redemption by a co-mortgagor of his share of the mortgaged property only.

Where a mortgage-deed recites that possession is given to the mortgagee and the mortgagor only agrees to assist the mortgagee in recovering produce from the tenants who are in cultivating possession of the mortgaged land a suit for recovery of possession by the mortgagee against the mortgagor is cognizable by a Civil Court.

Buta Shah v. *Kalu*, 46 P. R. 1895 (F. B.), distinguished and explained.

A mere engagement by the mortgagor to assist the mortgagee in recovering produce from tenants does not make him a tenant under the mortgagee, he is at most in some sort an agent for the mortgagee. AHMAD KHAN *v.* RATAN CHAND, 53 P. W. R. 1912 **539**

——— *Personal covenant—Suit on mortgage—Withdrawal of prayer for sale of hypotheca—Second Appeal, value of, is determined by original value of suit.*

A deed of mortgage provided as follows:—"If I fail to pay the amount at the prescribed time I agree to your realising principal and interest . . . . by causing sale of my *jenmam* and all other rights in the properties hypothecated and to pay the deficit, if any, in person." The mortgagee sued on the document and in the course of the trial withdrew the prayer for sale:

Held, (1) that the plaintiff was not entitled to a personal decree for the amount sued for:

(2) that a second appeal lay to the High Court, notwithstanding the withdrawal of the prayer for sale, as the question of whether a second appeal lies is determined by the nature of the suit as originally framed. CHERIYONNI *v.* NHERA POYILE, (1911) 2 M. W. N. 587; 10 M. L. T. 528; 22 M. L. J. 47 **174**

——— *Prior and puisne mortgagee—Suit by second mortgagee—Joinder of first mortgagee as party—Decree for sale—Non-reservation of rights of first mortgagee, effect of Whether bars first mortgagee's right to enforce his mortgage.*

A decree in a mortgage suit, brought by a second mortgagee impleading a prior mortgagee as party defendant, which directed the sale of the property without reserving the rights of the prior mortgagee, does not, where the latter's right has been admitted, bar a suit by the prior mortgagee for enforcement of his mortgage right. The decree in such suit does not intend that the sale of property is to be in defeasance of the first mortgagee's rights.

It is not necessary, in a suit by puisne mortgagee that the holders of prior mortgages should be made parties and question relating to their mortgage determined. KATCHALAI MUDALI *v.* KUPPANNA MUDALI, (1912) 1 M. W. N. 41 **182**

——— *Redemption suit—Limitation—Mortgagee alleging transaction to be sale—Mortgagor contending fraud and asserting mortgage—Donees from mortgagee—Limitation Act (IX of 1908), Sch. I, Arts. 91, 134 142, 148—Evidence Act (I of 1872), s. 92.*

A suit for redemption against donees from the mortgagee is not governed by Article 134 of the Limitation Act as this Article does not apply to persons who are not transferees for valuable consideration.

Mortgage—contd.

In a suit for redemption of mortgage, the mortgagee pleaded that the property had been sold to him by a registered deed-sale and not mortgaged The contention on behalf of the plaintiff was that though the deed was executed by him it was a fraudulent one inasmuch as he had been induced to sign it by a false representation that it was a mortgage-deed:

Held, that the suit was governed by Article 148 of the Limitation Act and that the plaintiff was entitled to prove the fraud and the fact that the transaction was a mortgage.

Held, further, that Article 91 or 142 of the Limitation Act was inapplicable to the case. NGA PAW v. NGA LU GALE, 4 BUR L. T. 265 **375**

——— ——*Redemption-suit Suit to redeem one particular mortgage—Decree for redemption of later mortgage—Cause of action different—Prayer for "any other relief"—Construction of document—Entry settling accounts and recording amount due under mortgage.*

In a suit for redemption it is imperative that plaintiff should say, in the event of there being more mortgages than one, which mortgage he is seeking to redeem.

When a plaintiff sues to redeem a certain mortgage, that particular mortgage is his cause of action, and to shift the attack to a later mortgage is to change the suit into one based on a different cause of action.

A prayer "for any other relief" may well cover any other relief arising out of the same cause of action but does not cover a relief arising from a different cause of action.

An entry relating to a mortgage already existing, in which accounts are settled and a sum is entered as the amount due under the mortgage, does not constitute a new mortgage. KARAM CHAND v. SULTAN, 72 P. W. R. 1912 **650**

——— ——*Redemption, suit for—Power of sale—Duties of mortgagee and purchaser—Inadequacy of price.*

In pursuance of power of sale in a mortgage-deed the property was sold by the mortgagee. In a suit for redemption against the mortgagee and the purchaser the mortgagor alleged that the sale was very disadvantageous but gave no hint to the defendants that they would be called upon at the trial to meet a charge of either corruption or collusion or to meet the case that the price was so low as in itself to be evidence of fraud:

Held, that under these circumstances, that failure of the defendants to produce counter-evidence as to the value of the property did not justify a finding of the lower Court in effect that the sale was fraudulent.

A mortgagee is not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his mortgage-debt. If he exercises it *bona fide* for that purpose, without corruption or collusion with the purchaser, the Court will not interfere, even though the sale be very disadvantageous; unless indeed, the price is so low as in itself to be evidence of fraud. HADDINGTON ISLAND QUARRY CO. LD v. ALDEN WESLEY, 10 M. L. T. 554 **261 P. C.**

——— ——*Registered deed—Subsequent transferee—Notice.*

A registered mortgage by a person entitled to

Mortgage—contd.

pose of immoveable property binds the property as against subsequent transferees from the mortgagor. It is not necessary for the mortgagee to prove that the subsequent transferees had express notice of his mortgage.

Questions of notice arise only when there is a conflict between a registered deed and an unregistered deed or oral sale, or when the transferor is not entitled to dispose of the property. SHRIKISON v. CHATARSINGH, 8 N. L. R. 18 **904**

——— ——*Sale of equity of redemption—Undertaking by purchaser to pay off mortgage—Personal liability to pay—Balance legally recoverable—Transfer of Property Act (IV of 1882), s 90.*

The purchaser of an equity of redemption is not personally bound to pay the mortgage-debt.

A mortgagor sold his equity of redemption and left a part of the purchase-money with the purchaser to pay off the mortgage. The purchaser did not do so, and the mortgagee sued on the mortgage and sold the mortgaged property which was not sufficient to pay off the decretal amount. He then sued, under section 90 of the Transfer of Property Act, for the recovery of the balance for the purchaser:

Held, that the mortgagee had no right to avail himself of the undertaking given by the purchaser to his vendor as the mortgagee was no party to the sale; and that the purchaser not having entered into any contract with the mortgagee, was not a person from whom "the balance was legally recoverable" within the meaning of section 90. JAMNA DAS v. RAM AUTAR, 16 C. W. N. 97; 11 M. L. T. 6; 9 A. L. J. 37; (1912) 1 M. W. N. 32; 15 C. L. J. 68; 14 BOM. L. R. 1; 21 M. L. J. 1158; 34 A. 63 **304 P. C.**

——— ——*Subsequent purchase—Merger—Intention to keep the mortgage alive.*

In considering the question whether an incumbrance should be deemed to continue to subsist on the ground that the continuance of it was for the benefit of the person who has acquired the property, the point of time to be regarded is the date of the acquisition of the property. If at the date of the acquisition it was the intention of the parties to keep the incumbrance alive it must subsist. JOGAL KISHORE v. RAM NARAIN, 9 A. L. J. 226 **619**

——— ——*Suit for possession by mortgagee—Decree, form of—Lien to be left for determination in redemption suit—Mortgagor leaving a portion of money for payment to previous mortgagee—Non-payment to previous mortgagee—"Reasonable time" how to be determined—Incomplete mortgage—Demand—Acquiescence—Payment of interest—Mortgagee's right to possession on default in payment of interest—Mortgagor pleading payment within twelve years—Limitation.*

In a suit by a mortgagee for possession against his mortgagor, if the right of the mortgagee to possession is established, it is sufficient to pass a decree for possession *simpliciter*, the matter of the amount of the lien being left to be decided upon redemption.

On 25th June, 1891, *A* mortgaged certain land to *B*. for Rs. 350. Out of the consideration, a sum of Rs. 147-12-0 was retained by *B*. for payment to a previous mortgagee *C*. who was in possession of a part of the land. Two years elapsed without *B*,

Mortgage—contd.

paying off *C*. On 18th July 1893, *A*. again mortgaged the same land to *B* for Rs. 600, Rs. 147-12-0 being as before left for payment to *C*. The essential conditions of both the mortgage-deeds were that *A*. was to hold possession and pay interest at the stipulated rate, *B* was to pay off *C*. and set free the land with him: on default of payment of interest in any one year, *B*. was to be entitled to possession. It was not till 1904 that *B*. paid off *C*. and so secured for *A*. the possession of the whole land.

In 1907, *B*. sued for possession on the allegation that interest for the first six years on Rs. 450 was paid by *A*. but nothing was paid thereafter.

A. pleaded that the suit must fail because of the non-payment of *C*.'s debt within a reasonable time and further alleged that he had paid interest in full on Rs. 600 to date of suit:

Held, (1) that the suit was within time as *A*. himself asserted payment of interest within 12 years before date of suit;

(2) that by regular payment of interest *A*. acquiesced in the continued possession by *C*. of a portion of the land; that *A*. acted as if the delay in paying *C*. off was not unreasonable and made *B*. understand that he did not intend to raise any objection on this score;

(3) that *A*. could not plead that the mortgage was incomplete and ineffectual by reason of non-payment of *C*.'s debt within a reasonable time.

In deciding what is "reasonable time" for payment of the unpaid portion of mortgage-money the wishes and interest of the mortgagor are an important factor—in most cases they are the decisive factor.

The absence of a demand by the mortgagor upon the mortgagee for redemption of the previous mortgagee would not prevent the mortgagee from losing the benefit of his mortgage by reason of the non-payment of the debt due to the previous mortgagee. KIMAN v. SULTANI MAL, 82 P. W. R. 1912 **559**

——— ——— *Usufructuary mortgage – Liability of mortgagor and mortgagee—Part of mortgaged property taken out of mortgagee's possession—Mortgagee remaining in possession of the rest for a long time, effect of—Interest—Redemption.*

A. executed an usufructuary mortgage in favour of *B*. in 1880. At the time of the mortgage a suit was pending in respect of a prior mortgage of 1874 by virtue of which a portion of the mortgaged property passed out of *B*.'s hand in 1886. *B*. remained in possession of the remaining property for over 24 years without taking any steps in respect of the portion which had gone out of his possession under the prior mortgage. In 1910 the mortgagor brought a suit for redemption:

Held, (1) that, under the circumstances, mortgagee was not entitled to claim the loss of interest which he had sustained owing to a part of the mortgaged property having gone out of his possession in 1886 under the prior mortgage;

(2) that the mortgagor was not entitled to claim a proportionate reduction of the principal money, because the mortgagee was not in a position to deliver to him the entire mortgaged property at the time of redemption. BIHARI LAL *v* DURGA DAS **156**

——— ——— *Usufructuary mortgagee—Suit for money—Transfer of Property Act (IV of 1882), ss. 67, 68.*

Mortgage—contd.

The remedy of a usufructuary mortgagee to whom possession had not been given, is to sue for possession under his contract, or to bring, under section 68 of the Transfer of Property Act, a suit for money He cannot turn his usufructuary mortgage into a simple mortgage and sue for sale of the property mortgaged. LAZARANNESSA BIBI v. MAHOMED JAFFAR **336**

——— ——— **decree** — *Execution — Purchase of judgment-debtor's mortgage-decree—Application to execute latter decree—Civil Procedure Code (Act V of 1908), O. XXI, r. 16—Sale certificate, construction of.*

C. obtained a mortgage-decree against *N*. and in execution thereof became purchaser of certain other mortgage decrees obtained by *N*: *Held*, that the whole interest of *N*. in the decrees obtained by him had passed to *C*. by operation of law and that, therefore, *C*. was entitled to apply as transferee under Order XXI, rule 16, Civil Procedure Code, for the execution of those decrees.

Per Spencer, J. -Where in a sale certificate relating to several plots of land, instead of the boundaries of each plot being stated, a general description of the whole area sold is entered, the *paimash* and survey numbers of the plots must be taken as a far more definite specification of what was sold than the boundaries. KUPPUSAMI IYENGAR *v* SUBBARAYA ROWTHA MINDA NAINAR, 11 M. L. T. 15; (1912) 1 M. W. N. 1; 22 M. L. J. 161 **324**

——— ——— ——— *Execution—Purchaser — Failure to get possession—Suit to recover possession—Obstruction by person interested not made party in mortgage-decree—Who is to retain possession.*

The purchaser at a sale in execution of a mortgage-decree, if he fails to get possession or is dispossessed, is entitled to recover possession by suit from a person interested but excluded from the mortgage-action, subject to that person's right to redeem. SALIMUDDI v. UZIR MAHOMED **299**

——— ——— ——— *Recital as to an antecedent debt in the deed, weight of—Evidence.*

Generally speaking, the recital of an antecedent debt in a mortgage-deed is not of much weight by itself. BADRI DAS v. RAM RIKH **142**

——— ——— **Redemption.** *See* INTEREST **963**

——— ——— ——— ——— ——— ——— *See* MORTGAGE—USUFRUCTUARY MORTGAGE **156**

——— ——— **or Sale**—Construction of deed—Criteria **667**

——— ——— **Suit**—Parties. *See* CIVIL PROCEDURE CODE, 1908, O. XXXIV **234**

——— ——— ——— ——— Sons of mortgagor not impleaded within limitation—Dismissal of suit even against the mortgagor **38**

——— ——— ——— *Mortgagor only made defendant—Property sold previously to another person—Parties—Failure to implead—Purchaser—Mortgage-decree inoperative against purchaser—Purchaser appearing as witness in suit—Condonation—Estoppel.*

Where a mortgagee is aware or has reason to believe, at the time of instituting a suit on his mortgage, that

Mortgage—concld.

the property has already been sold to another person, and in spite of this knowledge or belief, fails to implead the purchaser as a party to the suit, the mortgage-decree obtained against the mortgagor is inoperative as against the purchaser of the mortgaged property. The purchaser has a right to a declaration that the decree is inoperative against him

The mere fact that the purchaser appeared as a witness in the mortgage suit, when he was not aware of the true nature of the suit, does not constitute a condonation by the purchaser of the omission to implead him. NGA PAW E v. NGA SIN, U. B. R. (1911) I, 92 **874**

Moveable property—Debt secured by hypothecation bond **91**

——— ——— ——— not governed by the doctrine of *lis pendens* **849**

Muhammadan Law—inapplicable to trusts **882**

——— ——— ——— **Adoption**—*Inheritance.*

Under the general Muhammadan Law an adoption is not allowed; an adoption, if made in fact by a Muhammadan, carries with it no right of inheritance. MUHAMMAD UMAR KHAN v. MUHAMMAD NIAZ-UD-DIN KHAN, 6 P. W. R. 1912; (1912) 1 M. W. N. 77; 11 M. L. T. 76; 9 A. L. J. 137; 15 C. L. J. 172; 12 P. L. R. 1912; 22 M. L. J. 240; 14 BOM. L. R. 182; 16 C. W. N. 458; 39 C. 418 **344 P. C.**

——— ——— ——— **Dower**—*Shia—Sunni* Law—Minimum dower **882**

——— ——— ——— *Conveyance by husband to wife for dower Condition that property shall remain in husband's possession during his lifetime—Whether conveyance void.*

A perfectly honest sale deed was executed in good faith by a Muhammadan husband to his wife on account of her dower, with this condition that during the life-time of the husband, the land conveyed should remain in his *khas* possession and that the wife would not be entitled to alienate the property:

Held, that, under the Muhammadan Law, a stipulation of this kind did not render the whole sale invalid, although the stipulation itself might be invalid MOULA BUX v. AJAHAR MOLLA **689**

——— ——— ——— *No dower named at marriage—Excessive amount named in earnest —Excessive amount named for "show"—"Proper dower" tests for determining.*

Where no dower is proved to have been named at marriage, "proper dower" according to Mahammadan Law should be allowed.

Where a dower, excessive in respect of the means of the husband, was promised in earnest, it cannot be reduced in the absence of custom allowing reduction.

Where an excessive dower was promised but only for "show," "proper dower" should be allowed, and in estimating the amount of such dower the status of the husband should be taken into account.

Obiter—"Proper dower" varies according to social position of the woman's family, *the wealth of her husband*, her own personal qualifications, the circumstances of the time and the conditions of society surrounding her. SHADI KHAN v. BEEBEE UMDAN BEGAM, 34 P. W. R. 1912 **73**

Muhammadan Law—contd.

——— ——— ——— **Gift**—*Donor, ownership of —Gift, validity of—Gift invalid if right in abeyance.*

In the case of a Muhammadan, subject to the *hanafi* Law, present ownership on the part of a donor is an essential condition precedent to a valid gift by him. Such a person cannot make a valid gift of a right which at the time is in abeyance. NAZIR AHMAD v. RAGHUBAR DAYAL, 15 O. C. 7 **986**

——— ——— ——— *Validity—Delivery of one of two properties given—Effect of gift—Whether whole gift void.*

If a gift is made of two distinct properties and is perfected with regard to one of them by delivery, and not with regard to the other, the gift is not void in its entirety, but takes effect as to the property which has been duly delivered. MAHOMED FARID v. MAHOMED ABDUL GAFUR, 15 C. L. J. 14 **434**

——— ——— ——— **Guardian**—*Guardian of minor—Brother whether guardian—Unauthorised guardian*—De facto *guardian—Power to sell minor's property—Limitation Act (XV of 1877, Sch. II, Arts. 44, 144—Suit to set aside sale by guardian—Sale by unauthorised persons.*

According to Muhammadan Law, in the absence of duly appointed testamentary guardians, the care of a minor's property would devolve first on the father and his executor, next on the paternal grand father and his executor, and failing these, the right of nominating a guardian would vest in the ruling power and its administration. The brothers of a minor have no right whatever to act except under the authority of an appointment by the Court

The situation of an unauthorised guardian is not bettered by describing him as a "*de facto*" guardian. He may, by his *de facto* guardianship, assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it.

Article 44 of the Limitation Act of 1877 prescribes a period of 3 years within which a ward who has attained majority may set aside a sale made by his guardian, the time running from the date of the ward's majority. But this provision has no application to a case where the sale is effected, not by a guardian, but by a wholly unauthorised person. In such a case, a suit for possession of the property by the ward would be governed by Article 144. MATA DIN v. AHMAD ALI, 16 C. W. N. 338; 11 M. L. T. 145; (1912); 1 M. W. N. 183; 9 A. L. J. 215; 15 C. L. J. 270; 14 BOM. L. R. 192; 15 O. C. 49 **976 P. C.**

——— ——— ——— **Marriage**—*Marriage before* Iddat *null and void.*

The marriage of a Muhammadan woman before expiry of the period of *Iddat* is null and void. ISA v. RANON, 1 P. W. R. 1912 CR.; 83 P. L. R. 1912 **824**

——— ——— ——— **(Shia)**—*Husband and wife—Restitution of conjugal rights, suit for—Cruelty as defence—Jurisdiction of Civil Court—Legal cruelty, criterion of—Husband charging wife with murder and prostitution.*

The Civil Courts of India have succeeded to the duties which under the Muhammadan Law were discharged by the *Kazi* or at his instance by the umpires, and hence the Courts have the same jurisdiction.

Muhammadan Law—concld.

Cruelty on the part of a husband is a good and valid defence to a suit by him for restitution of conjugal rights, even where the parties are Muhammadan *Shias*.

The plea of cruelty would be allowed only in a case where the evidence establishes legal cruelty such as is demanded by the English Law in a suit for judicial separation There must be actual violence of such a character as to endanger personal health or safety, or there must be a reasonable apprehension of it.

A husband transferred some of his wife's property during her minority to his brothers. On attaining majority, the wife obtained a decree for possession of the property against her husband and his brothers. In execution of her decree for costs, she got a warrant of arrest issued against her husband.

The brothers of her husband raided her house and beat her. The husband was living with his brothers; and he and his brothers were heirs to his wife. The husband in a letter charged his wife with the murder of her child and for prostitution In a suit by the husband for restitution of conjugal rights with his wife:

Held, that there was ground for apprehension of danger to the health and safety of the wife;

(2) that the object of the husband was not to resume happy connubial relations but to get his wife n his power with no friendly motive to her;

(3) that the facts established legal cruelty on the part of the husband and consequently, his suit for estitution of conjugal right must be dismissed. AFAR HUSAIN *v.* HUSAN ARA BEGAM **609**

——————— **Marriage**—*Marumakkatayam Law—Marriage gifts—Effect of death or divorce of the wife.*

Among the Marumakkatayam Moplahs of Malabar, gifts are often made to the husband of a girl given in marriage, as a contribution for the maintenance of herself and her children and on her death or divorce, such gift becomes void.

Under the Muhammadan Law, the members of the natural family are under no obligation to maintain a girl after marriage even if she is divorced. And the above rule of Marumakkatayam Law as to such gifts would not apply when the parties are governed by the Muhammadan Law. KOVUMMAL PACKRICHI *v.* KOVUMMAL KEENHACHA, (1911) 2 M. W. N. 538 **236**

——————— **Moplahs** *following* Marumakkatayam *system*—Moplah *wife claiming maintenance under Muhammadan Law bound to live with her husband, if so required, notwithstanding* Marumakkatayam *custom to the contrary.*

Though the usual practice amongst the Moplahs of North Malabar following the Marumakkatayam Law is for a married woman to live in her tarwad house, yet, as the wife's right to maintenance is derived by her from the Muhammadan Law, she must take it subject to the obligation under that law to live with the husband in his own house if he requires her to do so. VELLUVAKANDI KUNHI PATHUMMA *v.* PONNANKI MOOSSAN MAMMAD, (1912) 1 M. W. N. 11 **300**

——————— **Succession**—Custom—Kunjpura State **695**

Municipality—*Permanent lessee under Municipality—Exemption from payment of rates—Contract—Onus of proof.*

A permanent lessee under a Municipality is not as such exempted from payment of Municipal rates. The case must be governed by the contract. If there is no provision in the lease for any exemption, the lessee must pay the rates which he is under a statutory obligation to pay.

The burden is upon the lessee to establish an exemption from the statute. DEBI DAS *v.* CHAIRMAN OF MOTIHARI MUNICIPALITY **183**

Murder—Death of the person killed need not be intended **833**

——————Culpable homicide not amounting to murder—Injury of a vital character—Absence of intention to cause death—Offence **817**

Mutation proceedings, *effect of.*

The Revenue Courts in mutation proceedings look to possession in the first instance as a guide and a mutation order does not preclude title being set up by the losing party. BHAGTU *v.* BUA DITTA, 26 P. W. R. 1912; 34 P. L. R. 1912 **957**

Nutu Churi, whether an obscene book **993**

Negative evidence, weight of **678**

Negotiable Instruments Act (XXVI of 1881), s. 5 **330**

——————— **ss. 30, 93, 105**—Hundi—*Liability of drawer—Notice of dishonour—Oral demand after maturity.*

The drawer of a *hundi* is not liable if due notice of dishonour is not given him.

The fact that the payee of a *hundi* met the drawer 1½ or 2 months after its maturity and demanded payment is not a sufficient compliance with the provisions of sections 93 and 106 of the Negotiable Instruments Act. SOBHOMAL *v.* POHUMAL, 5 S. L. R. 168 **255**

——————— **s. 93** **255**

——————— **s. 106** **255**

Notice. *See* RAILWAYS ACT.

————to quit. *See* TRANSFER OF PROPERTY ACT, s. 106.

————Ejectment suit—Denial of landlord's title **323**

————Mortgage by registered deed—Subsequent transferee **904**

————Suit against a public officer for act done in bad faith **721**

————Transfer of criminal case **224**

Novation of contract—Mortgage-deed executed in consideration of previous bonds—Deed not registered—Merger—Waiver—Right to sue on previous bonds **858**

Nuisance. *See* CRIMINAL PROCEDURE CODE, s. 103.

Oaths Act (X of 1873), ss.8, 9, 10, 11—*Criminal trial.*

The provisions of sections 8-11 of the Oaths Act do not apply to criminal proceedings. IMPERATOR *v. Haji* ALU, 5 S. L. R. 129 **215**

——————**ss. 9, 10, 11** **215**

Obscene book. *See* PENAL CODE, s. 292.

Occupancy-holding—*Mortgage by co-tenants—Subsequent surrender by heirs of one tenant—Mortgage with consent of one landlord—Suit by both landlords to eject mortgagee—Surrender, effect of—Central Provinces Tenancy Act (IX of 1883), ss. 41, 43 (2)—Limitation Act (XV of 1877), Sch. II. Art. 91.*

A., B., C. Mortgaged their occupancy-holding to *D.* in 1896 with the consent of *E.*, one of the two co-sharers in the village. *D.* obtained a decree for sale on the basis of his mortgage and purchased the holding at a Court-sale in execution of the decree. Subsequently, *A., B.* and *C.* died two years after his father's death, *F.*, the minor son of *A.*, left the village with his mother in 1900 or 1901 *F.*'s title was not denied prior to his departure by the landlord or by his co-tenants. On 16th March 1903, *C.*'s heirs alone surrendered the holding. In February 1905, *D.* obtained physical possession of the land and in the following August, the *lambardar* sued to eject him on the strength of the surrender. *E.* was joined as a co-plaintiff after trial of a preliminary issue:

Held, (1) that the consent of *E.* precluded the two landlords from acting together to avoid the transaction.

(2) That the surrender was bad so far as *F.* was concerned.

Obiter dictum—It is not necessary for a landlord, before he can sue for the ejectment of a tenant, to have a mortgage by the tenant declared void within the period prescribed by Article 91 of the Limitation Act. BAPU *v.* TEMSA, 8 N. L. R. 29 **982**

Opium Act (I of 1878), s. 9 **394**

——— **s. 9 (c)**—*Possession—Opium found in accused's house.*

Possession to be punishable must be possession with knowledge and assent.

Where opium is found in an accused person's house, it must be shown that he was in possession of it, before he can be called upon to account for it under section 10 of the Opium Act, in other words, that it was in his house with his knowledge and assent. NGA PU *v.* EMPEROR, 4 BUR. L. T. 270 **778**

Oudh Laws Act (XVIII of 1876, s. 3 (b) **882**

——— **s. 9 (1) and (3)**—*Pre-emption—Sale by under-proprietor—Birt-holder in mahal not a co-sharer—Birt-holder and co-sharer in another mahal members of village community—Determined right by lot.*

An under-proprietor in one of the *mahals* of a perfectly divided village sold some land to a co-sharer in another *mahal*. The plaintiff, a *birt* holder in the *mahal* in which the land sold was situate, sued for pre-emption of the land:

Held, (1) that the plaintiff could not be said to be a co-sharer of the tenure in which the property sold was situate, as the under-proprietary tenure of the vendor was higher than that of a *birt*-holder;

(2) that the pre-emptor and the vendee come under the definition of "members of a village community" given in section 9 (3) of the Oudh Laws Act, and, therefore, the right to purchase the land in suit should be determined by lot. RAM GOPAL *v.* JAGMOHAN SINGH **631**

Oudh Laws Act—concld.

——— **s. 9 cl. (1)**—*Pre-emption—"Sub-division," meaning of.*

The word "sub-division" in section 9, clause 1 of Act XVIII of 1876 has no special technical meaning, nor is it confined to a portion only of a village which is described as *thok* or *patti* in the Revenue Records.

Where separate villages are the component parts of a *mahal*, each village is a "sub-division" of the *mahal* within the meaning of the said section. PANCHAM SINGH *v.* GANGA BAKHSH SINGH **490**

Oudh Rent Act (XXII of 1886), s. 3, cls. (8), (9) **809**

——— **ss. 22, 23, 24, 25, 26, 27, 28** **554**

——— **s. 103 (2)** **432**

Parda-nashin lady—Authority to husband—Power to execute deed of sale, whether includes power to execute argeement for sale—Transferee without notice—Notice to some of transferees, members of joint *Mitakshara* family, whether good—Specific relief, grant of—Discretion of Court **637**

Pardon, *tender of—Approver—Pardon granted by District Magistrate before approver placed on trial—Forfeiture of pardon—Examination in Sessions Court not necessary—Pardon does not affect liability before perjury committed subsequently—Approver's statement on oath signed by him—Statement as witness—Perjury—Sanction to prosecute—Criminal Procedure Code (Act V of 1898), ss. 4 (h), 164, 337 (1), (2) and (4), 339 (2)—"Inquiring into the offence"—"Inquiry"—Proceedings under section 164—Judicial proceedings—Penal Code (Act XLV of 1860), s. 193.*

The words "inquiring into the offence" in section 337 (1) of the Criminal Procedure Code qualify the words "Magistrate of the First Class" and not the words "District Magistrate or Presidency Magistrate."

The "inquiry" referred to in section 337 (1) is not necessarily limited to an inquiry under Chapter XVIII of the Code.

A District Magistrate can legally grant a pardon although he does not himself inquire into the offence.

Pardon may legally be tendered to a person who has not been sent up for trial by the Police or to an accused before he is placed before the Committing Magistrate.

The provisions of section 337 (2) are complied with by the examination of the approver by the Committing Magistrate. The prosecution are not bound to call him in the Sessions Court if they think him an untruthful witness. It is not necessary that the approver should be examined in the Sessions Court before he can be said to have committed breach of the condition on which pardon was granted.

Queen v. *Rana Sami*, 24 M. 321, *Aiagiriswami* v. *Emperor*, 33 M. 514; 5 Ind. Cas 831; 7 M. L. T. 121; (1910) M. W. N. 5, followed.

A pardon connot effect a liability to be tried for perjury committed after the tender of the pardon.

Section 337 (4) only refers to those cases in which the disclosure made by the approver shows that only a minor offence triable by a Magistrate has been committed.

Pardon—concld.

A District Magistrate is competent to record the deposition of the approver on oath although he may have no jurisdiction to try the offence.

The deposition on an oath made by an approver before a District Magistrate, although signed by the approver, is a statement given by him as a witness.

The statement of an approver who has forfeited his pardon may be used as the basis of a charge of perjury against him Section 339 (2) contains no express limitation of the use of the statement to a trial for the original offence.

The proceeding in which the statement of a witness is recorded under section 164 is an investigation directed by law preliminary to the trial and is, therefore, a stage of a judicial proceeding under explanation 2 to section 193 of the Penal Code.

An approver can be prosecuted for perjury for making contradictory statements before the District Magistrate at time of tender of pardon and before the Committing Magistrate. EMPEROR *v.* ANDAL, 5 S. L. R. 174 **273**

Parties—Mortgage suit. *See* CIVIL PROCEDURE CODE, 1908, O. XXXIV **234**

——— ———Bond in favour of managing member of Hindu joint family—Suit on bond **305**

——— ———Hindu family trading firm—Contract with managing members—Right of managing members to sue alone on contract—Other members of firm not necessary parties to suit **873**

——— ———Mortgage suit—Mortgagor only made defendant—Property sold previously to another person **874**

——— ———Probate—Legatee impugning executor's good faith **171**

——— ———Scheme suit—Suit by two worshippers of temple—Petition by other worshippers to be made parties **232**

——— ———Suit for amendment of Settlement record—Whether Government necessary party **184**

——— ———*Limitation—Death of party—One of legal representatives brought on record—No bar by time against bringing other representatives.*

Where one of the representatives of a deceased party to a suit is brought on the record in time, there is no bar by time to bringing in other representatives on the record subsequently. ADUSUPALLI *v.* MARIKRUTHU, 11 M. L. T. 19; (1912) 1 M. W. N. 9; 22 M. L. J. 169 **313**

Partition—Adverse possession—Possession subsequent to partition—Remedy of the person to whom land is allotted **790**

——— ———Construction of *karar*—Allotment for maintenance *Tavazhi*—Partibility—*Wakf* properties **791**

——— ———Co-widows **320**

——— ———,essentials of—Enjoyment of *vrit* by rotation **225**

——— ——— Joint Hindu family—Separation of two branches **50**

——— ———Kunjpura State—Right of partition **695**

Partition—concld.

——— ———Private partition does not affect undivided co-parcenery body **535**

——— ——— *Defective mode of partition—No appeal preferred by persons injured against it—Irregularities—Revision—Power of Financial Commissioner to interfere in revision—Punjab Land Revenue Act (XVII of 1887), ss 17, 110, 117.*

When in a partition case many share-holders were not consulted, the possession of almost all was unreasonably disturbed and several other material irregularities were committed, the proceedings were set aside on revision by the Financial Commissioner. In partition cases it is essential that possession should be maintained as far as possible. BAHAWAL *v.* NURKHAN, 1 P. W. R. 1912 Rev. **815**

——— ———*Plaintiff keeping back property in his possession—Suit not maintainable.*

A suit for partition is not maintainable if the plaintiff keeps back some property in his possession which must have been put into *hotch potch*. MAHBUB BAKHSH *v.* ABDUL RAHMAN, 4 P. W. R. 1912: 84 P. L. R. 1912 **816**

——— ———**suit**—Plaintiff in possession—Claim merely for separation of share—Court-fee payable—*Ad valorem* Court-fee when payable. **185**

——— ———*Jurisdiction — Value — Suits Valuation Act (VII of 1887), s. 8—Court Fees Act (VII of 1870), s. 7 cls. 4 (b) & 5.*

In a suit for partition of lands of which plaintiff is in joint possession, he is entitled to value the suit at his own estimate for purposes of jurisdiction. CHALASAMY RAMIAH *v.* CHALASAMY RAMASWAMI, 11 M. L. T. 155; (1912) 1 M. W. N. 199 **903**

Partnership—*Death of one partner—Dissolution—Continuation of partnership—Contract Act (IX of 1872), s. 253, cl. 10—Account stated or settled—Long acquiescene—Limitation—Account to be taken from commencement unless account settled subsequently—Ordinary items not to be challenged in absence of fraud—Salary of partner when may be charged—Sums over-drawn by partner—Liability to pay interest.*

A partnership was commenced in 1883 between the husband of the plaintiff, and the defendants. The husband of the plaintiff died in 1887. Since his death, the business was conducted on the assumption that the plaintiff was a partner:

Held, that the original partnership must be held to have been continued by common consent, with this difference that the plaintiff re-placed her husband, and this condition of things could be explained only on the hypothesis that the contract between the founders of the partnership was that it was not to be dissolved by the death of any of the partners.

The mere balancing of an account in a book of accounts does not of itself constitute an account-stated, much less does it constitute an account-settled such as the parties would not be entitled to re-open except on special grounds.

But where an account has been rendered and has long been acquiesced in, unless fraud be proved, a Court will not re-open it, although the account may be shown to be erroneous and although no final settlement was ever made.

Partnership—concld.

Clancarty v. *Latouche*, (1810) 1 Ball and B. 420 and *Scott* v. *Milne*, 5 Beav. 215, on Appeal 7 Jur. 709, referred to.

So long as a partnership continues, the statute of limitation does not apply between the partners as to a claim for account; and the time from which the account is to begin in a general account of partnership dealings and transactions, is the commencement of the partnership, unless some account has since that time been settled by the partners, in which case the last settled account will be the point of departure.

Foster v. *Hodgson*, 19 Ves. 183 and *Cook* v. *Collingridge*, Jacob 607; 23 R. R. 155, 767; 1. L. J. Ch. (o. s.) 74, referred to.

Unless fraud is established, the ordinary items relating to purchases and sales in respect of the business are not to be challenged.

In the absence of any agreement to that effect, one partner cannot charge his co-partners with any sums in the shape of salary, commission or otherwise. But where a *parda-nashin* lady is a partner and the responsibility for the conduct of the partnership business is thrown upon the other partners, it is just and equitable that some allowance should be made in favour of the other partners.

Where some of the partners have over-drawn sums of money from the partnership-business and applied them to establish other firms from which they have earned large profits they must, when the partnership accounts are taken, not only account for the money but also pay interest on the same. GOKUL KRISHNA DAS *v.* SHASHI MUKHI DASI, 16 C. W. N. 299; 15 C. L. J. 204 **23**

——— *Partner's authority—Act of one partner when binding on the firm—Acceptance of* hundi—*Transaction not incidental to business of firm—Contract Act (IX of 1872)*, s. 251.

A partner's act binds the firm only if the other partners have in fact authorized or ratified it or if it is done in the course of carrying on the partnership business in the usual way.

The acceptance of a *hundi* by a partner, will, in the absence of express authority, bind the firm only if it is for a transaction *incidental* to the business of the firm.

Bunarsee Doss v. *v. Gholam Hossein*, 13 M. I. A 358; 13 W. R. (P. C.) 29, relied upon.

Where the business of a partnership is buying grain from *zemindars* for re-sale through commission agents and does not include lending money to *zemindars*, the acceptance of a *hundi* by one of the partners for guaranteeing a loan to a *zemindar* would not bind the firm. SOBHOMAL *v.* POHUMAL, 5 S. L. R. 168 **255**

Party—*Non-joinder—Objection that suit bad for want of necessary plaintiff—If can be taken in appeal for first time—Civil Procedure Code (Act V of 1908), O. I, r. 9.*

Where a defendant omits to take exception in the first Court to the frame of a suit on the ground that a necessary party has not been joined as plaintiff, it is not open to him at the appellate stage to take such objection. A Court has power to decide questions in controversy under rule 9 of Order I of the Code of Civil Procedure, in so far as the parties before it are concerned. LAKHI CHOWDHURI *v.* AKLOO JHA, 16 C. W. N. 639 **123**

Patta *for trees given to one person and that for land to another person—Cancellation of* patta *for trees, effect of—Right of land* pattadar *to trees.*

Plaintiff held the *patta* for trees standing on suit land for over 20 years and defendants had the *patta* for the land. Government having cancelled the trees *patta* two years before date of suit, defendants interfered with the enjoyment of the trees by the plaintiff. In a suit by plaintiff for recovery of the trees

Held, (1) that in the absence of evidence as to resumption by Government and grant of trees to defendants, the effect of cancellation of the trees *patta* was not to vest the ownership of the trees in the defendants.

(2) That plaintiff was entitled to rely on his possession for a preferential claim as against the defendants.

A *pattadar* for trees has an interest, during the continuance of the *patta*, in the trees itself and in all that is necessary for the growth of the trees, including the soil in which they grow. SENGODA GOUNDEN *v.* VARADAPPAN, 10 M. L. T. 488; (1911) 2 M. W. N. 534; 22 M. L. J. 201 **39**

Payment to Agent—*Accounts—Mode of proving item in a suit for accounts—Burden of proof.*

Payment to an agent is payment to the principal.

In an account case, the plaintiff is bound to prove each item and the best mode of doing so is to ask the defendant what items in the account he disputes and plaintiff should be called on to prove those items. TULSI RAM *v.* KARM CHAND, 25 P. W. R. 1912; 36 P. L. R. 1912 **955**

Penal Code (Act XLV of 1860), ss. 84, 85, 86—*Insanity—Temporary insanity—Intoxication resulting from bout of drinking or* ganja *smoking—Distinction—Ground of exemption—Absence of motive, effect of.*

If a person is of unsound mind, he is to be judged by the ordinary rules in regard to insanity, no matter whether the insanity arose from disease of the brain or from persistent indulgence in intoxicating drugs or liquor.

But intoxication resembling a temporary form of insanity, resulting from one bout or repeated bouts of drinking or *ganja* smoking, which is of such a temporary nature as to pass off a few hours after the consumption of the liquor or drug, must be distinguished from unsoundness of mind, even temporary unsoundness of mind, coming within the purview of section 84 of the Penal Code. Such intoxication should be dealt with according to the provisions of law contained in sections 85, 86.

Therefore, the fact that a person commits a crime while under the influence of such intoxication caused by a bout of *ganja* smoking, affords no excuse to the prisoner unless the intoxication be involuntary.

Queen-Empress v. *Sakharam*, 14 B. 364, followed.

Emperor v. *Bhelaka Ahim*, 29 C. 493, distinguished.

The enormity or apparent parposelessness of the crime itself without any further evidence cannot be relied on to establish insanity. VITHOO *v.* EMPEROR, 7 N. L. R. 185 **916**

——— **ss. 84, 307, 471**—*Unsoundness of mind—Proof—Evidence*

The accused was convicted for an offence, under section 307 of the Penal Code. It was found from

Penal Code—contd.

the evidence for the prosecution that he was known as "Mad Nag Pyan;" that immediately before he committed the offence he was noticed by persons to be in one of his mad fits, that he was under a delusion that the Phongyi whom he attacked was keeping his sisters and daughters in the monastery, that he confessed to the investigating Officer and the headman, that he discontinued the attack when he was asked to do so and that the act was utterly unprovoked and motiveless:

Held, that under these circumstances the accused was at the time of committing the offence incapable, by reason of unsoundness of mind, of knowing the nature of the act or that it was wrong or contrary to law. NGA PYAN v. EMPEROR, 4 BUR. L. T. 267 **385**

——— ———**s. 85** **916**

———**ss. 85, 86**—*Drunkenness as ground of exemption—Voluntary drunkenness—Involuntary drunkenness - Knowledge—Intention—Nature of the legal offence committed.*

Voluntary drunkenness is never an excuse for crime. The fact that a man was drunk makes no difference, *per se*, to the question of his criminal liability.

Involuntary drunkenness, as a ground of exemption, is treated in just the same way as insanity. In order that *involuntary* drunkenness may be accepted as a ground of exemption, it must be shown that the accused was so drunk that he did not know (1) the nature of the act, or (2) that it was wrong, or (3) that it was contrary to law.

Pearson case, 2 Lewin C. C. 144. *Rex.* v. *Meakin*, 7 Car. and P. 297, relied upon.

A man is assumed to intend the natural or necessary consequences of his act, and, in the majority of cases, the question of intention is merely the question of knowledge. Section 86 of the Penal Code only provides that, where intent is to be inferred from an act, a man voluntarily drunk is treated in the same way as a man sober.

Although neither voluntary drunkenness nor involuntary drunkenness, which does not involve one or other of the three states of mind mentioned in section 85 of the Penal Code, can excuse crimes committed under its influence, yet the fact of drunkenness may alter the nature of the *legal offence* committed in cases where an essential of the crime is the presence of *some particular knowledge or intention.* WARIS ALI *v.* EMPEROR, 7 N. L. R. 180 **919**

———**s. 86** **916, 919**

———**ss. 97, 101, 354**—*Outraging woman's modesty—Lover pulling woman by hair and hand—Private defence—Right of third person to prevent assault—Acquittal—Interference—High Court—Erroneous interpretation of law.*

The fact that *A.* is in love with *B.* and is jealous of *C.* does not authorise him to pull *B*'s hair and hand. An assault of this kind made in the presence of several persons is calculated to outrage the woman's modesty and is punishable under section 354 of the Penal Code.

A person, who sees a woman being assaulted in the manner described in sections 97 and 101 of the Penal Code, is justified in going to her assistance and even in cutting another person with a *da* if the latter interferes to prevent him.

Penal Code—contd.

An erroneous interpretation of law to the effect that a man claiming to be the lover of a woman is entitled to pull her by the hair and hand is alone sufficient to justify interference with an order of acquittal. MI HLA SO v. NGA THAN, 4 BUR. L. T. 259 **389**

———**s. 101** **389**

———**s. 114** **825**

———**ss. 143, 149, 425, 427**—*Mischief—Unlawful assembly—Intention—Making ditch through Railway - Motive—Letting water run off fields of accused.*

The accused, fifty in number, finding their fields flooded, cut a channel through the Railway to let the water run off their fields. Ten or fifteen only of the accused were engaged in digging while all were present:

Held, that, although the motive of the accused was to free their fields from water, their intention was to make a ditch through the Railway and they were guilty of mischief and unlawful assembly with the common object of damaging the Railway. DEPUTY SUPERINTENDENT v. CHULHAN AHIR, 16 C. W. N. 263 **826**

———**s. 147** **1002**

———**s. 147**—*Rioting—Cutting crops grown by accused - Right of private defence.*

B. bought the disputed land from the guardian of a minor. The minor subsequently sold the same land to *S.* Thereupon *B.* obtained an *ex parte* decree declaring his right to the land and secured possession in execution of that decree. In the meantime, the petitioners, who held the land as *bhagdars* under *S.*, actually cultivated the land and raised the crop which *B*'s *bhagdar*, the complainant, tried to cut. The petitioners opposed and a riot ensued, and the petitioners were convicted:

Held, that as the petitioners actually cultivated the disputed crop and were no parties either to the suit or to the delivery of possession of the land, they were justified in claiming what they had grown and in resisting the action of the complainant when he went to take possession, and that the petitioners were not guilty of rioting. GAJENDRA GHORAI *v.* EMPEROR, 15 C. L. J. 80 **1004**

———**s. 149** **826**

———**ss. 175, 193, 471**—*Evidence Act (I of 1872), s. 162—Production of document in obedience to Court Summons—Document found to be forged—Using as genuine a forged document—Giving false evidence with regard to the document—Perjury.*

Accused produced a document before a Munsif in obedience to a Court summons and, when examined as a witness, stated that P. W. No. 1 delivered it to him. It was found that the document was not genuine and that P. W. No. 1 had not given it to him. Accused was tried and convicted under section 471, Indian Penal Code, for using as genuine a forged document;

Held, (1) that the conviction was wrong as the mere production by a person of a document in obedience to a Court summons is not, by itself, a user of that document by him.

Penal Code—contd.

Assistant Sessions Judge, North Arcot v. *Ramammal*, 10 M. L. T. 563; (1912) 1 M. W. N. 3; 13 Ind. Cas. 275, followed.

A witness who is summoned to produce a document cannot be put to the risk of having to consider whether a document answering the description contained in the summons is in fact genuine and whether there is any reason to believe it to be not genuine. The mere production of a document in answer to a command of Court cannot be regarded as fraudulent in law.

(2) That the giving of false evidence by the accused that P. W. No. 1 delivered the document to him with a fraudulent intention did not amount to a fraudulent user of the document with reference to which the evidence was given, though it might expose him to a prosecution for perjury. MUTHIAH CHETTY, *In re*, 11 M. L. T. 21; 22 M. L. J. 181; (1912) 1 M. W. N 455 **286**

——— ——— **ss. 182, 193**—*Criminal Procedure Code (Act V of 1898), s. 195 - Sanction to prosecute—Perjury—False charge by witness made voluntarily and irrelevantly.*

A witness is bound to speak the truth thoguh he may have to make statements on oath which he would hesitate to utter in private life. A *bona fide* truth-speaking witness must, therefore, be protected even when he utters things that cannot be proved against others in the witness-box. The Court must use its discretion to refuse sanction when necessary.

Where a charge against another person is made by a witness not in the course of his evidence or in answer to a question but quite voluntarily and irrelevantly, sanction can be properly granted to prosecute the witness under section 182 of the Penal Code.

Although it would be dangerous to hold that the mere fact of a witness having made contradictory statements would justify a Court in granting sanction to prosecute him for perjury, the propriety or impropriety of such a grant of sanction must rest on the circumstances. NGA LU PE *v.* EMPEROR, 4 BUR. L. T. 262 **392**

——— ——— **s. 193** **273, 286, 825**

——— ——— **s. 193**—False charge made by witness voluntarily and irrelevantly **392**

——— ——— **ss. 193, 467, 471**—*Charges to be separate for every act of perjury or forgery—Independent evidence of user in each case—Asking of forgiveness—Incriminating statement - Confession.*

There must be a separate count for every alleged item of perjury or forgery, and this means that there must be independent evidence of user in the case of each document.

The expression "Sir, kindly forgive the fault. Such thing shall not take place again," is not an incriminating statement; and when used with reference to alleged forged receipts, is not an admission of forgery or of using a forged document

The conduct of a tenant is not evidence upon which the question as to the rate of rent can be decided. JANG BAHADUR LAL *v.* EMPEROR, 14 C. L. J. 452 **398**

——— ——— **s. 193**—*Perjury—Accused charged with making a particular false statement—Conviction on the strength of accused's previous contradictory statements—Secondary evidence of statement made by a person not called as witness.*

Where the prosecution undertakes to prove that a *particular statement* made by a person accused of an offence under section 193 of the Penal Code, is positively untrue, the accused cannot be convicted merely on the strength of contradictory statements previously made by him.

A fact in issue cannot be held proved by secondary evidence of statements made by a person who is not called as a witness and who is held by the Magistrate himself to be a liar. BAKSHALI *v.* EMPEROR, 5 S L. R 136 **220**

——— ——— **s. 193**—*Perjury—Contradictory statements not absolutely irreconcilable.*

A person should not be convicted under section 193 of the Penal Code for making contradictory statements when the statements are not absolutely irreconcilable. IMPERATOR *v.* ALU, 5 S L. R. 129 **215**

——— ——— **ss. 201, 202**—*Causing evidence of offence to disappear—Positive destruction of evidence not necessary—Burying corpse with marks of violation—Offence under section 202 not included under s. 201—Criminal Procedure Code (Act V of 1898), s. 238.*

The offence under section 202 of the Penal Code is not a minor offence included under section 201; for an essential ingredient of the offence under section 202 is the legal duty of the accused to give information and this is no part of the offence under section 201. Consequently, an accused against whom a charge under section 201 is framed cannot be convicted of an offence under section 202 without a charge under the latter section being framed against him.

In order to support a finding that the accused has caused evidence to disappear, it is not necessary to prove the *positive destruction* of evidence.

The burial of the corpse of a murdered man if done with the intention of concealing the fact that there were marks of violence on it might be an offence under section 201. IMPERATOR *v.* RINO, 5 S L. R. 123 **210**

——— ——— **s. 202** **210**

——— ——— **s 218** **825**

——— ——— **ss. 224, 225**—*Prisoner under sentence of transportation—Confinement in jail before actual transportation—Escape from jail—"Return from transportation."*

A prisoner under a sentence of transportation, who escapes from a jail where he is confined before he is actually transported beyond the seas, cannot be convicted under section 226 of the Penal Code. His escape is not a "return from transportation" NGA PO CHEIN *v.* EMPEROR, 4 BUR. L. T. 261 **390**

——— ——— **s. 226** **390**

——— ——— **s. 268** **999**

——— ——— **s. 292**—*Obscene book—Test of obscenity, what is—Religious publication—Doings of divine persons—Religious book* Natu Churi, *whether obscene—Not taking notice of obscene book previously, no ground to justify publication.*

Penal Code - contd.

The test in determining the obscenity of a publication is, whether the tendency of the matter charged as obscenity is to deprave and corrupt those into whose hands such a publication might fall.

If in fact a work is one of which it is certain that it would suggest to the minds of the young of either sex or even to persons of more advanced years thoughts of a most impure and libidinous character, then its sale is a criminal offence, and it is immaterial that the accused has in view an ulterior object which is innocent or even laudable.

As the tendency of a religious publication is not to deprave or corrupt the morals of persons, it is not obscene within the meaning of section 292 of the Indian Penal Code.

But if the objectionable passages contained in a religious book are extracted and printed separately and such passages deal with matters which are to be judged by the standard of human conduct and the tendency of such publication is to deprave and corrupt those whose minds are open to immoral influence, such publication may not be justified on the ground that the passages formed part of a religious book.

The *Urya* book *Natu Churi* is not an obscence publication, as it is an old religious work and the incident described in the book would not suggest immoral thoughts in those who believe in the divinity of Krishna and Radha. KHIRODE CHANDER ROY CHOWDHURY v. EMPEROR, 15 C. L. J. 151; 39 C. 377 **993**

——— ——— **ss. 299, 300, 301** —*Murder —Death of the person killed need not be intended.*

S. with the intention of killing *N.* gave him poisoned *halva* to eat. *N.* ate a little, and threw the rest away and this was picked up by *R.* who ate it and died:

Held, that *S* was guilty of the murder of *R.*

The Indian Law on culpable homicide discussed and compared with the English Law. PUBLIC PROSECUTOR v. MUSHUNOORU SURYANARAYANAMOORTY, (1912) 1 M.W. N. 136; 11 M. L. T. 127 **833**

——— ——— **s. 300** **833**

——— ——— **ss. 300, 302 and 304**— *Murder—Culpable homicide not amounting to murder —Injury of a vital character—Absence of intention to cause death—Offence.*

Accused, suspecting his wife of infidelity, stabbed her 4 times on the back with a clasp-knife. She ran up to the deceased, her aunt for protection and clasped her arms round deceased's waist. Deceased begged accused not to stab his wife. Accused then plunged the knife into deceased's back.

Held, per Sundara Aiyar and Abdur Rahim, JJ., (Spencer, J. dissenting).—That the accused was only guilty of culpable homicide not amounting to murder, as he had no intention of killing the deceased, or of causing a *vital* injury, *i.e.*, a wound at a place and of a character which would naturally cause death.

Per Abdur Rahim, J.—The wound actually inflicted was, no doubt, sufficient in the ordinary course of nature to cause death, but that is not enough to bring the case under section 302, Indian Penal Code. To make the offence murder, it must be shown that the accused *intended* to inflict *such* injury.

Per Spencer, J.—The offence was murder as the accused must have intended, or have known himself to be likely, when he stabbed the deceased in the back, to cause such bodily injury as would be sufficient in the ordinary course of nature to cause death. PERUMAL NAICKEN, *In re*, (1912) 1 M. W. N. 193 **817**

——— ——— **s. 301** **833**

——— ——— **s. 302** **817**

——— ——— **ss. 302, 304** —*Intention.*

Where four persons attacked one man, who in consequence of the attack, died subsequently: *held*, that the assailants are guilty under section 302, Indian Penal Code, if the common intention of the assailants was to cause death or bodily injury likely to cause death or sufficient in the ordinary course of nature to cause death; and under section 304 if their common intention was to make a violent assault upon the deceased and they knew that they were likely to cause his death. Their intention must be gathered from what they said and what they did at the time of the attack MUSAI v. EMPEROR **847**

——— ——— **s. 304** **817, 847**

——— ——— **s. 307** **335**

——— ——— **ss. 330, 331** **825**

——— ——— **s. 332** **1002**

——— ——— **s. 354** **389**

——— ——— **s. 378**—*Theft—Fish in open water—Feræ naturæ—Incapable of possession.*

Fish in open and unenclosed water are *feræ naturæ.* They are not capable of possession and hence cannot form the subject of theft.

Only such moveable property which is capable of possession can be the subject of theft. CHANGAL HALAPOTO v. BASARMAL, 5 S. L. R. 122 **214**

——— ——— **ss. 378, 379** —*Theft of flowing water—Possession—Intention—"Taking," meaning of—Essence of theft.*

Whether in the case of any particular river, channal or reservoir, Government can be said to be in possession of water must depend on circumstances and the question must be regarded as one of fact to be decided on the evidence in each case.

Waters in rivers are presumably vested in Government. And when the Government has taken elaborate steps and employed a large establishment to control the use of water in a river or channel and to prevent any person, not having the right to do so, from using it, the water in the river or channel should be regarded as being in possession of Government so as to be the subject of theft.

Per Sundara Aiyar, J.—The word "taking" in section 378, Indian Penal Code, means "reducing to possession," that is, the moving of property should be effected with a view to obtain the possession or custody of the property. Unless the intention of an accused person is to reduce the property into his own possession, he cannot be guilty of theft.

Per Benson, J. (Miller, J., concurring).—The essence of the offence of theft consists in the dishonest taking of property *out of the possession* of the owner, rather than in the taking of it into the *thief's own possession*, that is, it is only necessary that the thief

Penal Code—contd.

should "*intend* to take," it is not necessary that he should *succeed* in taking.

Per Benson and *Miller, JJ.*, (*Sundara Aiyar, J*, dissenting).—A person who diverts more water to his lands than he is entitled to by lowering the door of the sluice of Government canal without the permission of the officers of Government, commits theft in respect of water under section 378, Indian Penal Code. CHOCKALINGAM PILLAY, *In re*, 11 M. L. T. 162; (1912) 1 M. W. N. 119 **819**

——— ——— ——— **s. 379** **819**

——— ——— ——— **s. 379**—*Theft—Irrigation tank—Removal of fish—Facts of each case to be looked into.*

Whether the removal of fish from an irrigation tank amounts to theft depends upon the facts of each case. When the water is so low that the fish could not escape the removal may be theft. SUBBIAH SERVAI, *In re*, 11 M. L. T. 23; (1912) 1 M. W. N. 42 **278**

——— ——— ——— **s. 380** **395**

——— ——— ——— **ss. 392, 395** **783**

——— ——— ——— **ss. 392, 397**—*Misdirection to Jury—Absence of evidence that accused caused grievous hurt—Hurt caused by some of the robbers—Direction to convict.*

Where, on a charge against the accused under sections 392 and 397, Indian Penal Code, the Sessions Judge, while pointing out to the Jury that there was no evidence that the accused caused grievous hurt or used deadly weapons, directed them to convict under section 397, Indian Penal Code, because grievous hurt was caused by some of the robbers some of whom used knives:

Held, (1) that this amounted to a misdirection and the conviction under section 397, Indian Penal Code could not be sustained;

(2) that the accused were rightly convicted under section 392, Indian Penal Code. ARUNACHELLA TAVAN, *In re*, 11 M. L. T. 20; (1912) 1 M. W. N. 35; 22 M. L. J. 186 **282**

——— ——— ——— **s. 397** **282**

——— ——— ——— **s. 397**—*Deadly weapon*—Lathi.

A *lathi* cannot be rightly described as a deadly weapon within the meaning and for the purposes of section 397 of the Penal Code. LAD KHAN *v.* EMPEROR, 19 P. W. R. 1912 CR. **998**

——— ——— ——— **s. 400**—*Association for habitual pursuit of dacoity—General Criminality of tribe not to be imputed to individual members—Section to be strictly construed—Gist of offence—What must be established to convict accused—Approver's testimony—Corroboration—Acquittal—No adverse inference against accused after acquittal—Past misconduct of accused, when may be considered.*

The general criminality of a tribe or caste cannot be imputed to individual members operating in gangs where the prosecution is under section 400, Indian Penal Code.

The offence under section 400, Indian Penal Code, is one of a very special character and entirely the creature of statute. The section must, therefore, be strictly construed.

Penal Code—contd.

Association for the habitual pursuit of dacoity is the gist of the offence under section 400, Indian Penal Code.

Although the evidence need not show the same degree of particularity as to the commission of each dacoity as is required to support a substantive charge of that crime, it must be established, for the purpose of conviction, that the accused belong to a gang whose business is the habitual commission of dacoity. The special conspiracy must be proved.

Corroboration of the testimony of an approver must connect the accused with the offence, that is, association of a gang of persons for the business of habitually committing dacoity.

No adverse inference can be drawn against the accused after their acquittal. Therefore, if some of the persons accused under section 400, Indian Penal Code, had been tried on a charge of dacoity but acquitted, that fact cannot be relied on by the prosecution to prove that they were habitual dacoits.

If the association for the purpose of habitually committing dacoity be made out, the past history of the accused, that they had been convicted of dacoity or had been bound down to be of good behaviour would be significant. KADER SUNDAR *v.* EMPEROR, 16 C. W. N. 69 **279**

——— ——— ——— **s. 408**—*Criminal breach of trust by servant—Various sums of money received by servant from master at various times by false representations and not accounted for.*

The accused, as the servant of a firm, obtained various sums of money from the Manager of the firm at various times by false representations that they were required for paying coolies but could not account for them afterwards:

Held, that the accused was guilty of criminal breach of trust as a servant. THEOPHILUS RAMAPPA *In re*, 22 M. L. J. 112: 10 M. L. T. 517 **108**

——— ——— ——— **ss. 409, 477 A**—*Separate breaches of trust and falsifications of account on different dates—Joint trial—Illegality—Criminal Procedure Code (Act V of 1898), s. 234.*

The accused was charged at one trial under section 409, Indian Penal Code, for criminal breach of trust in respect of Rs. 432 made up of five sums of money entrusted to him at different dates in 1910 and of five separate falsifications of accounts on different dates under section 477 A, Indian Penal Code:

Held, that each breach of trust and falsification was a distinct offence and the trial of these five distinct offences at one trial was illegal. LAKSHMINARAIN APURAM *v.* EMPEROR, (1911) 2 M. W. N. 536 **213**

——— ——— ——— **s. 411** **395, 783**

——— ——— ——— **s. 411**—*Stolen property produced by accused from a jungle—Whether such production sufficient to sustain conviction—Evidence—Proof.*

Where an accused produced the stolen property from a *nullah* in a *jungle*, which was neither in his possession nor under his control: *Held*, that such production was insufficient to establish his guilt under section 411, Indian Penal Code. PIR BUKHSH *v.* EMPEROR, 46 P. L. R. 1912 **220**

——— ——— ——— **s. 414** **395**

Penal Code—contd.

——————s. 420—*Cheating—Advance obtained on false representation—Promissory-note executed—Admissibility of oral evidence to prove representation of intention—Prosecution bound to prove falsity of representation—Evidence Act (I of 1872), s. 92.*

The accused obtained an advance from the complainants through a broker on the representation that he had two boat-loads of paddy in the creek and that he would bring them to the mill and would sell them to the complainants. The accused and the broker jointly executed a promissory-note for the advance in favour of the complainants. The promissory-note contained no statement of the representation made by the accused. Subsequently the accused absconded; and it appeared he had no boat loads of paddy. The complainants thereupon preferred a charge of cheating against him:

Held, (1) that oral evidence was admissible to prove the representation of fraudulent intention and as the representation of intention was not inconsistent with the written agreement and would not have been embodied in it, there was nothing in the Evidence Act to preclude evidence being given of the representation of intention.

(2) That it was not sufficient to prove that the accused promised to bring paddy to the mill at some time or other and failed to do so; the prosecution must show that the representation made by the accused was false, that is, at the time of making it he had no intention of carrying out the promise.

(3) That the facts warranted the inference that the accused's representation was false NGA PO YON *v.* MOHR BROTHERS AND CO. LD., 4 BUR L. T. 279 **386**

——————s. 425 **826**

——————ss. 426, 430 *Mischief—Unlawfully taking water from canal.*

The applicants, who wanted water for the purpose of sowing their field, stole it by breaking through the wall of a canal:

Held, that they were guilty of having committed mischief under section 426 of the Indian Penal Code. BANSI *v.* EMPEROR, 9 A. L. J. 162 **829**

——————s. 427 **826**

——————s. 430 **829**

——————ss. 441, 447—*Criminal trespass—Entry on land in exercise of* bona fide *right.*

If a person enters on land in the possession of another in the exercise of a *bona fide* claim of right but without any intention to intimidate, insult or annoy the person in possession or to commit an offence, his act does not amount to criminal trespass although the accused may have no right to the land. IMPERATOR *v.* ABDUL LATIF, 5 S. L. R. 165 **219**

——————s. 447 **219**

——————s. 463 **211**

——————s. 467 **398**

——————s. 468 **275**

——————s. 471 **99, 211, 236, 385, 398**

——————ss. 475, 476 **211**

——————s. 477A **213**

Penal Code—concld.

——————s. 480—*False trade-mark—Offence or a wrong.*

Where the trade-mark used by the accused is a crescent encircling a crown over the letters A. M. R. and the one used by the complainant is a crescent encircling a star over the letters A. G. M. no offence of using a false trade mark or selling goods under a counterfeit trade-mark is committed.

A civil action for damages may lie. RASOOLKHAN SAHEB *v.* EMPEROR, (1912) 1 M. W. N. 85 **927**

——————s. 499, exception 9—*Defamation—Allegation made in a petition of divorce—Absolute Privilege, rule of, inapplicable in India—English cases, not to be referred for guidance—Practice—Evidence Act (I of 1872), s. 132, proviso.*

In construing the provisions of the Indian Penal Code, the Code is not to be frittered away by reference to English cases laying down a different principle.

The English rule of absolute privilege in cases of defamation does not apply *proprio vigore* in India.

Where a certain statement made in a petition for divorce filed in Court is alleged to amount to defamation, the case must be decided not with reference to the rules of English Law but with reference to section 499 of the Indian Penal Code.

Allegations which are made in a petition for divorce filed by the accused after his wife has left his house, and in the truth of which he has a reasonable belief, fall within the 9th exception to section 499. MR. MCGILL *v.* MR. BRYNE, 5 S. L. R. 133 **217**

——————s. 511 **99**

Penalty. *See* CONTRACT ACT, s 74.

Pendente lite, changes in title—Power of Court to consider **377**

Pensions Act (XXIII of 1871), s. 11 194

Perjury. *See* PENAL CODE, s. 193.

Personal Law—*Distinct and inconsistent personal laws in respect of paternal and maternal properties.*

The presumption is that a man carries his personal law with him.

Parbati v. *Jagadis*, 29 I. A. 82; 29 C. 453; 6 C. W. N. 490; 4 Bom L. R 365, *Ambabai* v. *Govind*, 23 B. 257, *Mailathi* v. *Subbaraya*, 24 M 650, relied on.

A person cannot simultaneously have two distinct and inconsistent personal laws, one governing his rights in respect of property taken by him from paternal ancestors, and the other in respect of properties received by him from maternal ancestors. BHAGABATI *v.* SOHODRA KOER **691**

Plaint, *amendment of—Original plaint based on negligence—Proposed amendment based on nuisance—Different cause of action—Suit against Government—Notice of suit—Civil Procedure Code (Act V of 1908), s. 80—Withdraw, leave to*

The plaint in a suit against the Secretary of State originally proceeded upon negligence, and the notice which was served as a preliminary to the plaint pointed to a suit based on negligence. Afterwards, the plaintiff prayed for an amendment of the plaint and the new proposed plaint proceeds upon nuisance:

Plaint—concld.

Held, that the cause of action being different, no permission to amend the plaint can be given.

Leave to withdraw with liberty to bring a fresh suit, is granted. McINERNY v. SECRETARY OF STATE, 38 C. 797 **370**

Pleader—Authority does not terminate with decree **365**

Pleader's fee *Costs—Practice.*

Where a certificate by a Pleader of the amount received by him as his fee was lodged in Court after arguments had commenced the amount of fee was not allowed as costs. RAGHUBIR SINGH v. UMRAO SINGH **500**

Pleadings—Non-transferable occupancy-holding—Mortgage without landlord's consent—Sale by Mortgagor to third party—Purchaser taking fresh lease from landlord—Mortgagee's suit for sale—Plea of purchaser that mortgage invalid, if tenable **698**

——————Party litigant if permitted to consume inconsistent positions **365**

——————Plaintiff to be kept strictly to cause of action set forth in plaint **721**

——————Suit based on succession and possession—Declaration as to reversionary rights whether can be granted **640**

——————Transferor cannot plead invalidity of transfer **613**

——————*Written statement—Inconsistent defence in alternative, whether allowable—Civil Procedure Code (Act XIV of 1882), s. 112—Civil Procedure Code (Act V of 1908), O. VI, r. 7—Amendment of written statement, when may be allowed.*

A defendant may in his written statement raise as many distinct and separate, and, therefore, inconsistent defences as he may think proper, in the alternative.

An amendment of the pleadings ought to be allowed whenever this can be done without injustice to the opposite side For the purpose of raising the real question at issue between the parties such amendment should be allowed, and if the opposite party has incurred expense and been caused delay, it should be compensated therefor. SRI RANG BEHARY LAL v. RANCHHEYA LAL, 15 C. L. J. 439 **128**

Pledge by unauthorised person—Joint tort feasors—Cause of action in both suits to be same—Subsequent assignment in respect of tort—*Lis pendens*, inapplicable to moveable property—First suit against pledgor—Moveable property pawned during the pendency of suit—Second suit against pledgee—Pledgor basing title on adoption—Adoption held not proved in first suit—Right of pledgee to raise issue of adoption in second suit—Privity between pledgor and pledgee **849**

Police functions—Exercise by Central Provinces *zamindars* **965**

Possession. *See* KHAS POSSESSION.

——, act of—Grazing cattle whether act of possession **125**

Possession—concld.

——————Bomb found in joint family house—Whose possession—Liability of managing member—Presumption of liability—How to be rebutted **721**

Poundage fee, refund of, on sale being set aside **365**

Power-of-attorney, construction of **705**

——————, construction **92**

——————Am-muktearnamah—Pardanashin *lady—Authority to husband—Power to execute deed of sale, whether includes power to execute agreement for sale—Specific Relief Act (I of 1877), ss. 22, 27, cl. (c)—Transferee without notice—Notice to some of transferees, members of joint Mitakshara family, whether good—Specific relief, grant of—Discretion of Court.*

A power given to an attorney to execute deeds of sale, does not authorize him to enter into an agreement for sale.

A notice to some of the transferees who are members of a joint *Mitakshara* family, in the absence of anything to show that those to whom the notice was given were entitled to represent the others, is not a sufficient notice within clause (*c*) of section 27 of the Specific Relief Act.

A contract for sale of land was made with a *pardanashin* Mahomedan lady through her husband who was her attorney The purchase-money, although not insufficient, was considerably less than what was paid by a subsequent purchaser. The authority of the husband to bind the lady was not proved. The variation of the time at which the contract was to be performed was not shown to have been assented to by the lady herself:

Held, that the Court may properly refuse to enforce the contract for sale. JANKI PERSHAD SINGH v. YAHIA HOSSAIN **637**

Practice—Appeal—Minor's property in possession of third person—Remedy of guardian—Suit **326**

——————Civil or Revenue Court returning plaint—Reference to Chief Court **447**

——————Judgment of Appellate Court very sketchy—Interference on merits in revision **102**

——————Plaintiff to get relief on his own right **788**

——————Stay of criminal proceedings pending civil suit **927**

——————Suit based on succession and possession—Declaration as to reversionary rights, whether can be granted—Discretion Pleadings **640**

——————*Holiday—Delivery of judgment—Not illegal.*

The delivery of a judgment on a holiday is not illegal.

A Judge is not prohibited from doing any particular kind of work during holidays. But if any party is injuriously affected by a Court doing any judicial work on a day when the Court is closed he will be entitled to a redress for the grievance.

Semble:—The English rule with regard to Sundays being a *dies non*, does not apply in India. VENKATESA IYENGAR v. KAMALAMMAL, (1912) 1 M. W. N. 65; 11 M. L. T. 84 **463**

Practice—contd.

——— ——— **(criminal)**—*Witness in attendance—Magistrate unable to record evidence—Adjournment—Witnesses to be told to appear at next hearing.*

Where a Magistrate has entertained a complaint, he is bound to proceed according to law.

Where a Magistrate is unable to record the evidence of the witnesses in attendance on the date fixed and the case is adjourned, the witnesses should be told to appear on the adjourned date. A party should not be required to repeatedly summon his witnesses on payment of fresh process-fees merely because the Magistrate is unable to record evidence on the date originally fixed. BALMOKAND v. NANAK CHAND, 3 P. W. R. 1912 Cr. **928**

Pre-emption. *See* OUDH LAWS ACT, s. 9.

——— ——— ——— *Benami* suit—*Bona fide* claim—Superior pre-emptor asserting claim to defeat rival pre-emptor—Money raised by mortgage to vendees **662**

——— ——— ——— Sale of occupancy-rights by joint tenant to landlord - Right of other tenant to pre-empt **28**

——— ——— ——— *Custom*—Mohalla Multani Darwaza *in the Ferozepore City*—Kucha Nihal Singh.

Kucha Nihal Singh is a part of the recognized subdivision, *Mohalla Multani Darwaza*, in the Ferozepore City.

The custom of pre-emption prevails in the *Mohalla* as well as in the *Kuchas* comprised therein. HARI SINGH v. BHOLI, 64 P. W. R. 1912 **719**

——— ——— ——— *Decree for pre-emptor—Appeal by vendee—Transfer of property on basis of which pre-emption decreed subsequent to decree—Construction of deed—Sale or mortgage*—Criteria—*Evidence—admissibility of oral evidence—Third party—Evidence Act (I of 1872), s. 92, scope of—Punjab Pre-emption Act (II of 1905), s. 4.*

Where, after obtaining a decree for pre-emption and during the pendency of an appeal against the decree preferred by the vendee, a pre-emptor parts with the property, on the strength of which he was able to sue for pre-emption, the transfer does not disentitle the pre-emptor to the decree he has already obtained and the vendee cannot ask the Appellate Court to take away from the pre-emptor the benefit of the decree on the ground of his subsequent transfer.

Dhanna Singh v. *Gurbakhsh Singh*, 91 P. R. 1909 (F. B.); 4 Ind. Cas. 337; 161 P. W. R 1909; 148 P. L. R. 1909, referred to.

The prohibition in section 92 of the Evidence Act against going behind a written deed applies only to parties to a deed and not to outsiders.

Tara Chand v. *Baldeo*, 117 P R. 1890 (F. B.); *Parma Nand* v. *Airapat Ram*, 20 P. R. 1899, relied upon.

In order to prove that an ostensible mortgage is really a sale, what has to be shown is (*a*) that there was a positive understanding between mortgagor and mortgagee that redemption would not be demanded, or (*b*) that the terms of the mortgage are such that redemption is a virtual impossibility.

Onerous conditions in a mortgage are not in themselves sufficient to warrant the decision that it was really a sale.

A. mortgaged a building site to the nephew of her husband. The site was situated in a town in the heart of a flourishing canal colony where such property was likely in future to increase in value. The mortgage-money was not higher than the market-value of the site. The term of the mortgage was fifteen years. No interest was chargeable on the mortgage-money proper but the mortgagee was entitled to build on the site at will and to charge the expenditure, with 6 per cent. per annum interest, on the house:

Held, that these circumstances were insufficient to prove that the transaction between the parties was a sale and not a mortgage. MEGHA RAM v. MAKHAN LAL **667**

Pre-emption—contd.

——— ——— ——— *Limitation—Vendee transferring property to another person before institution of suit—Second vendee impleaded after expiration of period of limitation*

Where, before a suit for pre-emption has been instituted, the vendee has re-sold the property to another person, the suit for pre-emption is barred against the second vendee if he is not brought on the record until after the expiration of the period of limitation prescribed for the suit. SHAH MUHAMED v. PIARA MAL, 84 P. R. 1911 **792**

——— ——— ——— *Mortgage by vendee after sale—Pre-emptor not bound by mortgage—Parties—Mortgagee not a necessary party in pre-emption suit—Mortgagee bound by decree against vendee.*

A pre-emptor is not bound to pay anything more than the amount which is fixed in a pre-emption decree as the price at which the sale took place.

A pre emptor is not bound by a mortgage effected by the original vendee after the sale. The mortgagee in such a case must look to his mortgagor alone.

Bogha Singh v. *Gurmukh Singh*, 93 P. R. 1902, followed.

Such a mortgagee is not a necessary party in a suit for pre-emption. As he holds the property under the vendee, he is bound by a decree for pre-emption passed against the vendee. DEO RAJ v. GOVIND PARSHAD, 55 P. W. R. 1912 **647**

——— ——— ——— *Pre-emptor not suing* bona fide *for herself—maintainability of suit.*

A pre-emption suit not instituted *bona fide* with the object of excluding a stranger from the village is not maintainable. MAHARANI v. RAM ADHAR **508**

——— ——— ——— *Pre-emptor and vendee equally related to vendor—Sharing in holding gives no superior right—Division of property between vendee and pre-emptor having equal rights—Price fixed in bad faith—Market-value to be paid—Punjab Pre-emption Act (II of 1905), ss. 12 (a), 14 (b), 22.*

Where two persons are equally related to the vendor, sharing in the holding in which the land sold is situate, gives no superior right of pre-emption to the either.

Where the pre emptor and the vendee have equal rights of pre-emption, the pre-emptor is entitled to pre-empt one-half of the property sold and the vendee is entitled to retain the other half.

When it is proved that the sale price has been fixed in bad faith, the *market-value* of the property must be ascertained and taken as the price to be paid by the pre-emptor. PATHANA v. NABA, 87 P. R. 1911 **802**

Pre-emption contd.

——— ——— ——— *Price over-stated in the deed fraudulently—Decree on payment of market-value Subsequent suit by vendor's reversioners—Custom—Alienation—Pre-emptor not debarred from asserting real consideration—Real consideration for necessity—Conversion of sale into mortgage—Estoppel—Fraud—* Particeps criminis.

A. and *B.* sold certain land for an alleged consideration of Rs 4,000. *C.* sued for pre-emption contending that the sale-price was really Rs 3,000. The Court found that the price stated in the sale-deed was not fixed in good faith and decreed the claim for pre-emption on payment of the ascertained market-value, Rs. 3,240.

On the death of *A.*, his sons sued *C.* for possession of the land on the ground that the sale by *A.* was neither for consideration nor for necessity while *B.*'s sons sued for a declaration that the sale by *B.* would not affect their reversionary rights.

It was found that the sum actually paid to the vendors was Rs 3,000 and that this sum was for necessity:

Held, (1) that the pre-emptor was not debarred in the present suit from asserting that the sale was really for Rs 3,000;

(2) that as the actual consideration of the sale was Rs. 3,000 and this sum was for necessity and fairly represented the market-value of the land, the sale could not be converted into a mere mortgage but the suits of the vendor's sons should be dismissed.

Although a pre emptor, who obtains a decree becomes in many respects identified in interest with the vendee, it would be contrary to all notions of equity and justice and repugnant to common sense to hold that a pre-emptor is bound, when he has obtained a decree on payment of the market-value which is less than the price stated in the deed, as *particeps criminis* with the vendee in the very fraud which it has been the object of the pre-emptor to bring to light and frustrate. DAN SINGH *v.* PHANGAN SINGH, 83 P. R. 1911 **796**

——— ——— ——— *Property sold subject to mortgage—Redemption of mortgage by vendee—Pre-emptor cannot claim to pre-empt equity of redemption only.*

Where property subject to a mortgage has been sold and the vendee has redeemed the mortgage before the institution of a suit for pre-emption, the pre-emptor cannot claim to pre-empt only the equity of redemption.

He must pay the whole amount of the purchase-money including the mortgage-money paid by the vendee before he can be allowed to pre-empt the property. SHAHBAZ KHAN *v.* FAZAL DIN, 74 P. W. R. 1912; 43 P. R. 1912 **430**

——— ——— ——— *Sale by vendee to a person entitled to pre-empt—Suit to pre-empt the sale by vendee, maintainability of.*

L. sold his property to *D.* on 5th of June 1909. *S.* had a right to pre-empt the property and was about to bring a suit for it, when on the 4th of June 1910, *D*, the vendee, re-sold the property to him. Thereupon *A*, who was related to *D*, brought a suit for pre-emption on the basis of the sale of 4th of June 1910, made by *D.* in favour of *S.*

Held, that the suit was maintainable. ADHARI DUBAIN *v.* SHEODIHAL PANDE **708**

Pre-emption—concld.

——— ——— ——— *Vendee selling the property to another person prior to suit—Suit against the first vendee alone—Second vendee made party to the suit beyond one year after the first sale but within one year after second sale—Limitation Act (IX of 1908), Sch. I, Art. 10.*

A. sold his share in a village to *B.* on 16th November 1909. *B* re-sold the property to *C.* on the 14th of November 1910 and got the sale-deed registered on the 21st of November 1910. *D.* sued *B.* for pre emption on the 15th of November 1910. *C.* was made a party to the suit in February 1911:

Held, that the suit was not barred by limitation. SAT NARAIN *v.* BADRI NATH, 9 A. L. J. 211 **643**

——— ——— ——— *Waiver—Acquiescence—Pre-emptor assisting in sale negotiations and demarcation of land—Delay in suing.*

A pre-emptor assisted in negotiating a sale being himself present at the time; he further actively assisted when the land sold was being demarcated out of a large field of which it was a part. The suit for pre-emption was brought on the very last possible day:

Held, that the pre emptor must be deemed to have waived his right of pre-emption, as by his conduct he actively brought about in the vendee's mind that he was perfectly agreeable to the purchase by vendee and did not intend to enforce his right. FATEH CHAND *v.* KIRPA SINGH, 76 P. W. R. 1912 **561**

——— ——— ——— Wajib-ul-arz—*Construction*—Rishtadar karibi—*Connection by marriage*—Rishtadar baid.

The *Wajib-ul arz* of a village gave a prior right of purchase to a *rishtadar karibi* who owned a share in the same *patti*. Plaintiff, a co-sharer in the *patti*, who was a connection by marriage of a person connected with the vendor by marriage brought this suit for pre-emption against the vendee who was not at all related to the vendor:

Held, that the relationship was too remote to give plaintiff a right of pre-emption within the meaning of the *Wajib-ul-arz*.

A connection by marriage of a connection by marriage is not even a *rishtadar baid*. FAKHRAN BIBI *v.* NAGESHAR RAM, 9 A. L. J. 84 **954**

Presumption. *See* EVIDENCE ACT, S. 114.

——— ——— ——— of legality—Restriction of warrant by accused **1002**

——— ——— ——— Procedure of registration **531**

——— ——— ——— *Whether presumption can be made in favour of what offends legal principle—* Debutter *lands*—Shebait—*Presumption of permanent tenancy.*

A presumption in favour of transaction assumes its regularity: it cannot be made in favour of that which offends legal principles.

Therefore, a presumption of permanent tenancy cannot be applied to *debutter* property, for to create a new and fixed rent for all time would be a breach of duty in a *shebait* and is not presumable. SATYA SRI GHOSHAL *v.* KARTIK CHANDA DAS, 15 C. L. J. 227; 16 C. W. N. 418 **596**

Previous rent decree—Subsequent suit by tenant for declaration that previous plaintiff is not tenant's landlord—*Res judicata* 40

Primogeniture, rule of 269

——— ———, rule of—Kunjpura State 695

Principal and agent—Accounts Suit for rendition of accounts against agent's heir Rendition of accounts, meaning of Refusal what constitutes 930

——— ——— ———Agent representing untruly the extent of his authority to third person—Breach of contract—Liability of agent to third person—Agent acting beyond the scope of his authority 94

——— ——— ———Payment to agent 955

——— ——— ———*Gambling debt of principal paid by agent—Right of agent to recover sums actually paid*—Hundi *drawn by principal—Consideration—Contract Act (IX of 1872), s. 23—Public Policy*

An agent is entitled to recover from his principal sums actually paid by the agent in settling a gambling debt incurred by the principal, whether the payment is by way of adjustment of accounts or in cash.

A *hundi* executed by a principal in favour of his agent for such payments is for consideration. GHASI RAM *v.* JAI LAL, 60 P. W. R. 1912; 79 P. L. R. 1912 319

——— ——— ———*Principal entitled to final account at the determination of agency—Accounts.*

A principal is always entitled to have a final account taken between himself and his agent at the determination of the agency. If accounts have been taken from time to time and settled between the parties, the agent when rendering the final account will be entitled to rely upon those casual accounts and to urge that they ought to be accepted as being *prima facie* correct. ABHAI CHARAN CHAKRAWATI *v.* KESHO CAS 642

Printing Presses and Books Act (XXV of 1867), ss. 1, 3—*"Book" includes portion of pamphlet - Printer of portion bound to print his name and place of printing.*

The word 'book,' as defined in section 1 of the Printing Presses and Books Act, 1867, includes part of a volume or pamphlet.

Therefore, the printer of a portion of a pamphlet is bound to print thereon his name and the place of printing and failure to do so constitutes a breach of the provisions of section 3 of the Act. EMPEROR *v.* HARI GOVIND LIMAYE, 14 BOM. L. R. 40 827

——— ——— ——— s. 3 827

Priority—Mortgage executed and attested on certain date, but registered subsequently—Another mortgage of same property registered in the meantime 653

——— ——— **of title** Purchase of tenure by mortgagee in execution—Subsequent purchase by landlord in execution of rent decree Non-annulment of incumbrance of mortgage, effect of 785

Private defence. *See* PENAL CODE, s. 97.

Privy Council Practice - *Fresh point.*

It is not usual to allow a point to be raised on appeal to the Privy Council which has not been discussed in the Court below, and upon which their Lordships have not got the assistance of the Court below. JIT SINGH *v.* MAHARAJ SINGH, 10 M. L. T. 551; 16 C. W. N. 122; (1912) 1 M. W. N. 29; 15 C. L. J. 78; 14 BOM. L. R. 33; 34 A. 57 257 P. C.

Probate. *See* WILL

——— ———Next reversioner disputing the Will 269

Probate and Administration Act (V of 1881), s. 19—*Will—Probate—Letters of Administration—Legatee's right to administer estate when some executors willing to act - Fitness of executors - Applications for Probate - Parties Legatee impugning executor's good faith should be made party.*

A legatee cannot be allowed to administer the estate of testator unless all the executors refuse to act The Court should not consider whether the executors who are willing to act are fit and proper persons for the grant of Probate.

Hara Coomar Sircar v. *Loorga Moni Dasi*, 21 C. 195 relied upon.

Although a legatee has no title to administer the property, he should be brought on the record of a Probate case as an interested person to safeguard his interests where he impugns the good faith of the executors. KARIMAN *v.* MASITI, 29 P. W. R. 1912; 24 P. L. R. 1912 171

——— ——— ——— s. 69—*"Interest," meaning of—Reversioner's right—Sister's right to object in the presence of widow and daughters—Letters of Administration, application for—Inquiry as to extent of estate.*

A Christian died leaving a widow and two daughters. The widow applied for grant of Letters of Administration to herself in respect of the deceased's estate. The sisters of the deceased objected.

Held, that the sisters had no right to object in the presence of the widow and daughters of the deceased.

The word "interest" in section 69 of the Probate and Administration Act cannot cover the case of a mere reversioner. An interest that has not arisen is properly not an interest, nor a right; it is nothing more than a bare expectation of a future right.

In an application for Letters of Administration, it is quite outside the scope of inquiry to determine the limits of the estate. SHARKEY *v.* JERRY ALLARD, 73 P. W. R. 1912 433

——— ——— ——— ss. 78, 79, 86 690

Professional ethics—Counsel retained by party—Examination of Counsel as witness, if proper 721

Promissory-note *executed simultaneously with the transaction of lending Stamp on promissory-note ineffectually cancelled—Note inadmissible in evidence Whether lender can succeed on other evidence of the loan.*

Where a lender is able to prove a loan independently and without the assistance of a promissory-note, which is inadmissible in evidence, his claim for the loan ought to succeed.

Promissory-note—concld.

The plaintiff lent a sum of money to the defendant. Simultaneously with the transaction of lending a promissory-note was executed, the stamp on which was ineffectually cancelled. The promissory-note being inadmissible in evidence, *held*, that the plaintiff could rely on other evidence of the loan. RAM SARUP *v.* JASODA KUNWAR, 9 A. L. J. 72 **138**

——— ——— ——— ———, *suit on—Promisee's name inserted in erroneous manner—Suit by real promisee—Maintainability of suit—Rectification of instrument, suit for, whether necessary.*

A suit on a promissory-note can be maintained by a person intended as the real promisee of the note, although a wrong name is mentioned by mistake in the note, as promisee. The real promisee is entitled to produce evidence to show that the name given is a mistake.

It is not necessary to bring a suit for rectification of the instrument before a suit on the promissory-note can be instituted. GOPAL ROW *v.* VEERAPPAN SERVAIKARAN, 10 M. L. T. 522; 22 M. L. J. 121 **95**

Provincial Insolvency Act (III of 1907), ss. 3, 37, 46—*Civil Procedure Code (Act XIV of 1882), Chap. XV, ss 588, 589—Order—Setting aside transfer of insolvent's house—Appeal—Deputy Commissioner of Darjeeling.*

An order of the Deputy Commissioner of Darjeeling setting aside a transfer of an insolvent's house and shop, is appealable to the District Judge and not to the High Court. CHAG MULL *v.* JAI NARAIN, 15 C. L. J. 239 **605**

——— ——— ——— **ss. 37, 46** **605**

——— ——— ——— **s. 37**—*Transfer to give preference—Mortgage in favour of a creditor discharging his debts—Debtor unable to pay his debts at the time—Annulment of transfer—Transfer of Property Act (IV of 1882), s. 53.*

A debtor, who was clearly unable to pay his debts, executed a mortgage of what appeared to be his whole valuable assets in favour of some of his creditors by which their own debts were discharged, some of these debts being on account of *hundis* which had not then become due. A portion of the mortgage-money was to be paid in cash to the debtor before the Sub-Registrar. Within three months from the date of the alienation, the other creditors applied that the debtor be declared an insolvent. Eventually, the debtor was declared an insolvent on this application:

Held, that the transfer was made with a view to give preference to some creditors over the others and should be annulled under section 37 of the Insolvency Act.

The terms of section 53 of the Transfer of Property Act and the terms of section 37 of the Insolvency Act are not identical. There is this material difference that in the case of transfers to be set aside under the provisions of section 53 of the Transfer of Property Act, actual fraud must be proved; whereas, under section 37 of the Insolvency Act, it is only necessary to show that the transfer has been made with a view to show preference to one creditor, to whom a debt may be validly due, over another creditor. BALMOKAND *v.* AYA SINGH, 18 P. W. R. 1912; 26 P. L. R. 1912 **68**

Provincial Small Cause Courts Act (IX of 1887), s. 16—*Civil Procedure Code (Act V of 1908), s. 15, O. XXXVII Jurisdiction of Karachi Small Cause Court—Suit under O. XXXVII not exceeding Rs. 1,000—Exclusive jurisdiction of Small Cause Court—No jurisdiction conferred on Sind Judicial Commissioner's Court by O. XXXVII.*

All suits on negotiable instruments in which the plaintiff desires to proceed summarily must be filed in Courts having appropriate local and pecuniary jurisdiction.

The Karachi Small Cause Court has exclusive jurisdiction to try all suits on negotiable instruments when the subject-matter of the suit does not exceed Rs. 1,000. Even if such a suit is brought under the provisions of Order XXXVII of the Civil Procedure Code, the Small Cause Court has exclusive jurisdiction. Section 16 of the Provincial Small Cause Courts Act bars the jurisdiction of the Sind Judicial Commissioner's Court to entertain such a suit.

Order XXXVII refers only to the mode of trial, it does not confer on the Courts specified therein jurisdiction to try suits which they are not otherwise competent to try. DOULATRAM *v.* HALO KANYA, 5 S. L. R. 155 **244**

——— ——— ——— **s. 25** **803**

——— ——— ——— **Sch. II, arts. 13, 18**—*Small Cause Suit—Claim for temple emoluments—Takid granting—Emoluments—Trusts—Suit for emoluments and neivedhanam—jurisdiction of Small Cause Court.*

A suit for temple emoluments, secured to the plaintiff by the author of a trust by a *takid*, which was registered on the same day as the instrument of trust itself, both in reality forming part of the same transaction, falls within the purview of Articles 13 and 18 of the Provincial Small Cause Courts Act; and is not cognizable by a Small Court.

Where a claim for *neivedhanam*, or rice allowance, is sued for along with a claim for such emoluments, the whole suit is excluded from the cognizance of a Small Cause Court and is triable as a regular suit. RANGASAMY PILLAI *v.* MUTHU CHIDAMBARA, (1912) 2 M. W. N. 589 **183**

——— ——— ——— **art. 18** **183**

——— ——— ——— **art. 26** **907**

——— ——— ——— **art. 31**—*Suit for a sum due on account—Omission of prayer as to defendant's accountability to plaintiff—Suit of small cause nature—Second appeal.*

Where the claim in a Court of first instance was for recovery of Rs. 500 due as per dealings between plaintiff and one *M.* and there was no prayer that any of the defendants should be made accountable to the plaintiff:

Held, that the suit was of a small cause nature and that no second appeal lay from the decree passed therein.

Article 31 of Schedule II of the Provincial Small Cause Courts Act applies to cases where the relationship of the parties is such that one of them is bound to render accounts to the other. CHIDRIE KRISTAPPA *v.* SIDDAMSETTI YAMANAPPA, 11 M. L. T. 13; (1912) 1 M. W. N. 36 **159**

Public policy—Proprietors of *zemindari* forming into limited company—Legality **673**

——— ——— ——— Sale of palanquin bearing service **190**

Punjab Courts Act (XVIII of 1884), s. 40 (1) (a) (i)—*Further appeal—Suit for declaration and injunction in respect of house—Value of house exceeding Rs. 1,000—Valuation of suit—Jurisdiction—Value—Court-fee—Court Fees Act (VII of 1870), s. 7 (IV) (c) and (d)—Suits Valuation Act (VII of 1887), s. 8—Chief Court Rules under s. 9, rule 4.*

In a suit for declaration where consequential relief in the nature of an injunction is prayed for, the value for purposes of Court-fee and jurisdiction is the amount at which the plaintiff values the relief between Rs. 100 and Rs. 500.

A further appeal lies from an appellate decree declaring a house to be *waqf* if the market-value of the house exceeds Rs. 1,000. KHAIR AHMAD *v.* MIR AHMAD ULLAH, 52 P. W. R. 1912 **408**

——— ——— ——— **s. 70 (1) (a).** *See* REVISION (CIVIL).

——— ——— ——— **s. 70 (1) (a)**—Revision—No application to set aside abatement **963**

——— ——— ——— **s. 70 (1) (b)**—*Further appeal—Pre-emption suit—Jurisdiction—Value during pendency of suit.*

A defendant's action *pendente lite* cannot effect the value of the suit. For the purposes of jurisdictional value for an appeal in a pre-emption suit, the value of improvements effected during suit should not be included. LAL HUSSAIN *v.* HASSA KHAN, 68 P. W. R. 1912 **428**

Punjab General Clauses Act (I of 1898), s. 4 **343**

Punjab Land Alienation Act (XIII of 1900), s. 9 (3)—Consignment of foreclosure proceedings to record-room—Commencement of Act before expiry of year of grace—No pending proceedings **621**

——— ——— ——— ——— **ss. 17, 110** **815**

——— ——— ——— **s. 117** **815, 953**

——— ——— ——— ——— **ss. 118, 119, 120** **953**

——— ——— ——— ——— **s. 122** **790**

——— ——— ——— ——— **s. 158 (2) (vi)** **812**

——— ——— ——— **s. 158 (2) (XIV)** **401**

Punjab Laws Act (IV of 1872), ss. 25, 29, 31—*Insolvency—Appeal from order under s. 25 passed before administration of estate—Order not a decree—Meaning and effect of order—Order refusing or granting discharge not to be made till estate fully administered—Rules under s. 31—Rule allowing appeal from order under s. 25 ultra vires.*

An order under section 25 of the Punjab Laws Act refusing to discharge an insolvent passed before the administration of the estate is complete is not a decree and is, consequently, not appealable.

The rule allowing appeal to the Chief Court from such an order is *ultra vires* of Government.

Ram Lal v. *Ladha Singh*, 62 P. R. 1886, followed.

Punjab Laws Act—concld.

An insolvency Court should not discharge, or refuse to discharge an insolvent until the estate is fully administered. If an order refusing discharge is made before the administration of the estate is complete, it should be taken to mean that at that stage the Court saw no sufficient grounds for a discharge. When the administration is complete, the Court has full power to again consider whether the insolvent should be discharged or not. AMAN-ULLAH *v.* ABDUL GHAFUR, 85 P. R. 1911 **808**

——— ——— ——— ——— **s. 29** **808**

——— ——— ——— ——— **s. 31**—Rules under section 31—Rule allowing appeal from order under section 25 *ultra vires* **808**

——— ——— ——— **ss. 47, 50 B**—*No rules framed by Government—Possession of buoy for crossing river not a punishable offence.*

No rules having been framed by the Local Government under section 47 or section 50 B of the Punjab Laws Act, constituting the manufacture of rafts or buoys or their use in crossing rivers an offence in the Lahore district, the possession of a buoy in this part of the province for use in crossing a river is not a punishable offence. EMPEROR *v.* SOHAN SINGH, 18 P. R. 1911 CR. **1001**

——— ——— ——— **s. 50 B** **1001**

Punjab Limitation Act (I of 1900), scope of **343**

Punjab Municipal Act (XX of 1891), s. 3 (4) **427**

Punjab Pre-emption Act (II of 1905), ss. 2 (2), 12—*Occupancy-rights under section 6 of the Tenancy Act—Sale to landlord by joint tenant—Right of other tenant to pre-empt—Landlord's right to defeat pre-emption—Remedy of landlord in case of such sale to third person—Punjab Tenancy Act (XVI of 1887), ss. 5, 6, 53, 56, 60.*

Where one of two joint occupancy-tenants under section 6 of the Punjab Tenancy Act has sold his occupancy-rights to the landlord, the other tenant is entitled to pre-empt.

There is nothing in the Punjab Tenancy Act or in the Pre-emption Act which gives a landlord any right of pre-emption, or right to defeat a claim to pre-empt in the case of a sale of a right of occupancy under any section other than section 5.

Ghauhra v. *Harbhaj*, 16 P. R. 1905; 41 P. L. R. 1905, explained and distinguished.

In the case of such a sale to the landlord himself, he is estopped, by reason of being a party to the sale, from suing to avoid the sale under section 60 of the Tenancy Act. If the sale is to a third person, and the landlord has not given his previous consent in writing, he can sue to avoid the sale. AMAR SINGH *v.* HUSAINA, 15 P. W. R. 1912; 36 P. R. 1912; 18 P. L. R. 1912 **28**

——— ——— ——— **ss, 3, 5**—*Agricultural land—Urban immoveable property—Character of land to be looked as on the date of sale and not as before or after sale.*

A piece of land was entered in the last Settlement as *bara (ghair mumkin)* and no Revenue was assessed

Punjab Pre-emption Act - contd.

on it. After the Settlement, however, it was brought under cultivation and was occupied for agricultural purposes for about 15 years. At the date of its sale it was still occupied for these purposes though it was situate in the direction of the recent extension of a town and on the main road connecting the town with its Railway Station:

Held, that, for the purposes of pre-emption, the land was agricultural land and not urban immoveable property.

In determining whether or not a piece of land is for pre-emption purposes agricultural land the time to be looked at is the time when the sale was made. The fact that at one time it was *ghair mumkin* and not assessed to Revenue, that since the date of sale it has been built upon by the vendee or that it lies in the direction of recent extensions of a town and on the main road connecting the town with its Railway Station, is insufficient to alter its character. JIWA *v.* BUTA, 21 P. W. R. 1912; 23 P. L. R 1912; 26 P. R. 1912 **167**

——— ——— ——— **s. 4** **667**

——— ——— ——— **s. 5** **167**

——— ——— ——— **s. 11, proviso—**

"Agnate," meaning of Widow of agnate—Widow recorded as owner—Brother owning land not inherited by plaintiff.

A *sapinda* under Hindu Law is not synonymous with agnate.

The widow of a male agnate is not an "agnate," as the word is used in the proviso to section 11 of the Punjab Pre-emption Act.

Three *Bania* brothers, *A.*, *B.* and *C.* purchased certain land in a village *X.* and certain other villages in 1885 and were duly recorded as owners. On 7th December 1889, *A.* died leaving a widow *D.* On 22nd February 1890, a partition was effected by which the land in village *X.* fell to the shares of *B* and *D*, *C.* getting his share in the other villages. Mutation was sanctioned according to the partition. In 1896, *D.* died and mutation of her land in the village *X.* was effected on 5th July 1897 in favour of *B* and *C.* In November 1907, *C.* sued for pre-emption of certain agricultural land in the village *X*:

Held, (1) that *C.* did not fulfil the requirements of the proviso to section 11 of the Punjab Pre-emption Act;

(2) that *D.* was not *C.*'s agnate;

(3) that the fact that *B* had been continuously recorded as owner in village *X.* for more than 20 years did not help *C.*, as *B.* did not hold *C.*'s land CHAJJU MAL *v.* TELU MAL, 61 P. W. R. 1912 **665**

——— ——— ——— **s. 12** **28**

——— ——— ——— **ss. 12 (a), 14 (b)** **802**

——— ——— ——— **s. 13 (1) fifthly**

Common entrance from the street—Blind alley "Street" meaning of—Punjab Municipal Act (XX of 1891), s. 3 (4).

Four houses opened into a blind alley of irregular shape and small dimensions. The mouth of the alley gave access to the houses from the public street. There was no arch or door at the mouth of the alley. Each of the four houses opening into the alley had a separate door and the four houses were not shown to

Punjab Pre-emption Act—concld.

have at one time constituted one building with the opening passage of the alley as its entrance and to have been subsequently sub-divided into separate dwelling houses. There was nothing to show that no one other than the owner of those houses had free access to or a right of way over the blind alley. It was not proved that the blind alley was the private property of the owners of the four houses:

Held, that the blind alley did not constitute a common entrance to the four houses from the street within the meaning of section 13 (1) *fifthly* of the Punjab Pre-emption Act.

The Legislature intended to use the word "street" in section 13, in much the same sense in which the word is used in the Punjab Municipal Act, as including an alley, whether a thoroughfare or not, over which the public have a right of way. NABA *v.* PIARA MAL, 70 P. W. R. 1912 **427**

——— ——— ——— **s. 19, scope of—**

Withdrawal of deposit, effect of—Pre emption—Benami suit—Bona fide claim—Superior pre-emptor asserting claim to defeat rival pre-emptor—Money raised by mortgage to vendees.

Section 19 of the Punjab Pre-emption Act, does not provide for a case in which the pre-emptor, after having made the necessary deposit under sub-section (1) (*a*) of the section, has withdrawn it subsequent to the decision of the suit The penal provisions of sub section (3) come into operation only if the pre-emptor fails, within the time fixed by the Court, to make the deposit or furnish the security mentioned in sub section (1). But once the deposit is made in pursuance of the order of the Court within the time fixed by it, the Court has no power to reject the plaint by reason of the subsequent withdrawal of the deposit.

In the case of rival pre-emptors, if the right of pre emption invested in one of them is superior to that of the other, that right cannot be defeated merely because his object in prosecuting the suit is to prevent the other pre-emptor from getting the land and because he has raised funds for the purpose by mortgaging the land to the vendees.

Where the superior pre-emptor brought his suit subsequent to the suit of his rival pre-emptor, and it appeared that the money deposited in Court under section 19 of the Pre-emption Act was advanced by the vendees and that the money paid in compliance with the pre emption decree passed in his favour was advanced on a mortgage of the land in suit by near relations of vendees:

Held, that the facts were insufficient to make the superior pre-emptor a *banami* pre-emptor and to disentitle him to a decree for pre-emption. SHERU *v.* JAWAHIR SINGH **662**

——— ——— **s. 22** **802**

Punjab Tenancy Act XVI of 1887,

s. 3—Occupant of water-mill **348**

s. 4 **511**

——— ——— **ss. 5, 6** **28**

——— ——— ——— ——— **s. 50** **447**

——— ——— ——— ——— **ss. 53, 56, 60** **28**

——— ——— ——— ——— **s. 77 (3) (1),** **447, 812**

——— ——— ——— ——— **ss. 77 (3) (1),** **100, 401**

Question of Law -Estoppel 81

Railway Administration - Power to reserve separate accommodation for particular classes of passengers—Power to remove passenger trespassing into a reserved compartment 237

Railways Act (IX of 1890), s. 47—*Rules made by Railway Company—Rules adopted by Railway Company to be deemed as made by them—Identity of rules, whether should appear on face of Circular or Gazette.*

Rules adopted by a Railway Company, though not originally prepared by it, would come within the description of rules made by it: and rules so adopted, if sanctioned by the Governor-General in Council and published in the Gazette of India, would satisfy the requirements of section 47 of the Railways Act.

It is not necessary that the identity of rules made by a Railway Company with those sanctioned and published, should appear on the face of the Circular or the Gazette. BENGAL NAGPUR RAILWAY CO. LD. *v.* RAM PROTAP GHANESWAM DAS, 16 C. W. N. 360 529

——— ——— ——— **s. 77**—*Notice to the Traffic Manager equivalent to notice to the Agent—Contract Act (IX of 1872), s. 23—Risk-note Form H—Liability of the Railway Administration.*

It is the business of the Traffic Manager to settle all claims against a Railway. A notice to that official is a claim preferred "to the Railway Administration" under section 77 of the Railways Act The agent must be presumed to know what is going on in his subordinate offices and the notice of claim to the Traffic Manager must be regarded as equivalent to notice to the Agent.

Woods v. *Meher Ali*, 13 C. W. N. 24; 4 M L. T. 427; 2 Ind. Cas. 107, followed.

Where a consignor signs a risk-note in the old Form H. and agrees to hold the Railway Administration free from all responsibility for any loss, etc , for such consignment, the Railway Administration is fully protected from liability to compensation for loss. RAM GOPAL *v.* AGENT, BOMBAY BARODA AND CENTRAL INDIA RY. CO. 297

——— ——— ——— **ss. 77, 140**—*Non-delivery of goods—Consignee imposing conditions wrongfully—Liability of Railway Company—Notice of claim—Service of notice—Sale of goods without observing provisions of law—Damages.*

Where the non-delivery of certain goods was due to the fact that the consignees would only take delivery on a condition they were not entitled to impose:

Held, that the goods remained at the Railway Company's shed at the risk of the consignees by reason of their failure to take delivery and the Company was not liable for their loss.

Where a suit was instituted against a Railway Company for compensation for loss of goods, but the method of serving the notice of claim required by section 77 of the Railways Act, was not followed, nor was it shown that the claim was otherwise preferred to the Railway Administration so as to satisfy the requirements of section 77:

Held, that the suit must fail.

Where certain goods were sold by a Railway Company owing to the consignees' failure to take delivery, but in so selling the Railway Company omitted to observe the provisions prescribed by the Railways Act:

Held, that the sale was not in accordance with law, and the consignees were entitled to damages, if any. JANKI DAS *v.* BENGAL NAGPUR RAILWAY COMPANY, 15 C. L. J. 211; 16 C. W. N. 356 509

——— ——— ——— **s. 109**—*Railway Administration—Power to reserve separate accommodation for particular classes of passengers—Power to remove passenger trespassing into a reserved compartment—Interpretation of statutes—Express powers granted to a Company—Exclusion of other powers by implication—Master and servant—Servant acting outside the scope of his authority—Liability of master—Secretary of State for India - Liability for illegal removal by Railway servant - Assault—Removal by threat of force—Forcible removal.*

A Railway Administration has power to reserve separate compartments for Europeans, and any person who is not a European is not entitled to travel in such reserved compartment. There is nothing inherently illegal in the provision of separate accommodation for Europeans and Indians. Section 109 of the Railways Act implies a general power of reservation of a compartment for passengers of a particular class, community or race.

A mere verbal threat to use force if the person threatened persists in a particular course of conduct does not amount to an assault.

Birbul Khatifa v. *Emperor*, 30 C. 97 at p. 100, relied upon.

The removal of a person by a threat to use force is 'a forcible removal.'

The Railway authorities have no power to remove a passenger from a compartment which is reserved for the use of another passenger or class of passengers.

Where a statute confers powers upon a Company which the Company as owner of property could have exercised without statutory power, the powers expressly given should be treated as defining and limiting the right conferred and as implying a prohibition of the more extensive rights which the Company might have by virtue of its ownership of property.

Where the servants of a Government Railway Administration have no power to remove a passenger and in removing him have acted outside the scope of their authority, the passenger has no cause of action against the Secretary of State for India who is not liable for such acts of his servants. MATHRADAS *v.* SECRETARY OF STATE, 5 S. L. R. 140 237

——— ——— ——— **s. 140** 509

Razinamah decree, *construction of—Stipulation that husband should give jewels to wife to wear when required—Suit by wife for possession of jewels, whether maintainable—Civil Procedure Code (Act V of 1908), s. 47.*

A *razinamah* decree in a suit by husband against his wife for restitution of conjugal rights, provided that the husband was to give certain jewels to the wife to wear whenever the latter required them and that at other times he was to keep them. In a suit by the wife pursuant to the *razinamah* for possession of the jewels: *Held*, (1) that, in the

Razinamah decree—concld.

Essence of the allegation that the wife required the jewels for purposes of wearing, the suit was not maintainable;

(2) that the suit should not be dismissed on the ground that the jewels were to be worn by the wife only on certain occasions, as that was not the import of the *razinamah*, nor as barred by section 47, Civil Procedure Code, 1908. CHELLAMMAL *v.* KRISHNASAWMY IYER **618**

Receipt—Instrument purporting to receive money from Bank and specifying name of messenger **330**

Redemption. *See* MORTGAGE—REDEMPTION.

Reformatory Schools Act (VIII of 1897), s. 16—*Detention in lieu of imprisonment—Appeal—Power of Appellate Court to alter sentence of imprisonment to one of whipping—Effect of alteration.*

Under section 16 of the Reformatory Schools Act, an order substituting detention in a Reformatory for imprisonment cannot be interfered with in appeal, but this does not preclude an Appellate Court from altering the sentence of imprisonment to one of whipping. When the order of imprisonment is altered to one of whipping, the order of detention in a Reformatory falls to the ground. IMPERATOR *v.* RAJABALI, 5 S. L. R. 173 **284**

Registration—Defect in procedure of registration, consequences of—Admissibility of document in evidence **531**

——— ——— ——— Partition of estate settled by written agreement to refer to arbitration—Admissibility of agreement in evidence without registration—Agreement complete before formally written—Terms as a rule settled before writing **500**

——— ——— ——— Sale of equity of redemption **852**

Registration Act (III of 1877), s. 17 **852**

——— ——— ——— **ss. 32, 60, 73, 87**—*Presentation for registration—Endorsement of certificate of registration on the bond—Presumption—Evidence Act (I of 1872), s. 114—Defect in procedure of registration, consequences of—Admissibility of document in evidence.*

The certificate of due registration endorsed upon a bond raises a strong presumption in favour of its due registration and, in the absence of clear proof that the requirements of law were not complied with, the Court is bound to admit the same in evidence.

A document was presented for registration to a Sub-Registrar who for some reason refused to register it. An application was then made to the Registrar who set aside the order of the Sub-Registrar but, instead of returning the document to the applicant for making a fresh presentation to the Sub-Registrar, himself sent the document to the Sub-Registrar for registration. The document was thereupon registered:

Held, that the irregularity in sending the document direct to the Sub-Registrar for registration was a defect in procedure and did not vitiate the registration. RAMCHANDRA DAS *v.* FARZAND ALI KHAN, 9 A. L. J. 188 **531**

Registration Act—(1877)—concld.

——— ——— ——— **s. 32**—*Presentation of document for registration—Presentation by father of executant in presence of executant.*

A lady executed a bond, and went to the registration office where she was present in a *doli* while her father presented the document to the Sub-Registrar for registration. The lady there and then admitted execution and receipt of money: *Held*, that there was proper presentation of the document within the meaning of section 32 of the Registration Act WILAITI BEGAM *v.* FAZAL HUSAIN KHAN, 9 A. L. J. 148 **961**

——— ——— ——— **ss. 47, 50** **653**

——— ——— ——— **ss. 60, 73, 87** **531**

——— ——— ——— **(XVI of 1908), s. 17 (b)**—*Agreement to refer to arbitration—Registration—Partition of estate settled by written agreement to refer to arbitration—Admissibility of agreement in evidence without registration—Agreement complete before formally written—Terms as a rule settled before writing.*

In every case where an agreement is reduced to writing, the writing is a record of terms which have already been settled between the parties. Their minds are made up before they advance to the stage of writing, the terms are not settled between them as the writing proceeds, and, therefore, strictly speaking written agreements in all cases are subsequent in point of time to the settlement of the terms which they purport to record. But the two operations of mental agreement and of putting down the terms of the agreement on paper constitute only one transaction.

An agreement to refer to arbitration recited *inter alia* "the executants have agreed and consented to divide the estate in dispute and accordingly they appoint.....arbitrators and an umpire and agree that the arbitrators shall partition the estate and thereupon each executant shall obtain proprietary possession of his respective share as declared by the arbitrators." It was found on evidence that this agreement was the only record of matters which had been settled before it was executed and there was no evidence of any agreement, independent of the instrument, to partition the estate:

Held, that the agreement was inadmissible in evidence for want of registration. RAGHUBIR SINGH *v.* UMRAO SINGH **500**

——— ——— ——— **s. 49** **858**

——— ——— ——— **ss. 73, 74, 77**—*Application for registration—Inquiry—No evidence produced—Order of refusal.*

Where, owing to the absence of the parties, who were to attend for the purpose of an inquiry under section 74 of the Indian Registration Act, a Registrar dismisses an application made under section 73 of the Act to have the document registered, the order of the Registrar is an order of refusal within the meaning of section 77 of the Act. ABDUL HAKIM KHAN *v.* CHANDAN, 9 A. L. J. 4 **83**

——— ——— ——— **ss. 74, 77** **83**

Regulation XVII of 1806, ss. 7, 8—*Mortgage—Foreclosure proceedings—Prescribed procedure imperative—Omission to affix seal on notice—Fatal defect—Punjab Land Alienation Act (XIII of 1900), s. 9 (3)—Consignment of foreclosure proceedings to record-room—Commencement of Act before expiry of year of grace—No pending proceedings.*

Where foreclosure proceedings were consigned to the record-room before the year of grace had expired, and after the consignment of the record, but before the expiry of the year of grace, the Punjab Alienation of Land Act came in force:

Held, that there were no proceedings *for the enforcement of the conditional sale clause pending* before the Court at the time of the commencement of the Act.

Where a mortgagee sues for possession of the mortgaged property upon the ground that he has become owner thereof under the terms of the conditional sale clause it is *incumbent* upon him to prove affirmatively that each and all of the conditions prescribed by sections 7 and 8 of Regulation XVII of 1806 have been duly fulfilled. He must show that the foreclosure proceedings were valid in every respect. His plaint should distinctly allege, not only that the year of grace had expired, but that the procedure prescribed by law, both preparatory to and in connection with the notice of foreclosure, had been duly observed.

A plaintiff, who neither sets forth these necessary particulars in his plaint, nor adduces any proof in support of the special relief which he seeks to enforce, cannot avoid the consequences of his neglect by merely relying on the circumstances that the defendant did not plead the non-observance of the prescribed procedure but defended the suit on other grounds.

Lachmi v. *Tota*, 16 P. R. 1888; *Kirpa Ram* v. *Bhagwana*, 106 P. R. 1889, followed.

Bhagirath v. *Nathmal*, 105 P. R. 1907, distinguished.

The provisions of Regulation XVII of 1806 are not merely directory but imperative, prescribing conditions precedent to the right of the mortgagee, to enforce forfeiture of the estate of the mortgagor, and have for their object to protect mortgagors, who are often poor and ignorant men, from fraud and oppression on the part of the money-lenders. The prescribed procedure must, therefore, be strictly followed.

Madhopersad v. *Gajudhar*, 11 C. 111 at p 117; 11 I. A. 186, followed.

The omission to affix the seal of the District Judge upon the foreclosure notice renders the foreclosure proceedings bad in law and is fatal to a suit by the mortgagee for possession as owner. BAKHTAWARI v. SHIBBAN LAL, 69 P. W. R. 1912 **621**

——— ——— ———**s. 8** **621**

——— ——— **I of 1886, ss. 39, 62** **377**

Release, *not conveyance but admission.*

A release does not operate as a conveyance: it is at the most an admission by the party executing the release that he has no interest in the property. NARAK LAL v. THAGOO LAL **455**

Religious Endowment. *See* HINDU LAW—ENDOWMENT.

Religious institution—*Dharmsala—Mahantship*—Rule of succession—Necessity to ascertain—Right of owner's descendant to oust trespasser **62**

Remand of accused. *See* CRIMINAL PROCEDURE CODE, s. 167.

——— ———, order of—Appeal—Revision **855**

Rent—Damages—True test **29**

Res judicata. *See* CIVIL PROCEDURE CODE 1882, s. 13; CIVIL PROCEDURE CODE, 1908, s. 11.

——— ——— ———Previous suit for rent—Denial of relationship of landlord and tenant—Dismissal of rent suit—Subsequent suit for possession—Whether defendant can urge tenancy **688**

——— ——— ———Mortgage executed during pendency of suit in which mortgagor's title to the property is in question—*Lis pendens* **641**

——— ——— ———Suit in Revenue Court for ejectment on ground of sub-tenancy—Subsequent suit in Civil Court for ejectment on ground of trespass **634**

——— ——— ———*Appeal against only one out of two decrees.*

Where two decrees have been passed and both of them require to be set aside in order to give the dissatisfied party the relief which he seeks, but an appeal is filed against only one decree while the other is allowed to become final, the latter operates as *res judicata* in appeal against the former. WALIULLAH v. EJAZ ALI, 15 O. C. 22 **934**

——— ———*Civil Procedure Code (Act XIV of 1882), s. 158—Dismissal of suit under this section, effect of—Gift of land out of holding to absentee relation—Whether* shamilat *included—Intention of parties—Status of full proprietor.*

The dismissal of a suit under section 158 of the old Civil Procedure Code operates as *res judicata* in respect of the right of the plaintiff to recover by any subsequent suit the property sued for in the first suit.

The ancestors of plaintiffs and defendants originally owned a joint holding in equal shares. The plaintiffs' branch, however, remained absentees for a long time. Their suit to recover their half share of the holding and of *shamilat* was dismissed in 1891. In 1897 defendants voluntarily gifted about 29 *bighas* to the plaintiffs out of the original holding. This area constituted about 1/5th share of the whole holding.

On a subsequent partition of the *shamilat* land, the area falling to the share of the holding was allotted to defendants without giving plaintiffs any share. Plaintiffs thereupon sued for possession of one-half share, of the *shamilat* area allotted to defendants.

Held, (1) that plaintiffs were not entitled to one-half share, as their suit for the *shamilat* was dismissed in 1891;

(2) that in considering whether the gift to plaintiffs in 1897 included the corresponding share of *shamilat*, what the Court had to look to was the intention of the parties and as the mutation proceedings showed that plaintiffs were restored to the

Res judicata—concld.

position of full proprietors in respect of 1/5th share in the holding, they were entitled to 1/5th share in the *shamilat* allotted to the holding. MUHAMMAD *v.* IMAM KHATUN, 25 P. L. R. 1912; 37 P. W. R. 1912 **172**

——— ——— ——— *Pledge by unauthorised person—Joint tort-feasors—Cause of action in both suits to be same—Subsequent assignment in respect of tort*—Lis pendens, *inapplicable to moveable property—First suit against pledgor—Moveable property pawned during the pendency of suit—Second suit against pledgee—Pledgor basing title on adoption—Adoption held not proved in first suit—Right of pledgee to raise issue of adoption in second suit—Privity between pledgor and pledgee.*

In order that a judgment in a previous suit should operate to bar proceedings in a second suit, the cause of action in the second suit must be precisely the same as the cause of action in the first suit.

Wegg Prosser v. *Evans*, (1895) 1 Q. B. 108, followed.

A fresh assignment in respect of a tort subsequent to that originally sued upon will not come within the scope of the first judgment so as to bar the fresh assignment.

The doctrine of *lis pendens* does not apply to moveable property.

Wigram v. *Buckley*, (1894) 3 Ch. 483; 63 L. J Ch. 689; 7 R. 469; 71 L. T. 287; 43 W. R. 147, followed.

A., claiming as the adopted son of *B.*, took possession of certain ornaments left by *B.* and pawned some of them to *C. D.*, the heir of *B.* sued *A.* for possession of the ornaments and recovered judgment which, however, was not satisfied. The question of the adoption of *A.* was decided against him in this suit. During the pendency of this suit, most of the ornaments were pledged by *A.* to *C.* Subsequently *D.* sued *C.* for detention of the ornaments. *C.* pleaded that, as *A.* and *C.* were joint tort-feasors, the second suit was barred by the judgment in the first suit. *C.* further sought to raise an issue as to the adoption of *A.*:

Held, (1) that the second suit was not barred by the principle of *res judicata.*

(2) That as the doctrine of *lis pendens* did not apply to moveable property, the fact that the first suit was pending at the time of the pledge of a large portion of the ornaments sought to be recovered in the subsequent suit, could not prejudice *C.* on the issue of *res judicata.*

(3) That *C.* not being a privy of the person who was defendant in the first sut, was not bound by that judgment.

(4) That the judgment in the previous suit was no bar to the issue sought to be raised by *C.* as to the adoption of *A.* as the judgment was subsequent to the pledge and *C.* did not claim under a person against whom the issue of adoption had been finally heard and determined at the time of the pledge. GOVIND BABA GUJAR *v.* SHRIMANT JIJIBAI SAHEB, 14 BOM. L. R. 9; 36 B. 189 **849**

——— ——— ——— *Suit for rent—Previous Certificate cancelled on ground that* bona fide *claim of right is involved—No adjudication on merits—Public Demands Recovery Act (I B. C. of 1895), s. 7 sub-s. (1) cl. (c), s. 10, s. 12 sub-s. (1), s. 32, sub-s. (1)—Civil Procedure Code (Act XIV of 1882), s. 13.*

A certificate for arrears of rent was made on behalf of a landlord who was a ward of Court. The tenant objected on the ground that he held the land rent-free. The certificate officer decided in favour of the landlord. Upon an appeal by the tenant, the Collector, without entering into the merits, cancelled the certificate on the ground that there was a *bona fide* claim of right involved in the proceedings. The landlord then brought a suit for rent in respect of which the certificate had previously been made:

Held, that the suit is not barred by the doctrine of *res judicata* as the Collector did not cancel the certificate on the merits JANKI KOERI *v.* BASDEO OJHA **351**

Restitution of conjugal rights. *See* MUHAMMADAN LAW.

Restriction against alienation **613**

Resumption of Police and excise functions exercised by Central Provinces *Zamindars* **965**

Revenue Sale—*Sale of larger share than one in default—Mistake of Collector's officers—Effect of sale on share not in default.*

The officers of a Collectorate, under the erroneous impression that the share in default was much larger in extent than it really was, exposed for sale the plaintiffs' share of property in respect of which no default had been made:

Held, that the act of the Collector, in exposing for sale any share in excess of the share which was really in default, was wholly without jurisdiction, and therefore, could not prejudice the rights of the plaintiffs. GANGA PERSHAD SAHU *v.* IRSHAD ALI KHAN, 15 C L J. 54 **959**

——— ——— ——— *Omission to post proclamation in time—Irregularity or illegality—Sale merely irregular—Not to be set aside without proof of injury—Inadequacy of price—No presumption as matter of law that inadequacy of price is due to irregularity—Revenue Sale Law (Act XI of 1859, s. 6—Bengal Act (VII of 1868), s. 8.*

The omission to post the proclamation of a revenue sale in the Collectorate one month before the date of sale, does not amount to more than an irregularity and does not make the whole sale entirely null and void.

Therefore, a person whose property has been sold cannot ask to have the sale set aside simply and solely on the ground that the sale was illegal by reason of the fact that the notice had not been served in time without proof of injury.

The Court is not bound, as matter of law, to conclude that inadequacy of price was due to the irregularity. GANGADHAR DAS *v.* BHIKARI CHARAN DAS, 16 C. W. N 227 **403**

Revenue Sale Law (Act XI of 1859, s. 6 **403**

——— ——— ——— **ss. 10 11, 53**—*Bengal Land Registration Act (VII B C of 876), s. 70—Separate accounts, opening of, by Collector without jurisdiction, effect of—Civil Procedure Code (Act XIV of 1882), s. 575—Civil Procedure Code (Act V of 1908), s. 98 sub-s(2)—Point of law only to be referred*

Per *Mookerjee and Vincent, JJ. (Brett, J. dissenting*—A proprietor, who is not a recorded sharer of a joint estate held in joint tenancy, within the meaning

Revenue Sale Law—concld.

of section 10 of Act XI of 1859, nor a recorded sharer whose share consists of a specific portion of the land of the estate within the meaning of section 11, but is recorded as proprietor of an undivided interest held in common tenancy of a specific portion of the lands of the estate but not extending over the whole estate, within the meaning of section 70 of the Bengal Land Registration Act, 1876, is not entitled to claim the benefit of the exception made in section 53 of Act XI of 1859 in favour of sharers with whom the Collector has, under section 10 or section 11 of the Act, opened separate accounts.

Per *Mookerjee, J.*—Where jurisdiction is usurped in contravention of statutory provisions, the act performed is a nullity. Therefore, if a Collector opens a separate account in clear contravention of the provisions of sections 10 and 11 of Act XI of 1859, that is, if he applies the provisions to cases to which the Legislature never intended that they should be applied, his act is without jurisdiction and cannot confer upon the person who obtains a separate account opened under such circumstances, the statutory privilege created by section 53.

Shareholders in some only of the villages constituting an estate, cannot claim to have a separate account opened under either section 10 or section 11.

Nunho Shahee v. *Ram Pershad*, 21 W. R. 38, followed.

Under section 575 of the Civil Procedure Code, 1882, it was the appeal that was referred to a third Judge, when the Judges hearing an appeal differed in opinion on a point of law; under the present Code of 1908 only the point of law is to be referred. MAHAMMAD MEHDI HASSAN KHAN *v.* SHEOSHANKAR PERSAD SINGH, 14 C. L. J. 552; 39 C. 353 **353**

——— ——— ——— **ss. 11, 53** **353**

Review. *See* CIVIL PROCEDURE CODE, 1908, O. XLVII.

——— ——— *Ex parte* decree—Period of limitation for application for setting aside *ex parte* decree **318**

——— ——— High Court—Criminal Case Rule discharged under misapprehension of facts—Judgment not signed—Re-hearing of case **776**

Revision (Civil). *See* CIVIL PROCEDURE CODE, 1908, s. 115.

——— ——— ——— Assumption of custom without proof **865**

——— ——— ——— Interlocutory orders **903**

——— ——— ——— Order forfeiting bond **223**

——— ——— ——— Partition cases—Power of Financial Commissioner to interfere **815**

——— ——— ——— Preliminary and interlocutory order **800**

——— ——— ——— Separate Hindu family—Omission to acquire production of Succession Certificate Act **363**

——— ——— ——— *Error of law—Substantial justice not done.*

The High Court will interfere in revision where the lower Court has been guilty of an error of law and substantial justice has not been done in the case. JANKI PRASHAD *v.* THAKUR DAS **21**

Revision—concld.

——— ——— **(Civil)**—*Civil Procedure Code (Act V of 1908), O. XLI, r. 23—Order not appealable.*

An order of remand under rule 23 of Order XLI which is not appealable, cannot be interfered in revision. RAMJI DAS *v.* SHANKAR DAS, 10 P. W. R. 1912 **855**

——— ——— ——— *by High Court—Provincial Small Cause Courts Act (IX of 1887), s. 25.*

Per *Piggott, J. C.*—It is no doubt advisable that the High Court should in exceptional cases assert a general power of revision in suits tried by Small Cause Courts where the decision arrived at appears to be capricious or perverse or arrived at in defiance of well known principles of law. But it is not at all an adequate ground for interference under section 25, Provincial Small Cause Courts Act that the presiding Judge of the Small Cause Court had before him for determination a doubtful issue of law, and that his decision on the said issue, though honestly arrived at and upon a reasonable and fair consideration of the law applicable to the point and the authorities thereon, is one which this Court might not have been prepared to affirm if the matter had come before it in a second appeal. BRIJ MOHAN LAL *v.* MUNNI BIBI, 14 O. C. 343 **803**

——— ——— ——— *Material irregularity—Failure to consider important evidence—Misunderstanding position of parties—False assumption—Punjab Courts Act (XVIII of 1884), s. 70 (1) (a) and (b).*

Where in dealing with a possessory suit under section 9 of the Specific Relief Act, the Court entirely misunderstood the position of the plaintiffs, ignored material and important evidence, misconstrued a material document and failed to apply its mind to the distinction between possession and use or occupation:

Held, that the Court acted with material irregularity within the terms of section 70 (1) of the Punjab Courts Act and that a re-trial of the suit was necessary. O'BRIEN *v.* ABDUL RAHMAN, 28 P. W. R. 1912; 14 P. L. R. 19 2 **6**

——— ——— ——— *Technical error—Discretion.*

It is discretionary with the High Court to interfere on revision, and it will not exercise its powers merely because the lower Court has erred on a technical point if it appears that the lower Court's decision does substantial justice between the parties. ABDUL RAHMAN *v.* BHAGWAN DAS, 59 P. W. R. 1912 **720**

——— ——— **(Criminal).** *See* CRIMINAL PROCEDURE CODE, s. 439.

——— ——— ——— Judgment of lower Appellate Court very sketchy—Evidence not examined or weighed carefully—High Courts's power to interfere on merits **102**

——— ——— ——— Reduction of sentence—Effect to be given to real intention of Magistrate **109**

Revival of case—Discharge of accused by Magistrate Revival of case by same Magistrate, if legal—Magistrate hearing case partly—Discharge of accused by another Magistrate for non-attendance of remaining prosecution witnesses **776**

Right of private defence. *See* PENAL CODE, s. 147.

——— **to sue**—Contract—Provision for benefit of third parties—Right of such third parties to enforce the provision in their favour **205**

——— ——— *Hindu family trading firm—Contract with managing members—Right of managing members to sue alone on contract—Parties—Other members of firm not necessary parties to suit.*

The managing members of a Hindu family trading firm, with whom a contract is made, are entitled to sue to recover damages or compensation for breach of such contract. It is not necessary for all the partners in the trade business to join in the suit. The suit by the managing members is maintainable despite the non-joinder of a member of the firm who, though interested in the result of the suit, has no part in the management of the business and is not one of the partners with whom the contract was made. BADRI DAS *v.* SANTA SINGH, 3 P. R. 1912; 44 P W. R. 1912 **873**

Rioting. *See* PENAL CODE, s. 147.

Riwaj-i-am unsupported by instances—Evidentiary value **448**

Rules and Orders of the Chief Court, Vol. I, r. XXXIII (1) (2) 850

Sale. *See* REVENUE SALE.

Sale Certificate, construction of **324**

Sale in execution. *See* CIVIL PROCEDURE CODE, 1908, O. XXI, r. 66 **337**

——— ——— Bid considered highest by *Nazir* conducting sale—Re-opening of bids by order of Court—Higher bid obtained and bidder declared purchaser—Legality of procedure **597**

——— ——— Attaching creditors, responsibility of—Decree-holder, liability of, for improper attachment—Warranty of title of judgment-debtor **803**

——— ——— Transfer of pending execution case—Sale held irregularly—No application by judgment-debtor to set aside sale—Transferee of judgment-debtors, whether competent to question sale **542**

——— **of goods**—Lien for unpaid purchase-money—Consideration agreed to be paid at a future date **992**

——— ——— *Suit against buyer—Strangers in possession—Decree only against buyer—Attachment.*

Where the right of the plaintiff to recover the price of goods sold is against his vendee alone, third persons found in possession of such goods cannot be made liable for the price in a suit against them all. After a decree against the vendee, such goods may be attached although in the possession of others. MADDANIAH *v.* BHIMAPPA, (1912) 1 M. W. N. 72 **469**

——— **or mortgage**—Construction of deed—*Criteria* **667**

Sanction to prosecute. *See* CRIMINAL PROCEDURE CODE, s. 195 **111**

——— ——— Commitment by wrong Court—Commitment to wrong Court—Using a document as genuine—Compulsory production in Court **275**

Sanction to prosecute—concld.

——— ——— *Criminal Procedure Code (Act V of 1898), s. 195—Filing forged document though not tendering in evidence—Attempt to use forged document—Penal Code (Act XLV of 1860), ss. 471, 511—Proceeding under section 195, Criminal Procedure Code—Costs.*

The filing of a forged document in a Court with the intention of relying on it at the trial of a case amounts to an attempt to use document though the document itself was not actually used; and the person filing it may be prosecuted for offences under sections 511 and 471 of the Indian Penal Code.

Ambika Prasad v. *Emperor*, 35 C. 820; 8 Cr. L. J. 398, dissented from.

It is improper to award costs to a person who applies for sanction under section 195, Criminal Procedure Code. KRISHNA PROSHAD *v.* RABINDRA NATH **99**

——— ——— *Refusal of sanction by Munsif—Appeal to the District Judge—Transfer of appeal to Sub-Judge—Jurisdiction of Sub-Judge to hear appeal—Civil Procedure Code (Act V of 1908), s. 115—Bengal North-Western Provinces and Assam Civil Courts Act (XII of 1887), ss. 21, 22—Criminal Procedure Code (Act V of 1898), s. 195 cls. (6), (7).*

As the District Judge is the only Court to which appeals from the orders of a Munsif ordinarily lie within the meaning of clause (7) of section 195 of the Criminal Procedure Code, a Subordinate Judge has no jurisdiction to hear an appeal from an order of a Munsif granting or refusing a sanction for prosecution, although the appeal having been at first filed in the District Court was transferred by the District Judge to the Sub-Judge for disposal under section 22 of the Bengal Civil Courts Act. RAM CHARAN CHANDRA *v.* TIRUPULLA SHEIKH, 16 C. W. N. 645; 13 CR. L. J. 191 **1007**

——— ——— *Whether application in writing necessary Inquiry—Sanction after great length of time—Criminal Procedure Code (Act V of 1898), s. 195.*

Sanction under section 195 of the Criminal Procedure Code should ordinarily be given only on an application made by some person who may desire to complain of any of the particular offences specified in the section but whose complaint cannot be entertained without such sanction.

It must be observed, however, that section 195 does not expressly provide that an application must be made for the grant of sanction. The rule stated above may be justified to this extent that before sanction is granted, the Court must be satisfied that there is some person who is willing to avail himself of it and carry on the prosecution.

An application for sanction need not be made in writing nor need it be made before an inquiry is held under section 195.

An application was made to a Munsif for sanction to prosecute under sections 209, 210, 193 and 465, Indian Penal Code; the Munsif refused the application on the ground that it was undesirable to grant sanction to a private prosecutor, and his order was upheld on appeal:

Held, that in the circumstances of the present case it would be improper to grant sanction to the private prosecutor. RAGHUNANDAN PROSAD SINGH *v.* RAM NARAIN SINGH **97**

Sanjidar, position of—Denial of owner's right by *sanjidar* 32

Scheme suit instituted before passing of new Code—Bar under section 92 (2) of the new Civil Procedure Code 264

Scribe whether an attesting witness 902

Secretary of State for India—Liability for illegal removal by Railway servant 237

Security for costs. *See* CIVIL PROCEDURE CODE, O. XLI, r. 10 335

Sentence—Commencement of sentence of imprisonment—Accused under custody for not giving security 1005

Service, contract of—Enforcement 868

——— **of summons.** *See* CIVIL PROCEDURE CODE, 1908, O. V.

Shebait. *See* HINDU LAW—*Shebait.*

———— Permanent lease granted by *Shebait*—Effect of lease 686

———— Succession—Deed of endowment 329

Small Cause Court Jurisdiction. *See* SMALL CAUSE SUIT.

Small Cause Suit—Claim for temple emoluments and *neivedhanam* 183

———— Suit to compel refund of assets improperly distributed under section 295, Civil Procedure Code 907

———— Suit for a sum due on account—No prayer for accounting 159

———— Wilful omission by defendant to cultivate land according to agreement—Suit for compensation whether suit for rent 29

Specific performance *See* SPECIFIC RELIEF ACT, s. 15

———— Contract by minor's guardian for purchase of immoveable property 331

———— Contract on behalf of minor—Minor's benefit 673

———— Contract with a number of persons—Right of one to enforce specific performance—Vendor and purchaser 315

————, suit for—Contract for sale—Subsequent sale to other vendees—Form of decree—Trust 176

———— Master and servant—Contract of service 868

Specific Relief, grant of—Discretion of Court 637

Specific Relief Act (I of 1877), s. 9—*Possessory suit—Point for determination—Dispossession within six months before suit—Finding that plaintiff not in possession—Suit to be dismissed—Limitation Act (XV of 1877), Sch. II, Art. 3.*

It is not a point requisite for the purposes of a suit under section 9 of the Specific Relief Act, that the plaintiff was in possession of the land in suit within six months from the date of dispossession. All that has to be determined is, whether the plaintiff was dispossessed and whether his suit was brought within six months from when the dispossession occurred.

Specific Relief Act—contd.

Where a Court finds that there was no dispossession, because there was no possession by the plaintiff the suit should be dismissed. JNAN CHANDRA NAG DAS v. LOCHH MOHAN 541

———— **s. 9**—*Persons dispossessed, whether must be co-plaintiffs—Possession, act of—Nature of property—Grazing cattle whether act of possession.*

Where a person enters wrongfully upon any land it is open to any one of the persons dispossessed to maintain an action for his ejectment, and it is no substantial grievance that all the persons dispossessed have not been joined as plaintiffs. He is sufficiently protected if the persons dispossessed are on the record either as plaintiffs or as *pro forma* defendants.

Whether a particular act may be treated as an act of possession, depends upon the nature of the property and the special circumstance of the case.

Rajkrishna v. *Muktaram Das*, 7 Ind. Cas. 709; 12 C. L. J. 605, followed.

The fact that the cattle of a person occasionally grazed on a piece of land is not by itself sufficient to show that the land was in the possession of that person. DEBENDRA NATH v. BINDHUBALA DASI 125

———— **s. 15**—*Specific performance—Contract to sell land—Contract signed by widow and husband's executor—Subsequent revocation of Probate—Whether contract is specifically enforceable against widow—Delay in bringing suit, whether material—No evidence of waiver, abandonment or acquiescence—Undue influence—Inadequate consideration—False allegation of payment of purchase-money.*

A contract to sell certain property was executed by a widow. The widow was a semi illiterate *pardanashin* woman, who was in the greatest straits when she made the contract. She had no competent advice in making the contract: the consideration for the sale was very inadequate and the transaction was altogether independent on the part of the widow. In a suit for specific performance of the contract, the vendee alleged that he had paid the bulk of the purchase-money but this allegation was proved to be false:

Held, that the plaintiff was not entitled to enforce the contract.

Obiter dicta. (*Per Coxe, J.*)—Where a contract to sell was executed by *M.*'s executor who had obtained Probate and also by *M.*'s widow who executed it in exercise of the power given to her by the Will of her husband to assent to a conveyance by the executor but the Probate was subsequently revoked:

Held, that if the contract was one which ought otherwise to be specially performed, it could be enforced against the interest of the widow in the property.

Hoorocks v. *Rigby*, 9 Ch. D. 180; 47 L. J. Ch. 800; 38 L. T. 782; 26 W. R. 714, referred to.

Where there has been nothing in the plaintiff's conduct that could possibly be regarded as evidence of waiver, abandonment, or acquiescence, and where the defendant's position has in no way been altered by the delay on the part of the plaintiff in bringing a suit for specific performance of the contract:

Held, that the delay was immaterial. KEDAR NATH v. MANU BIBI, 16 C. W. N. 247 879

Specific Relief Act - contd.

——— ——— ——— **ss. 15, 17** — *Hindu family — Divided brother — Agreement to sell — Part-performance — Court's power Execution of sale-deed.*

In the case of a divided Hindu family specific performance of a part of a contract, affecting some of the properties, cannot be ordered by Courts, as section 17, Specific Relief Act, expressly prohibits it.

In cases falling under section 15, it is open to the Courts to grant a decree for part-performance, the term "may" indicating their discretion.

A Court cannot compel the defendant to execute a deed of sale for the whole property and, on his failure to do so, issue one in his name under the seal of the Court, as it cannot sanction a transaction devoid of any legal effect.

A Court cannot ask a party to do an act the effect of which would be to compel a third party to bring a suit. GOVINDA NAICKEN *v.* APATHSHAYA IYER, (1912) 1 M. W. N. 87; 11 M. L. T. 87; 22 M. L. J. 257 **471**

——— ——— **s. 17** **471**

——— ——— ——— **ss. 21, 56, 57** *Contract of service as managing agent to limited Company — Enforcement of contract — Indirectly obtaining relief — Injunction not to dispense with services of managing agents — Master and servant — Contract of service — Specific performance.*

A servant cannot enforce a positive contract of service. Nor can he obtain an injunction to restrain the master from dispensing with his services except in a given manner or until after a stated period.

Therefore, where the Managing Agents of a Limited Company prayed for an injunction upon the Company to restrain them from passing, at any meeting to be held under a certain notice issued by the Company, any resolution purporting to dispense with the services of the petitioners as Managing Agents of the Company, and from interfering with the conduct of the business of the Company by the Managing Agents, on the ground that their services could not be dispensed with otherwise than by a certain special resolution as mentioned in the contract between the parties:

Held, that such an injunction could not be granted, for the result would be to continue their services, and so in effect to specifically enforce the contract, that the Company could dismiss the Managing Agents who were the Company's servants whom they had appointed, and if they dismissed the Managing Agents wrongfully, the latter would be entitled to sue for damages. N. C. SIRCAR AND SONS *v.* BARABONI COAL CONCERN, LD., 16 C. W. N. 298 **868**

——— ——— ——— **s. 22** **637**

——— ——— ——— **s. 27** (C) — Notice to some of transferees, members of joint *Mitakshara* family, whether good **637**

——— ——— ——— **s. 42** **489, 947, 953**

——— ——— ——— **s. 42** — Suit by tenant to determine who is landlord **40**

——— ——— ——— **ss. 52, 54** — *Injunction — Person building on other's land in spite of protest — Pecuniary compensation — Adequate relief.*

Where a person builds on another person's property against his Will and in spite of his protest, pecuniary compensation cannot be regarded as adequate relief for the invasion. In such a case, the owner is entitled to an injunction. BHAOSINGH *v.* HAZARI, 7 N. L. R. 179 **862**

——— ——— ——— **s. 54** **554, 661, 862**

——— ——— ——— **ss. 55, 56** **554**

——— ——— ——— **ss. 56, 57** **868**

Stamp Act (II of 1899), s. 2 (7) — *Negotiable Instruments Act (XXVI of 1881), s. 5 — Cheque — Receipts — Instrument purporting to receive money from bank and specifying name of messenger.*

An instrument which purports to receive a sum of money from the saving account of a depositor with a Bank and specifies the name of the messenger who is to receive payment is only a receipt and is not liable to stamp duty as a cheque. STAMP ACT, *In re*, 38 P. L. R. 1912 **330**

——— ——— ——— **ss. 30, 65** — *Receipt of money by money order — Refusal by payee to give a duly stamped receipt of payment to the remitter, whether an offence.*

G. remitted a sum of Rs. 34 to *B.* by a postal money order. *B.* on receipt of the money signed a receipt in duplicate and delivered the same to the postal peon but *G.* demanded a duly stamped receipt from *B.* which *B.* refused to give:

Held, that *B.* ought not to be convicted under section 65 of the Stamp Act for having refused to give the second stamped receipt to *G.*

Section 30 does not require a person receiving money to specify the particular purpose for which the money is paid. BALAMAKUND *v.* EMPEROR, 9 A. L. J. 97 **778**

——— ——— ——— **s. 65** — Receipt of money by money order — Refusal by payee to give a separate stamped receipt **778**

Step-in-aid of execution — Oral assignment of decree — Application by oral assignee **78**

——— ——— ——— Deposit of Nazir's travelling allowance **189**

Statutes, interpretation of. See INTERPRETATION OF STATUTES.

Stay of criminal proceedings — *Civil suit instituted in respect of the same matter — Practice.*

Where a person, against whom criminal proceedings are started in respect of a matter, has instituted a civil suit without waste of time, the decision of which is likely to throw considerable further light on the case, the criminal prosecution should be stayed pending the decision of the civil suit. BHOJA RAM *v.* EMPEROR, 21 P. W. R. 1912 CR. **927**

Subrogation — Payment by puisne mortgagee of prior mortgagee's decree — Shield against subsequent incumbrancer **939**

Succession Act (X of 1865), ss. 46 48, 50 **577**

Succession Certificate Act VII of 1889), s. 4 **148**

——— ——— ——— **s. 4** — *Separate Hindu family — Certificate necessary — Revision — Irregularity.*

It is a serious irregularity not to require the plaintiff to produce the certificate required by section 4 of the Succession Certificate Act in the case of a separate Hindu family. GHISU *v.* RAM BALLABH **363**

Sufficient cause. *See* LIMITATION ACT, s. 5.

Suit for resumption or assessment by landlord—Limitation **513, 517, 518**

——— to set aside the gift by presumptive heir—Declaration that debt paid by donee was a charge upon the property, whether could be made in the suit **191**

——— to set aside compromise decree **80**

——— *for arrears of rent—Joinder of claims in respect of several holdings—Oudh Rent Act (XXII of 1886), s. 108, cl. (2).*

Under the Oudh Rent Act a single suit by a landlord for arrears of rent due from a tenant in respect of several holdings in one and the same village is competent.

Where the holdings are not all held under the same tenure the Court may, if necessary, specify in its judgment the arrears due with respect to each holding. RUDRA PRASAD SAHI *v.* GAJADHAR SINGH **462**

——— *, institution of application—Presentation of returned plaint to competent Court—Suit to be treated as instituted when presented in competent Court—Civil Procedure Code (Act XIV of 1882), s. 57—Limitation (Act XV of 1877), s. 14.*

The combined effect of section 57 of the Civil Procedure Code of 1882 and section 14 of the Limitation Act of 1877 is that when a plaint which has been returned is presented in a Court of competent jurisdiction, the suit must be taken to be instituted on the date of such presentation. HEDLOT KHASIA *v.* KA RAN KHASIANI, 15 C. L. J. 241 **377**

Suits Valuation Act (VII of 1887), s. 8 **408, 864, 903**

——— ——— ——— ——— **s. 9**—Chief Court Rules under, r. 4 **408**

Summary trial—*Offence punishable with one year's rigorous imprisonment—Opium Act (I of 1878), s. 9—Subsequent regular trial without summary trial being quashed*—Ultra vires—*Criminal Procedure Code (Act V of 1898), s. 530.*

The accused was prosecuted for an offence under section 9 of the Opium Act punishable with one year's rigorous imprisonment. The additional Township Magistrate tried the case in a summary manner and imposed a sentence of 4 months' rigorous imprisonment. The District Magistrate having declared the trial void, the Magistrate re-tried the case in the regular manner and imposed the same punishment:

Held, that both the trials were void *ab initio*.

The summary trial was *ultra vires*, as the offence being punishable with one year's rigorous imprisonment, the Magistrate had no jurisdiction to try the case summarily.

The regular trial was *ultra vires*, as the former proceedings not having been quashed by the High Court, the accused could not be tried over again.

The whole proceedings were quashed and a re-trial ordered. EMPEROR *v.* NGA SIT CHO, 4 BUR. L. T. 271 **394**

Summons, service of. *See* CIVIL PROCEDURE CODE, 1908, O. V.

Surrender by heirs of one occupancy-tenant, effect of **982**

Tenancy-in-common—No right of survivorship **550**

Tenant—Grove-holder **634**

——— ———Occupant of water-mill **348**

Theft. *See* PENAL CODE, ss. 378, 379.

Thumb impression—*Whether may be proved against accused in another proceeding—Voluntary statement without compulsion whether may be used against witness—Evidence Act (I of 1872), s. 132, proviso.*

The taking of a thumb impression is merely observing a characteristic feature of a man's body, and is not equivalent to asking a question and receiving an answer; that is, the thumb impression is not equivalent to an answer within the purview of the proviso to section 132 of the Evidence Act, and may in a criminal proceeding be proved against the person whose thumb impression is taken.

Where an accused person has made a statement voluntarily and without compulsion on the part of the Court, it may be used against him on his trial if relevant; that is, the proviso to section 132 of the Evidence Act does not apply unless the witness objects to answer the question.

Queen-Empress v. *Gopal Das*, 3 M. 271, and *Moher Sheikh* v. *Queen-Empress*, 21 C. 392, followed.

Therefore, even if taking a thumb impression is equivalent to an answer, no objection being made to the thumb impression being taken, the proviso to section 132 does not apply. TUNOO MIA *v.* EMPEROR 16 C. W. N. 502; 15 C. L. J. 399; 39 C. 348 **925**

Tort by Government servant—No cause of action against Government **799**

Transfer—*Non-transferable right conferred by decree—Restriction against alienation imposed by Legislature—Restriction imposed by decree or contract—Distinction—Waiver of condition—Consent—Attestation of deed—Abandonment—Transferor cannot plead invalidity of transfer—Transfer of Property Act (IV of 1882), s. 6 (h) and (i), scope of.*

The interests which are declared inalienable by section 6 (*i*) of the Transfer of Property Act are particular interests which have been created by statutes enacted to regulate the relations between landlord and tenant. An interest conferred by a decree is not covered by section 6 (*i*).

The transfer of a non-transferable right in land conferred by a decree does not fall within the scope of section 6 (*h*) of the Act.

There is an essential distinction between restrictions on transfers imposed by the Legislature and restrictions imposed by contract or decree. The general policy of the law is to promote the free alienation and circulation of property and to discourage the introduction of restrictions calculated to interfere with the fulfilment of these objects

In cases where the Legislature deems it expedient to fetter the privilege of free alienation, the prohibition, founded upon considerations of public interest, must be treated as absolute.

But no such force can be attributed to a restriction which has its origin in an agreement of the parties or a decree of Court. The contract or decree does not purport to affect the rights and interests of

Transfer—concld.

any one but the parties themselves, it merely regulates the relations of the parties *inter se*.

Consequently, where there is a decree settling the rights of two parties, which contains a provision that one of them shall not alienate the property which he has got from the other, the presumption is that the condition against alienation is inserted for benefit of the other party. The latter may waive the benefit of the condition, and if he elects to do so by giving his consent to a transfer, the transfer is a valid transaction.

It is not competent to a transferor of a non-transferable interest, conferred by a decree, to raise the plea that the transfer is void.

Although the mere attestation of a deed does not import notice of its contents, yet where a superior proprietor attests a deed of gift, being aware of its provisions, and recognizes the donee as the transferee of the property, it will be inferred that he gave his consent to the transfer. Such a consent given by the superior landlord is binding on his son.

To constitute abandonment of a heritable, though non-transferable interest in land, there must be the clearest evidence of an intention to abandon. Abandonment cannot be inferred from the mere fact that there has been no active assertion of the right during the short period which has intervened since the right came into existence. WAZIR MUHAMMAD *v.* HAR PRASAD **613**

Transfer of case. *See* CIVIL PROCEDURE CODE, 1908, s. 24, CRIMINAL PROCEDURE CODE, s 528.

——————— Application for transfer of suit from Presidency Small Cause Court to High Court to be made to a Judge on the Original Side **860**

Transfer of Property Act (IV of 1882), s. 6 (a)—*Reversioner—Transfer of expectancy, validity of.*

A Hindu widow mortgaged certain property in which she had only a life-interest. A reversioner sued for a declaration that the mortgage would not affect his rights in respect of the property after the widow's death.

This suit was withdrawn in consequence of a compromise whereby it was agreed that during her life-time the widow would get from the mortgagee a certain sum as her maintenance, while the rest of the profits of the property would be divided between the reversioner and the mortgagee and that after the death of the widow the reversioner and the mortgagee would divide the property in equal shares:

Held, that the effect of the agreement was to transfer to the mortgagee one half of the mortgaged property on the widow's death, and that this amounted to a transfer of an expectancy by the reversioner and was, therefore, invalid under the provisions of section 6 (*a*) of the Transfer of Property Act. BHAGAN *v.* MUNNU **495**

——————— s. 6 (h) (i), scope of **613**

——————— s. 43 **466**

——————— s. 53 **68**

——————— ss. 54, 123—*Sale or gift, how effected—Registration—Mutation—Estoppel—Statement by donor before mutation officer that the donee's name may be recorded, whether alone sufficient to affect transfer—Suit by donor for possession, whether maintainable.*

The husband of the plaintiff *B.* a widow, and *R.* were both entitled to get possession of certain immoveable property. *R.* made an application for mutation of his name alone in the Revenue Court. *B* made a statement before the mutation officer that she was the heir of her husband but she did not want her name entered in the *khewat* and agreed to *R*'s name being entered in respect of the estate. Upon this *R.*'s name alone was recorded in the Revenue papers. Sometimes afterward *B.* filed a suit for possession of her husband's share in the property against *R*:

Held, that the suit was maintainable. The statements of *B.* in the mutation proceedings could not be said to have complied with the provisions of sections 54 and 123 of the Transfer of Property Act which lay down the effectual mode of effecting transfer of interest in immoveable property by sale or gift. RAM PRASAD *v.* BEDO **436**

——————— s. 58 **91**

——————— s. 59 **429**

——————— ss. 67, 68 **336**

——————— s. 90 **304**

——————— s. 106—*Lessee for a fixed term—Notice to quit delivered at a shop where defendant did not reside—Validity of notice to quit—Lessee holding over—Notice, whether necessary.*

A notice to quit, sent by Post and delivered by the postal peon to a person other than the defendant at the shop from which the defendant was sought to be ejected, but where the defendant did not reside, is not a good notice within the meaning of section 106 of the Transfer of Property Act.

If a lessee for a fixed term of years remains in possession of a house after the expiration of the term of the lease in defiance of the authority of the lessor, he is not entitled to a notice to quit under section 106 of the Transfer of Property Act. GOKUL CHAND *v.* SHIB CHARAN, 9 A. L. J. 574 **59**

——————— s. 108 **554**

——————— s. 123—Gift how effected **436**

Trees—*Patta* for trees given to one person and that for land to another person—Cancellation of *patta* for trees, effect of—Right of land *pattadar* to trees **39**

Trespasser—*Damages.*

Exemplary damages may be awarded against a trespasser. JAGAN NATH *v.* DEBI SAHAY **493**

——————— Ejectment suit—Plaintiff bound to prove his title **62**

Trust. *See* TRUSTS ACT.

——————— *Agreement between trustees vesting management in one—Effect on the capacity of other trustees.*

Although by agreement the ordinary management of the trust is vested in one trustee, the agreement does not deprive the other trustees of their office of trustees MALAPPURATH PARAMADHATHIL *v.* CHANNAZHI KRISHNAN, (1911) 2 M. W. N. 537 **234**

Trust—contd.

——— *Dedication of property to a Church—Secession of trustees from the faith of the Church Right to recover properties from the secessionists—Change of trust in accordance with the new faith of the trustees—Recantation, effect of, on the right to trusteeship—Evidence Act (I of 1872), s. 57—Matters of public history—Law governing temporal rights in Roman Catholic Churches—Right to remove trustee who has seceded from faith—Absence of prayer for removal—Amendment of plaint—Right to recover moveables—Limitation—Civil Procedure Code (Act XIV of 1882), s. 30.*

Plaintiffs, alleging that the suit properties were dedicated to the Roman Catholic Church, sued for their recovery from defendants, who were formerly Roman Catholics, but who seceded from the Roman Catholic faith and had become members of the Syro-Chaldean Church. Plaintiffs alleged that they had the management and control of the Church properties. Leave was obtained to implead the defendants as representing all the Christians of the village. The defendants denied the plaint allegations.

It was found that the properties were dedicated to the Roman Catholic Church and that defendants seceded from the Roman Catholic faith:

Held, (1) that the defendants could not claim to have the trusts of the institution altered so as to convert the Church into and for changing worship according to the tenets of the Syro-Chaldean faith:

Bishop Mellus v. *Vicar Apostolic of Malabar*, 2 M. 295, referred to;

(2) that certain letters of the Jesuit Fathers, though admissible strictly to prove facts of history, could not be used under section 57 of the Evidence Act to prove where certain missionaries were living or when they died;

(3) that the Cannon Law should be invoked as a guide in deciding questions respecting temporal rights in Roman Catholic Churches;

(4) that a single trustee cannot recover possession of properties appertaining to the trust from another trustee by evicting him, though he may be entitled to maintain a suit in ejectment against a stranger on behalf of the trust;

(5) that the defendants, by their secession from the faith of the Catholic Church, were liable to be removed from the office of trustee;

Mariam Pillai v. *Bishop of Mylapore*, 17 M. 447, referred to;

(6) that a recantation by the defendants would not render them fit to hold the responsible office of trustee;

(7) that, even in the absence of a specific prayer for removal of defendants from the office of trustee, the Court could decree removal by directing an amendment of the plaint;

(8) that when the Court allows a plaintiff to sue some persons as representing themselves and others, having the same interest in the subject-matter of the suit, the consent of the defendants on record is not necessary to enable the Court to do so.

Andrews v. *Salmon*, (1888) W. N. 102, referred to;

(9) that, as the right to the properties of the trust goes with the right to the office of trustees, plaintiffs' claim for moveables was not barred by limitation. AMBALAMPAKKIYA UDAYAN *v.* J. M. BATHE, (1912) 1 M. W. N. 152 **599**

Trust—concld.

——— *Deed of trust, conduct of trustees after execution of—Oudh Laws Act (XVIII of 1876), s. 3 (b)—Trust, non-applicability of Muhammadan Law to—Gift does not include trust—Trusts Act (II of 1882), ss 4, 6—Dower debt, discharge of, not unlawful—Trust, creation of, requires no physical delivery—English rules not applicable to Indian cases—Shia Law fixed no minimum dower while Sunni Law does—Family settlements, construction of.*

The conduct of trustees, as manifested after the execution of the deed of trust and misconduct on their part or neglect to perform their duties, cannot be put forward as a valid reason for holding that the author of the trust had no intention of acting seriously, or for determining his intention at the time when he executed the deed of trust

Under section 3 (*b*) of the Oudh Laws Act, the Muhammadan Law does not apply to trusts. The term "gift" as used in the section cannot be interpreted so as to include trust.

The discharge of a dower debt, due from the settlor to his wife, and the prevention of future disputes and litigation between the members of the settlor's family, are not in any sense unlawful within the meaning of section 4 of the Trusts Act.

The physical delivery of the property, in addition to the execution of a registered instrument of transfer, is not necessary to effect a valid trust under section 6 of the Trusts Act.

In construing family settlements Courts are to ascertain the real meaning of the parties to the transaction; and when that meaning has been ascertained, if it appears that the whole plan cannot be carried out but that a part of it can, effect is to be given to that part

The rules established in English Courts for construing English documents are not, as such, applicable to transactions between natives of this country.

In the case of Shias, there appears to be no fixed legal minimum for dower though in the case of Sunnis there is some authority for saying that the minimum amount is 10 *dirms*. MOHAMMAD HASHIM ALI KHAN *v.* SADIQ HUSAIN KHAN, 14 O. C. 356 **882**

Trusts Act (II of 1882), ss. 4, 6 **882**

——— **s. 88**— *urchase made by trustee—Trustee and beneficiary—Right and liability.*

One *G.* made a Will by which he appointed several persons as trustees of his estate. The trustees appointed *K.*, who was a co-trustee, their general attorney. A part of the trust property was subject to a mortgage. The mortgage-bond was attached in execution of a decree and was about to be sold. *K.* advised the trustees to purchase the mortgage-bond as that would enhance the interest of the trust estate. The trustees could not come to a final conclusion before the date of sale. Thereupon *K.* purchased the bond himself:

Held, that *K.* must be held to have made this purchase for the benefit of the trust and that he could only charge the trust with the amount which he had actually paid for it. GOPI NARAIN v KUNJ BEHARI LAL, 9 A. L. J. 3 1 **625**

——— **s. 91** **176**

Trustee and Beneficiary. *See* TRUSTS ACT, s. 8

Under-proprietary right – *Dhayak* **809**

Under-raiyat, *lease to – Stipulation that after expiry of term,* raiyat *would give under-*raiyat *– fresh lease, validity of – Ejectment of under-*raiyat *– Bengal Tenancy Act (VIII of 1885), s* 85.

A *raiyat* gave his under-*raiyat* a lease for nine years, and it was stipulated that after the expiry of the term, the *raiyat* would give the under-*raiyat* a fresh lease of the land on fair rent:

Held, that the stipulation was not null and void, that the lease was not in contravention of the terms of section 85 of the Bengal Tenancy Act, and that the *raiyat* could not eject the under-*raiyat* without giving him the option to take a fresh lease at a fair rent. ALI MOHAMMAD *v.* NAYAN RAJAH BHUIYA, 15 C. L. J. 122; 16 C. W. N. 620 *note* **912**

Undue influence – Inadequate consideration – False allegation of payment of purchase-money **879**

U. P. Land Revenue Act (III of 1901), s. 4 (15) **809**

——— ——— **s. 164** **535**

Unsoundness of mind. *See* PENAL CODE, s. 84.

Usufructuary mortgage – Non-transferable holding – Abandonment – Usufructuary mortgagee placed in possession – Payment of rent by tenant – Decree for ejectment **941**

Vakil – *Power to compromise – Vakil exceeding power – Compromise prejudicial to client.*

Where the Vakil of a party to a suit entered into an agreement with the opposite party which settled none of the matters in dispute between his client and his adversary, but left his client to fight the whole matter in a fresh litigation, meantime surrendering suit property to the former:

Held, that the Vakil acted improperly and the agreement of compromise was not valid. MANIKA MUDELIAR *v.* DEVASI KAMINI PILLAI, (1912) 1 M. W. N. 158 **595**

Validating Act XIV of 1904 **855**

Valuation of suit – Improvements effected during pendency of suit **428**

——— ——— ——— ——— Partition suit **903**

——— ——— ——— ——— Suit for declaration and injunction in respect of house **408**

Suit for declaration of invalidity of mortgage deed – Consequential prayer for cancellation of deed and injunction – Amount of liability under deed – Court-fee Jurisdiction – Court Fees Act (VII of 1870), s 7 IV (c) and (d) – Suits Valuation Act (VII of 1887), s. 8.

Where a minor sues for a declaration that a mortgage-deed executed in his name by his guardian is invalid against him and further prays for cancellation of the deed and for a permanent injuction to restrain the defendant from enforcing the terms of the deed, the value of the suit for purposes of Court-fees and jurisdiction is the amount of liability under the deed, as stated in the plaint. The plaintiff cannot, in such a case, be allowed to fix a lower and arbitrary value for purposes of Court-fee computation and jurisdiction. DEVIDAS *v.* RAMLAL, 7 N. L. R. 190 **864**

Vendor and Purchaser – Applicability of *caveat-emptor* – Sale in execution **803**

——— ——— ——— Sale of goods – Lien for unpaid money **992**

——— ——— ——— Sale of share, excluding *sir bila lagan*, construction of – Covenant by vendor to pay rent, if subsequently assessed – Contract to indemnify **979**

——— ——— ——— Contract of sale with a number of persons – Right of one to enforce specific performance **315**

——— ——— — *Contract for sale – Subsequent sale to other vendees – Specific performance, suit for, by first contracting party – Decree, form of – Subsequent vendees to execute conveyance to plaintiff – Absence of prayer in plaint – Trusts – Trusts Act (II of 1882), s. 91 – Civil Procedure Code (Act V of 1908), O. XLI, r. 33.*

Where it is agreed to sell property to one person and it is subsequently sold by the vendor in contravention of the agreement, and the first purchaser brings a suit for specific performance of the contract of sale, the proper form of the decree to be passed in case of plaintiff's success, is not to declare the subsequent sale void but to direct the subsequent purchaser to execute a conveyance to plaintiff. The Court has power under Order XLI, rule 33, Civil Procedure Code, 1908, to pass such a decree even though the plaint does not contain a prayer to that effect.

The subsequent purchaser in such a case is in law a trustee of the property for the person who has a prior agreement for sale. SUBIHA PILLAY *v.* VELLAPPA NAICKEN, 10 M. L. T. 524; (1911) 2 M. W. N. 560; 22 M. L. J. 124 **176**

Vrit. *See* HINDU LAW.

Waiver – Assumption of jurisdiction in irregular manner – Objection not taken at proper time **542**

——— ——— Contract to sell land **879**

——— ——— Failure to join in an appeal against mutation proceedings **863**

——— ——— Landlord's right to eject **671**

——— ——— Novation of contract-deed executed in consideration of previous bond – Deed not registered – Right to sue on previous bond **858**

——— ——— Pre-emptor assisting in sale negotiation and demarcation of land **561**

——— ——— Restriction against alienation imposed by decree or contract **693**

Wajib-ul-arz. *See* PRE-EMPTION.

——— ——— ——— *Construction* – "Maveshi," *meaning of – Grazing rights in* shamilat *land.*

Where a *Wajib-ul-arz* conferred grazing rights on non-occupancy-tenants and other non-proprietary residents of the village over *shamilat* land in respect of their *maveshi*:

Held, that the word *maveshi* should be restricted to "cattle" used for agricultural and domestic purposes, and that goats and sheep kept mainly for trading purposes are not included in the term. HANSRAJ *v.* NARAIN CHAND, 86 P. R. 1911 **716**

Wakf property – Allotment – Partition **791**

Warrant—*Destruction by accused—Presumption of legality—Criminal Procedure Code (Act V of 1898), ss. 98, 100, 552—Penal Code (Act XLV of 1860), ss. 147, 332.*

Where, upon an application under section 552 of the Criminal Procedure Code, a warrant under section 100 of the Code was issued to compel restoration of an abducted female, but was drawn up on a form which was printed for use under section 98 of the Code, and the accused persons snatched away the warrant and destroyed it:

Held, that it must be presumed that the warrant contained the substance of what is set out in section 100 and that the portions which had to be altered were altered. GURAMEAH *v.* EMPEROR, 16 C. W. N. 336; 39 C. 403 **1002**

Warranty of title of judgment-debtor **803**

"Week," *meaning of—General rule—Exclusion of day on which order is made—Deficit Court-fee to be paid "in a week"—Intention to allow full seven days.*

The word "week," when used in reference to computation of time from which it is to be reckoned, *prima facie* excludes the day of that date though the expression may be inclusive or exclusive according to the context.

An inflexible rule of interpretation cannot be allowed and whether the day on which the order is made is to be included or excluded, must depend upon the circumstances and the reason of the thing.

A fair rule of construction seems to be that where the computation is to be for the benefit of the person affected, as much time should be given as the language admits of, and where it is to his detriment, the language should be construed as strictly as possible.

North, In re, Ex parte Hasbuck, (1895) 2 Q. B. 264, at p. 270, relied upon.

Where the Court ordered the plaintiff to file deficit Court-fee "in a week:"

Held, that the intention of the Court was to allow the plaintiff full seven days. GOPAL LAL *v.* BAHORNI, 15 C. L. J. 120 **900**

widow. *See* HINDU LAW—WIDOW.

——— Partition—Co-widows **320**

——— Unchastity. *See* CUSTOM—WIDOW **290**

———, *suit against Evidence necessary as to nature of debt.*

In a suit against a widow, evidence should be taken as to whether the debt was incurred by her as representing her husband's estate. TADIKONDA VENKAYA *v.* KODALI VENKATASUBBAMMA, (1912) 1 M. W. N. 49 **486**

Will. *See* PROBATE AND ADMINISTRATION ACT.

——— Deed, construction of—Gift, deed or Will **409**

——— of share of *writ* **225**

———, *construction of—Devise to daughter on death of two widows.*

Where land is devised by a Will to two widows of the testator and, on their death, to his daughter, the land given to each widow would on her death pass to the daughter. GOVINDA PILLAY *v.* MEENATCHI ACHI, 10 M. L. T. 493; (1911) 2 M. W. N. 563; 22 M. L. J. 204 **152**

Will—contd.

———*Construction—Hindu Law—Devise to widows and daughters—Widows' share to go to daughters on their death—Nature of widow's interest—Tenancy-in-common—No right of survivorship between widows—Nature of daughter's interest—Absolute estate—Land Acquisition Act (I of 1894), ss 18, 32—Deposit of widow's share in Court on objection of daughters—Withdrawal of objection—Subsequent death of widow—Jurisdiction—Determination of question of succession to deceased widow—Daughter not claiming her own share left by Will—Recognition as heir of deceased widow in acquisition proceedings—Application of s. 18 to question of succession of deceased claimant and investment of money—Investment in securities when to be made.*

A testator left two widows, *A* and *B* and two daughters, *C.* and *D.* By his Will he left his lands half to his widows and half to his daughters stating that after the death of the widows their half would go to the daughters, and after the death of the daughters to their descendants.

The testator died in 1887. In 1899, *C.* sued the widows and obtained a decree for ¼th of the lands. *D.* did not join in the suit and never obtained the ¼th share left her by her father.

In 1909 a portion of the lands left by the testator was acquired by Government. The Land Acquisition Officer awarded ¼th of the compensation to *C.* and ¾ths to the widows. As *C.* objected that the widows were not competent to alienate the land, the officer deposited the ¾ths of the money in Court. Subsequently, *C.* withdrew her objection and the Land Acquisition Officer reported that the money might be paid to the widows. Before the Divisional Court had time to deal with the matter, *A.* died and a dispute arose as to who were her heirs, *C.* and *D.* claiming that *A.*'s share went to them while the surviving widow claimed that it went to her. The Divisional Judge held that *A.*'s share went to the daughters and ordered that the money deposited in Court should be invested in Government Pro-notes and that the interest should be paid half to *B.* and one quarter to each of the daughters:

Held, (1) that the Divisional Judge was right in deciding the question of title arising between the rival claimants. Such questions should be decided in the case and should not be left to be decided by a separate suit. The Court was bound to decide all points the decision of which was necessary to enable it to pass orders as to the disposal of the money, including questions arising as to who was the proper heir of the claimant who had died after the deposit of money in Court.

Babujan v. *The Secretary of State for India in Council and the Chairman, Gaya Municipality*, 4 C L. J. 256, followed.

(2) That the money having been once deposited in Court, the Court was obliged to observe the provisions of section 32 of the Land Acquisition Act, in spite of the withdrawal of *C.*'s objection.

(3) That section 18 of the Act did not apply to the determination of the question as to the succession to *A.*'s share and as to the investment of the money.

(4) That, on a proper interpretation of the Will, each of the widows was to hold for life as a tenant-in-common without the benefit of survivorship and the share of either widow passed at her death to the daughters.

Will--contd.

Munni v. *Umrao Singh*, 39 P. R. 1909; 55 P. W. R. 1909; 59 P. L. R. 1909; 1 Ind. Cas. 720, referred to.

(5) That as *D.* did not choose to sue for her 4th share which fell to her immediately on her father's death, she could not claim to get that share out of the share left by *A*'s death by a disproportionate division of the compensation-money. If *D.* claimed a share in the land, she should have put in a claim before the Land Acquisition Officer in her own right as heir of her father.

(6) That *D.* could only be recognized in these proceedings as *A.*'s heir and could get her share only of *A.*'s property.

(7) That the Will left to *A.* and *B.* nothing more than the life-interest of a widow, but *C.* and *D.* took an absolute estate under the devise as their interest was not entailed by express words or by necessary implication.

Radha Prasad Mallick v. *Ranee Moni Dossee*, 33 C. 947; 3 C. L. J. 502; 10 C. W. N. 695, relied upon.

(8) That, consequently, only *B.*'s share of the compensation awarded should be invested in securities while the daughters' share of the money should be made over to them. NIHAL KAUR *v.* SECRETARY OF STATE **550**

——— *Construction—Intention of testator—Hindu Law—Self-acquired property left to one daughter as owner and to the other daughter in the event of her decease—Absolute estate acquired by survivor.*

A Hindu left a Will in respect of his self-acquired property by which he expressly excluded his collaterals from sharing in that property. The Will directed that the property should in the first instance devolve on the testator's widowed daughter, *A.*, who would be owner like himself but, that in case of *A.*'s death, the testator's married daughter, *B*, would be the owner of the property. *A.* pre-deceased *B.*

Held, that the intention of the testator was to make provision for *A.* in the first instance for life in the event of her pre-deceasing *B.* but she was to have absolute estate only if she survived *B.* In the event of *B.* surviving *A.* the Will conferred an absolute estate on *B.*

The aim and object of the testator was that the absolute owner of the property should be the daughter who survived the other.

A Will is not to be construed with literal strictness. The Courts are bound to look to all its provisions in order to see what the real intentions of the testator were. The Will must be read as a whole and regard must be had to the wishes of the testator to be gathered from the general tenure of the document. RAM CHAND *v.* DIWAN CHAND . **571**

——— *Probate — Suspicion to be removed before order — Suspicion to be inherent and not to arise from conflicting evidence—Proof of fact—Objection that more evidence might be adduced — Presumption against misconduct—Improbabilities—Clear evidence of reliable witnesses—Expert testimony, how to be taken—Document, proof of—Refusal to cross-examine — Document put in hands of witness—Right of adversary to see document—Succession Act (X of 1865), ss. 46, 48, 50 - Evidence Act (I of 1872), ss. 3, 45, 101, 135.*

The principle laid down in *Barry* v. *Bultin*, 2 Moore P. C. 480; 4 S. E. C. (o. s) 175 and *Tyrrell* v. *Painton*, (1894) P. 151, 159; 6 R. 540; 70 L. T. 453; 42 W. R. 343, to the effect that whenever a Will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless the suspicion is removed, applies to cases where the suspicion is inherent in the transaction itself as put forward by the propounder, and not where it arises from a conflict of testimony and the question is which set of witnesses should be believed.

Jenkins, C. J.—Demonstration, or a conclusion at all points logical, cannot be expected, nor can a degree of certainty be demanded of which the matter under investigation is not reasonably capable.

If there is sufficient evidence of a fact, it is no objection to proof of it that more evidence might have been adduced.

Presumption against misconduct is among the probabilities to be taken into account in estimating the value of evidence, and this probability gains in strength where the character and position of the individual impugned is above reproach.

The mere improbability of this or that in a complex transaction, cannot go for much against the clear and distinct evidence of witnesses of good general character

Woodroffe, J.—Where expert testimony is given, the better course to follow is that the expert should hear the evidence as to which he is asked his opinion than that he should give his opinion on a copy of the deposition.

A Court cannot assume that a document is proved, from the refusal of opposing Counsel to cross-examine it. The latter is entitled to wait until the Court ruled whether the document had been proved or not.

If the cross-examining Counsel, after putting a paper into the hands of a witness, merely asks him some questions as to its general nature or identity his adversary will have no right to see the document; but if the paper be used for the purpose of refreshing the memory of the witness, or if any questions be put respecting its contents or as to the handwriting in which it is written, a sight of it may then be demanded by the opposing Counsel. GOPESSUR DUTT *v.* BISSESSUR DUTT, 16 C. W. N. 265; 39 C. 245 **577**

Will—concld.

Withdrawal of suit **370**

Witness - Previous depositions - Mode of proof—Conflict of testimony—How to be tested **678**

——— ———, *non-attendance of—Prayer for arrest—Refusal upon insufficient ground.*

In a suit against the Calcutta Municipality, the plaintiff desired to call as a witness a servant of the Municipality and to require him to produce certain material documents. The witness failed to attend and the plaintiff asked the Court to compel his attendance by arrest if necessary. That prayer was rejected without satisfactory reasons:

Held, that the attendance of the witness should be compelled with the production of the documents, and that the case should be sent down to the first Court for re-hearing. UPENDRA NARAIN GHOSH *v.* CHAIRMAN OF THE CALCUTTA CORPORATION, 16 C. W. N. 116 **332**

Words and Phrases.

any further order that may be just 213
any other evidence 1
arrear 71
assets realised by sale or otherwise 907
aulad va ahfad 155
book 827
case 284
cause of a like nature 260
date of decree 88
decretal money 671
good faith 260
inquiring into the offence 273
inquiry 273
in a week 900
institution of proceedings 221
interest 433
kept from knowledge of right 63
land 634
maveshi 716
other sufficient cause 318
personally interested 222

Words and Phrases—concld.

proceedings 175
return from transportation 390
review of judgment 140
rights of parties 800
rishtadar qaribi 954
same transaction 825
shall be made 832
shishya 329
sishyanukrami 329
street 427
sub-division 490
taking 819
thing 482
time requisite for obtaining copy 714
try any case 222

Written statements. *See* PLEADINGS.

——————————, amendment of, when may be allowed 128

Yajman Vritti—Nature of property—Impartible and inalienable—Custom recognizing partition and alienation—Burden of proof—Partition, essentials of—Enjoyment of *vrit* by rotation—Will of a share of *vrit*—Succession to *vrit* 225

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